

See discussions, stats, and author profiles for this publication 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

Article in SSRN Electronic Journal · January 2017

DOI: 10.2139/ssrn.3010724

CITATIONS

0

READS

165

2 authors, including:



**Hualing Fu**

The University of Hong Kong

78 PUBLICATIONS 401 CITATIONS

[SEE PROFILE](#)

Some of the authors of this publication are also working on these related projects:



authoritarianism and law [View project](#)

---

## Diverging Trends in the Socialist Constitutionalism of the People's Republic of China and the Socialist Republic of Vietnam

FU HUALING AND JASON BUHI

### 6.1 Introduction

The People's Republic of China and the Socialist Republic of Vietnam are probably the best reference points for each other in comparative studies of socialist constitutionalism, not just for their extensive similarities, but also their growing differences. For at least a decade, and especially since 2011,<sup>1</sup> the two East Asian party-states have been pursuing increasingly distinct paths towards the future. Although history records that Vietnam has taken important governance cues from China for centuries,<sup>2</sup> a discernable pattern exists whereby some of Vietnam's more independent moves occur during periods of tension with its neighbour to the north.<sup>3</sup> We seem to be

Fu Hualing, Professor of Law, University of Hong Kong Faculty of Law; Jason Buhi, Visiting Assistant Professor, Peking University School of Transnational Law (Shenzhen). The authors would like to thank John Gillespie, Keith Hand, Andrew Harding, Pip Nicholson and Wang Chenguang for their comments on the earlier versions of this paper.

<sup>1</sup> We assert that China has been growing more insular since the 18th Party Congress in 2012, while Vietnam has been trending more open since its 11th Party Congress in 2011.

<sup>2</sup> China dominated Vietnam for much of the period from 112 BC to 939 AD, and the Chinese influence continues with varying intensity to the present era. For example, the nineteenth-century Nguyen Dynasty's Gia Long Code was heavily based on the Qing Code. During the 1940s, Chinese advisers shaped the stance of the Communist Party of Indochina. For a compilation of various historical notes, see John Gillespie and Albert Chen, *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (New York, NY: Routledge Press, 2010), pp. 3–6; also Joern Dosch and Alexander L. Vuving, *The Impact of China on Governance Structures in Vietnam* (Bonn: German Development Institute, 2008).

<sup>3</sup> Vietnam, like China, attempted a near-wholesale importation of the Soviet political-legal system but remained closer to Moscow upon the Sino-Soviet split in 1968. Relations deteriorated as the countries fought a border war in 1979. Deference reappeared in the mid-1980s as Vietnam's *doi moi* reforms aligned Vietnam with China's reform policies, but the Vietnamese counterbalanced that with more internationalist initiatives after 1989,

at such a geopolitically inspired crossroads right now, as China pursues aggressive territorial claims in waters off the Vietnam coast.<sup>4</sup>

Despite their significant differences in size, population and economic scale, the two systems invite comparison because they share common cultural (Confucian)<sup>5</sup> and political (Soviet)<sup>6</sup> origins. Both state apparatuses are subordinate to the leadership of a communist party whose supremacy is entrenched in the national constitution. Both claim to be committed to building a socialist rule of law that offers protection of human rights, although the substance differs greatly from Western expectations.<sup>7</sup> Both have been experiencing rapid socioeconomic transformations after liberalising policies under the banner of developing a socialist market economy.<sup>8</sup>

as many major laws were borrowed from or inspired by multilateral institutions in the 1990s. Gillespie and Chen, *Legal Reforms in China and Vietnam*, pp. 7–8.

<sup>4</sup> Whereas the Preamble of the Vietnamese Constitution of 1992 twice thanked ‘the precious assistance of friends across the world, especially of the socialist and neighboring countries’ (emphasis added) in achieving revolutionary victories, the ‘especially’ clause was dropped from the new Constitution of 2013. Similar language was removed from the new Article 12 (previously Article 14) describing the substantive bases of Vietnam’s foreign policy. Indeed, the HYSY 981 oil-rig incident invited speculation that Vietnam will revisit its ‘Three Nos’ defence policy (i.e., having no formal military alliances, not allowing any foreign military bases on Vietnamese territory, and not relying on other countries in combat operations). See Ankit Panda, ‘After HYSY-981: A U.S.-Vietnam Alliance?’, *The Diplomat*, 22 July 2014, available at <http://thediplomat.com/2014/07/after-hysy-981-a-u-s-vietnam-alliance>.

<sup>5</sup> Bui Ngoc Son, ‘The Confucian Foundations of Ho Chi Minh’s Vision of Government’ (2013) 46(1) *Journal of Oriental Studies* 35–59.

<sup>6</sup> The Preamble of the 1982 Constitution explicitly entrenches the leadership of the CCP and, according to Article 1, China remains a socialist country practicing ‘democratic dictatorship’ based on the alliance of workers and peasants. The Preamble of the 2013 Vietnamese Constitution notes the leadership of the VCP, while Article 4 declares that the VCP, ‘acting upon the Marxist-Leninist doctrine and Ho Chi Minh’s thought, is the leading force of the State and society’. Constitution of the Socialist Republic of Vietnam (as amended in 2013), unofficial translation available at [www.constitutionnet.org/vl/item/constitution-socialist-republic-vietnam-amended-2013](http://www.constitutionnet.org/vl/item/constitution-socialist-republic-vietnam-amended-2013).

<sup>7</sup> See e.g., Albert H. Y. Chen, ‘Conclusion: Comparative Reflections on Human Rights in Asia’, in Randall Peerenboom et al. (eds.), *Human Rights in Asia* (London: Routledge, 2006); Sonya Sceats and Shaun Breslin, ‘China’s Indirect Impact on the International Human Rights System’, in *China and the International Human Rights System* (London: Chatham House, 2012), pp. 41–45; ‘Human Rights Watch World Report: Vietnam 2013’, Human Rights Watch, available at [www.hrw.org/world-report/2013/country-chapters/vietnam](http://www.hrw.org/world-report/2013/country-chapters/vietnam).

<sup>8</sup> Both are middle income countries, although China is at the higher-middle end of the per capita income scale (USD 7,589) while Vietnam is at the lower-middle end (USD 2,052). In terms of GDP per capita (nominal), China ranked 78/184 in 2014 with USD 7,589 per capita; and Vietnam’s was USD 2,052, ranked 132/184. To put this in perspective,

Noting these similarities, several comparative studies have been undertaken in recent years,<sup>9</sup> but the field lies outside the mainstream of international constitutional discourse and is therefore still open to development. Conventional liberal criticism of constitutional law in Leninist states centres around its lack of constitutionalism – that is, the text does not outline and establish a system that functions to constrain the real political power of (or behind) the state, especially through an independent judiciary.<sup>10</sup> Thus described, the constitution's only operative provisions are the decrees justifying the exercise of absolute political power by the ruling party; all other provisions – especially those involving individual liberties – are merely irrelevant 'window dressing'.<sup>11</sup> If true, the Chinese and Vietnamese constitutions are ineffective and inconsequential. Yet these critiques cannot explain why such meaningless constitutional provisions are robustly debated and frequently resorted to, with varying degrees of effectiveness, by aggrieved parties, both through the courts and on the streets, as discussed below.

Many argue that socialist constitutions are, at least, aspirational,<sup>12</sup> and history demonstrates that once inspired there is little the people of China

Vietnam in 2014 was where China was in 2006. IMF ranking available at [www.indexmundi.com/facts/indicators/NY.GDP.PCAP.CD/compare?country=cn#country=cn:vnm](http://www.indexmundi.com/facts/indicators/NY.GDP.PCAP.CD/compare?country=cn#country=cn:vnm).

Meanwhile, the United Nations Development Program's (UNDP) Human Development Index (HDI) provides another apt comparison. In 2013, China was ranked as a high development country with a HDI score of .719, while Vietnam was a middle development country with a score of .638. Once again, Vietnam in 2013 was about where China was in 2004–2005 in terms of HDI. UNDP HDI Index available at <http://hdr.undp.org/en/content/human-development-index-hdi>.

<sup>9</sup> See e.g., Gillespie and Chen, *Legal Reforms in China and Vietnam*; John Gillespie and Pip Nicholson, *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Canberra: Asia Pacific Press, 2005); Teresa Wright, *Accepting Authoritarianism: State-Society Relations in China's Reform Era* (Stanford, CA: Stanford University Press, 2010), pp 162–179. Bui Ngoc Son, 'The Discourse of Constitutional Review in Vietnam' (2014) 9 *Journal of Comparative Law* 175–205; Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge: Cambridge University Press, 2008); Dosch and Vuving, *The Impact of China on Governance Structures in Vietnam*.

<sup>10</sup> Albert H. Y. Chen, 'The Achievement of Constitutionalism in Asia: Moving Beyond 'Constitutions without Constitutionalism'', in Albert H. Y. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014).

<sup>11</sup> Tony Saich, *Governance and Politics of China* (Basingstoke: Palgrave Macmillian, 2010, 3rd edn.), p. 148.

<sup>12</sup> This characterisation has been around for many years. See e.g., William B. Simons (ed.), *The Constitutions of the Communist World* (Germantown, MD: Sijthoff and Noordhoff,

or Vietnam cannot achieve. The party-states, having codified normative rights, face credibility crises if they violate the peoples' expectations by ignoring those undertakings for too long. Indeed, constitutional interpretation, enforcement and/or reform sometimes legitimately occur through alternative processes known as either 'political constitutionalism' (wherein political mechanisms such as legislative processes assume and manage constitutional enforcement),<sup>13</sup> or 'popular' or 'civic' constitutionalism (wherein citizens spontaneously assert ownership over constitutional interpretation and compel a dialogue and a settlement with the state on matters relating to constitutional rights).<sup>14</sup> While the former can be used to capture popular demands within the authoritarian system, the latter may be more worrisome to authoritarian rulers, as the spontaneous demand for constitutional rights is 'gain[ing] new cohesion and momentum',<sup>15</sup> demonstrating a nascent constitutional awareness among

1980), p. xv ('The constitutions of the communist world have always been used for internal as well as external consumption – to proclaim what has been achieved and to lay down the program of what is still to be accomplished.'). He Weifang, Stephanie Balme and Michael Dowdle, among others, point out that a significant part of the 1982 Chinese Constitution declares goals to be achieved in the future, including a system of democratic political representation, as well as a wide range of political, social and economic rights. Balme and Dowdle refer to China's constitutionalism as 'development potential, not developmental accomplishment', Stephanie Balme et al., 'Introduction: Exploring for Constitutionalism in 21st Century China', in Stephanie Balme and Michael Dowdle (eds.), *Building Constitutionalism in China* (New York, NY: Palgrave Macmillan, 2010), p. 10.

<sup>13</sup> See Chen Duanhong, 'The People Must be Present' ['Ren Min Bi Dei Chu Chang'], in *Constituent Power and Fundamental Law [Zhi Xian Quan Yu Gen Ben Fa]* (Beijing: China Legal Publishing House), pp. 46–110; Jiang Shigong, 'Written and Unwritten Constitution: A New Approach to the Study of Constitutional Government in China' (2010) 36(1) *Modern China* 12–46.

<sup>14</sup> Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1993); John E. Finn, 'The Civic Constitution: Some Preliminaries', in Sotirios A. Barber and Robert P. George (eds.), *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton, NJ: Princeton University Press, 2001), p. 44; Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Bui Ngoc Son and Pip Nicholson, 'Activism and Popular Constitutionalism in Contemporary Vietnam' (2016) *Law & Social Inquiry Law*; and Mark Tushnet, 'Popular Constitutionalism as Political Law' (2006) 81 *Chicago-Kent Law Review* 991; Zhang Qianfan, 'A Constitution without Constitutionalism? The Paths of Constitutional Development in China' (2010) 8(4) *International Journal of Constitutional Law* 950.

<sup>15</sup> Keith Hand, 'Resolving Constitutional Disputes in Contemporary China' (2011) 7 *East Asia Law Review* 51, 65–66.

the public outside of the party-states' master plan.<sup>16</sup> Inspired citizens are increasingly usurping judicial roles by interpreting and implementing constitutional rights through online mobilisations, peaceful vigils, religious ceremonies, labour strikes and street actions.<sup>17</sup> Such resilient demands have made constitutional supremacy a subject of lively debate,<sup>18</sup> with the positive potential of generating more healthy dialogue between party-state and society. Indeed, a diverse range of legal and accommodative approaches are now being deployed.<sup>19</sup> As such, if constitutional studies concern the distribution and exercise of political power, then research on the Chinese and Vietnamese constitutions must venture into a 'results-oriented pragmatic approach'.<sup>20</sup> The failure to explore such avenues is fatal to an academic understanding of different national governance schemes, comparative scholarship generally and, specifically, to the aspirations of citizens and reformers in socialist states who seek to develop ties to mainstream constitutional discourse.

This Chapter provides an overview to a comparative study of Sino-Vietnamese comparative constitutionalism by exploring the bases of three core substantive pillars of socialist constitutionalism: insistence on Party leadership, reliance on socialist rule of law and adaptation to populism. After considering several examples of how constitutional rules

<sup>16</sup> See Stephanie Balme, 'China's Constitutional Research and Teaching: A State of the Art', in Balme and Dowdle, *Building Constitutionalism in China*, p. 107; Keith Hand, 'Citizens Engage the Constitution: The Sun Zhigang Incident and Constitutional Review Proposals in the People's Republic of China' in Balme and Dowdle, *Building Constitutionalism in China*, p. 221. See also Stephanie Balme, 'The Judicialisation of Politics and the Politicisation of the Judiciary (1978–2005)' (2005) 5 *Global Jurist Frontiers* 1; Randall Peerenboom, 'Law and Development of Constitutional Democracy: Problem or Paradigm?' (2005) 19 *Columbia Journal of Asian Law* 185, 204.

<sup>17</sup> Hand, 'Resolving Constitutional Disputes in Contemporary China' 51, 92, also citing Carl Minzner, 'Xinfang: Alternative to Formal Chinese Legal Institutions' (2006) 42 *Stanford Journal of International Law* 103, 143–145.

<sup>18</sup> Of course, both China and Vietnam make the controversial assertion that their national constitutions are the supreme law of the land (Art. 5, 1982 Chinese Constitution; Arts. 4,8,9, 2013 Vietnamese Constitution), but the lack of rigorous judicial enforcement does not necessarily mean the constitution is an empty letter.

<sup>19</sup> Judicial enforcement is obviously preferable as it is more transparent, structured and formal; political and popular constitutionalism are both characterised by opacity and informal trade-offs, while popular constitutionalism can be informal or occasionally chaotic. See e.g., Keith Hand, 'Constitutionalising Wukan: The Value of the Constitution outside the Courtroom' (February 2012) 12(3) *China Brief*; Minzner, 'Xinfang', 143–145.

<sup>20</sup> Randall Peerenboom, *The Social Foundations of China's Living Constitution* (2010), available at SSRN: <https://ssrn.com/abstract=1542463> or <http://dx.doi.org/10.2139/ssrn.1542463>, 41.

are currently operating through political and popular constitutionalism in all three areas, we conclude that Vietnam is presently moving in a direction that offers more prospects for convergence with international norms,<sup>21</sup> as the current Vietnamese party-state is relatively less politically monolithic, more open to the influence of international laws and more tolerant of civil society than its Chinese counterpart. That being the case, we predict that, for the foreseeable future, Vietnam will likely continue to depart from the increasingly insular Chinese model of constitutional development.

## 6.2 Leadership of the Communist Parties

At a foundational level, there have been few structural changes to the authoritarian Chinese and Vietnamese party-state constitutional orders, in spite of the pervasive social and economic reforms of the last three decades. With the exception of the first Vietnamese Constitution of 1946,<sup>22</sup> all of China and Vietnam's post-revolution constitutions (each of which has had five) have enshrined Leninist political supervision. Party leadership is a prime directive consistently entrenched in both the Chinese and Vietnamese national constitutions, clearly declared in their respective Preambles and core text. The respective Chinese Communist Party (CCP) and the Vietnamese Communist Party (VCP) monopolise political and military power,<sup>23</sup> institutionalise democratic centralism and prohibit threatening discourse.

Though Party leadership cannot be changed through any legal means, the organisation of that power is significantly different in China and Vietnam. While decisive and effective implementation characterises both countries, the Vietnamese party-state is presently more open to

<sup>21</sup> Some institutional limits on this flirtation are evaluated by Thiem Bui, 'Liberal Constitutionalism and the Socialist State in an Era of Globalisation: An Inquiry into Vietnam's Constitutional Discourse and Power Structures' (2013) 5 *The Global Studies Journal* 2.

<sup>22</sup> Perhaps this is because that 1946 Constitution represented a synthesis of Western and Ho Chi Minh Thought, calling for a tripartite separation of powers and guaranteeing fundamental rights. David G. Marr, 'Ho Chi Minh's Independence Declaration', in K. W. Taylor and John K. Whitmore (eds.), *Essays into Vietnamese Past* (Ithaca, NY: Cornell University Press, 1995), pp. 221–231.

<sup>23</sup> Article 4 of the Vietnam Constitution (2013) makes the party the vanguard and representative not only of the Vietnamese working class, but of the whole Vietnamese people and nation, further narrowing the legal space to exercise the right to pluralistic and freely contested elections. Article 65 follows the government lead in enshrining a new legal requirement for Vietnam's armed forces to be absolutely loyal to the Communist Party.

constructive debate within the Party forum, as evinced by having more diffuse executive authorities and a more competitive selection process for membership in its Central Committee.

Indeed, both nations feature a party-state that operates on the basis of democratic centralism. This ensures a decisive decision-making process, thus establishing 'effective' states in which policy making and implementation is swift, owing in part to a denial of separation of powers and a lack of mechanisms through which formal checks and balances can be exercised.<sup>24</sup> While these structural deficiencies perpetuate other systemic problems, they need not undercut raw 'government effectiveness', which – as defined by international institutions – simply measures whether a regime can implement meaningful change.<sup>25</sup> Fukuyama forcefully argues that state effectiveness is a necessary condition for successful constitutional and legal reform, as strong leaders in the Confucian tradition are well positioned for nation-building, demonstrated by the cases of South Korea, Japan, Taiwan and Singapore.<sup>26</sup> Once there is the political will to promote reform, effective states have strong institutions to rely upon and competent bureaucrats to implement programs with a high degree of efficiency.<sup>27</sup> Accepting that both states have high implementation capacity,<sup>28</sup> it becomes a question of political values and will.

<sup>24</sup> As the 2014 Decision Concerning Some Major Questions in Comprehensively Promoting the Rule of Law [Zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jue ding] explains, China will not admit any separation of powers and will not tolerate any institution to have a veto on the Party's decisions. English translation and Chinese original available at <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>.

<sup>25</sup> The World Bank provides this definition: 'Government effectiveness captures perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.' Available at <https://info.worldbank.org/governance/wgi/pdf/ge.pdf>.

<sup>26</sup> Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy* (London: Profile Books, 2014).

<sup>27</sup> 'Regardless of the degree of government intervention, the fast-growing economies of East Asia share a common feature: they all possess competent, high-capacity state.' *Ibid.*, p. 335.

<sup>28</sup> For instance, the World Bank's Worldwide Governance Indicators (WGI) index measures governance ability via six indicators: voice and accountability; political stability and absence of violence; government effectiveness; regulatory quality; rule of law; and control of corruption. China and Vietnam performed the best in government effectiveness among the six indicators in the 2014 survey. Importantly, China outperformed its 'East Asian and Pacific' neighbours in 'government effectiveness' while lagging behind in the

It is perhaps on those bases that several meaningful and consequential differences between the political designs of the two party-states is emerging. Since the Tiananmen crackdown in 1989, the CCP has demonstrated a much higher concentration of political power in the hands of a smaller number of men, while the VCP has demonstrated signs of political diffusion, splitting into contesting blocs. As a result, the nascent checks and balances within the Vietnamese system are more apparent. Former Chinese President Hu Jintao found the trend so disturbing that he felt compelled to issue an internal Party document:

criticis[ing] the Vietnamese authorities for moving ‘too quickly toward inner-party democracy’, even warning that a destabilising Mikhail Gorbachev-like figure could come to power. The CCP also banned public discussion of Vietnam’s reforms, deploying party intellectuals to argue publicly against such a political development in China.<sup>29</sup>

This fear likely emanates from the fact that developments in Vietnam indicate the emergence of more political constitutionalism, as there is more intra-party democracy in the VCP than the CCP.

At the level of elite politics, the commanding heights of Vietnam’s party-state feature a broader policy-making coalition involving more diverse stakeholders in the decision-making process.<sup>30</sup> This is true in both the executive and legislative arenas. Speaking of the executives first, China has endowed its supreme leader with a ‘trinity’ of positions that unify command of the party-state: President of the State, General Secretary of the CCP and Commander-in-Chief of the Armed Forces. That makes the officeholder, now Xi Jinping, incredibly powerful. Meanwhile,

other five indicators. Vietnam closely tracked the regional averages. As a lower-middle income country, Vietnam clearly outperformed other similarly situated countries in terms of both ‘political stability’ and ‘government effectiveness’. These assets generate confidence and legitimacy in the durability of the system and hope for its capacity to improve. World Bank Worldwide Governance Indicators, Government Effectiveness, available at <http://info.worldbank.org/governance/wgi/index.aspx#doc>.

<sup>29</sup> Regina Abrami, Edmund Malesky and Yu Zheng, ‘Vietnam through Chinese Eyes: Divergent Accountability in Single-Party Regimes’, citing Gu Sanyue, ‘Yuenan chule ge Deng Xiaoping’ [‘There is a Deng Xiaoping in Vietnam’], Blog China, December 2006, available at <http://vip.bokee.com/article.php?id=197040>; Martin K. Dimitrov, ‘Understanding Communist Collapse and Resilience’, in Martin K. Dimitrov (ed.), *Why Communism Did Not Collapse: Understanding Authoritarian Regime Resilience in Asia and Europe* (Cambridge: Cambridge University Press, 2013), p. 238.

<sup>30</sup> Edmund Malesky, Regina Abrami and Yu Zheng, ‘Institutions and Inequality in Single-Party Regimes: A Comparative Analysis of Vietnam and China’ (2011) 43(4) *Comparative Politics* 409.

in Vietnam, the posts are separate: the Prime Minister, the President and the General Secretary of the VCP are separate positions held by separate persons.<sup>31</sup> Although political power was consolidated by a more conservative faction at the 12th National Congress of the VCP in 2016, political observers indicate that those three individuals can and have represented different political factions within the VCP, perhaps reflecting a grand bargain.<sup>32</sup>

Power is also more diffuse throughout the legislative organs of the Vietnamese party-state. For example, the ultimate political power in China rests in the CCP Politburo (twenty-five members before October 2018) and especially its Standing Committee (currently seven members, down from nine in 2013), with the Central Committee (205 full members and 171 alternate members) playing only a ceremonial role.<sup>33</sup> Adding the 2,987 representatives of the National People's Congress, that is a total of roughly 3,395 representatives for 1.3 billion people, each representing 435,000 souls. In Vietnam, the 150-strong VCP Central Committee has been grappling for power with the smaller Standing Committee (fifteen members), while the state's National Assembly contains 498 members. That amounts to roughly 660 people presiding over 90 million souls, or one representative for every 136,000 people.

The VCP's broader Central Committee has been a relevant decision maker since the demise of General Secretary Le Duan in 1986, with some claiming that it is superior to a Standing Committee that has been reduced to 'a glorified secretariat'.<sup>34</sup> Indeed, that Central Committee has grabbed attention for an ability, though rarely manifested, to reject recommendations on significant political decisions from the Politburo.<sup>35</sup> The Central Committee's apparent power was demonstrated in October 2012, when it reversed a Politburo decision initiated by General Secretary Nguyễn Phú Trọng to discipline Prime Minister Nguyễn Tấn Dũng for economic mismanagement and nepotism.<sup>36</sup> It next rejected Trọng's recommendation of two persons to the Politburo in May 2013, opting

<sup>31</sup> At present, the President of Vietnam is Truong Tan Sang; the Secretary-General is Nguyen Phu Trong; and the Prime Minister is Nguyen Tan Dung.

<sup>32</sup> <http://thediplomat.com/2015/07/vietnam-after-2016-who-will-lead/>.

<sup>33</sup> 18th Communist Party of China Central Committee [Zhongguo gongchandang di shiba jie zhongyang weiyuanhui], available at [http://news.xinhuanet.com/ziliao/2012-11/15/c\\_123854387.htm](http://news.xinhuanet.com/ziliao/2012-11/15/c_123854387.htm).

<sup>34</sup> Malesky, Abrami and Zheng, 'Institutions and Inequality', 13.

<sup>35</sup> Ibid.

<sup>36</sup> Available at <http://thediplomat.com/2015/07/vietnam-after-2016-who-will-lead/>.

for its own favoured candidates.<sup>37</sup> Another unprecedented vote of no confidence for twenty top party officials was overcome by Prime Minister Dũng's faction in the Central Committee in January 2015.<sup>38</sup> Meanwhile, across the divide, senior members of the National Assembly have boldly criticised the Prime Minister,<sup>39</sup> while another proposed that Vietnam should adopt a bicameral legislature, with the National Assembly serving as the lower house and the VCP's Central Committee as the senate.<sup>40</sup> While corruption, patronage and factional politics are common issues facing both the CCP and VCP, power is much more centralised in the CCP, where political competition is much less visible.

While what we know of these events clearly suggests significant internal power struggles, this broader coalition enables wider political participation and more fierce competition for power in Vietnam than in China. There is, for example, no formal, competitive procedure for joining Politburo or the Standing Committee in China, and the rejection rate of nominees to the ceremonial Central Committee is only between 4 to 8 per cent. However, in Vietnam, the gap between nominated candidates and elected members in the Central Committee is 23 per cent for full members and 54 per cent for alternate members.<sup>41</sup> A larger circle of decision makers composed of more representative competing factions can produce different political consequences and so, in Vietnam, the political process appears relatively more open, more representative of diverse interests and potentially more accountable to the larger society.

Vietnam's broader political participation and fiercer political competition make the VCP more accountable, both horizontally and vertically, than the CCP.<sup>42</sup> Political pluralism at the elite level has had a cascade effect in making the atmosphere surrounding legal processes more transparent. There has been more competition between the Party and the state, and disagreements among different state organisations can be openly manifested. In one famous case, the Vietnamese police promulgated a 'one person, one motorcycle' policy, and following that policy, the

<sup>37</sup> Le Hong Hiep, 'Power Shifts in Vietnam's Political System', East Asia Forum, 5 March 2015, available at [www.eastasiaforum.org/2015/03/05/power-shifts-in-vietnams-political-system/](http://www.eastasiaforum.org/2015/03/05/power-shifts-in-vietnams-political-system/).

<sup>38</sup> Votes in June 2013, November 2014, and January 2015, respectively. See [www.bloomberg.com/news/articles/2014-11-15/vietnam-confidence-vote-reveals-jockeying-among-political-elite](http://www.bloomberg.com/news/articles/2014-11-15/vietnam-confidence-vote-reveals-jockeying-among-political-elite).

<sup>39</sup> Available at [www.bbc.com/news/world-asia-20322830](http://www.bbc.com/news/world-asia-20322830).

<sup>40</sup> Le Hong Hiep, 'Power Shifts in Vietnam's Political System'.

<sup>41</sup> Malesky, Abrami and Zheng, 'Institutions and Inequality', 17.

<sup>42</sup> Martin K. Dimitrov, 'Understanding Communist Collapse and Resilience', p. 32.

Hanoi government suspended registration of motorcycles in some of the city's districts.<sup>43</sup> The restriction inspired deep hostility and resistance among Vietnam's motorcycle users, leading to fierce social mobilisation and public debate over constitutional property rights. The Hanoi government and the police held their ground, but the Ministry of Justice and National Assembly eventually threatened legal challenges, forcing them to back off.<sup>44</sup>

In contrast, CCP elites are more monopolistic and retain more extensive and institutionalised control over state apparatuses, even overriding state organs in making and implementing decisions. The CCP is deeply embedded in government departments, and exercises routine political control of state institutions and public authorities.<sup>45</sup> It relies on informal institutions under the control of the Party, known as 'small leading groups', which cut across any perceived boundary between Party and state.<sup>46</sup> These CCP cells play a key role in decision making within Chinese state organs, and are increasingly asserting political control in private sector law firms, accounting firms and non-governmental organisations (NGOs).<sup>47</sup>

There also appears to be a stronger political will for, and deeper commitment to, structural reform in Vietnam. After fierce debate, the Vietnamese chose to ratify a new constitution in 2013, rather than amend the old. During the debates, the National Assembly took a strong position in supporting a proposed Constitutional Council.<sup>48</sup> Prior to the abrupt final decision against its adoption, elements of Vietnamese society undertook a rich discussion of constitutional review that advanced the concept of building such an independent constitutional adjudication forum quite

<sup>43</sup> Bui Ngoc Son, 'Constitutional Developments in Vietnam in the First Decade of the 21st Century', in Albert H. Y. Chen, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014), pp. 206–207.

<sup>44</sup> Interestingly, when the Guangdong police banned the use of motorcycles in the city, the police only faced a legal challenge by the motorcycle manufacturers. Jim Yardley, 'In City Ban, A Sign of Wealth and Its Discontents', *New York Times Asia Journal*, 15 January 2007, available at [http://www.nytimes.com/2007/01/15/world/asia/15china.html?\\_r=0](http://www.nytimes.com/2007/01/15/world/asia/15china.html?_r=0).

<sup>45</sup> Ibid. at Abrami, Malesky and Zheng, 'Vietnam through Chinese Eyes', pp. 259–61.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid. Also Sarah Biddulph, *The Stability Imperative Human Rights and Law in China* (Vancouver: UBC Press, 2015).

<sup>48</sup> Le Nhung, 'Will Vietnam Have Constitutional Council or Constitutional Court?', Vietnam-NetBridge, 21 February 2013, available at <http://english.vietnamnet.vn/fms/government/66904/vietnam-will-have-constitutional-council-or-constitutional-court-.html>; Vietnam News, 'NA Deputies Discuss Constitutional Council', 2013, available at <http://vietnamnews.vn/in-bai/240346/na-deputies-discuss-constitutional-council.htm>.

far.<sup>49</sup> To date, the only known comparable example in China was for a retired Chief Justice to call for the creation of a similar institution at a quasi-official function.<sup>50</sup> The CCP largely associates such suggestions as heresies associated with colour revolutions, to be perpetrated by Western powers and their domestic agents.<sup>51</sup> Indeed, whereas Vietnam appears to be liberalising its perspective on consultation, input and debate since 2013, China has opted to go in the opposite direction, rendering the terms ‘constitutionalism’, ‘civil society’ and ‘judicial independence’ (among others) taboo in academic discourse.<sup>52</sup>

Intriguingly, the Vietnamese are currently debating procedural rules both for holding public demonstrations and voting in referendums. The former is meant to actualise a limited and issue-specific freedom to assemble granted in article 25 and has been boosted by recent nationalist sentiment against China.<sup>53</sup> Of more structural interest, article 29 grants the right to vote in a referendum to any person over eighteen years old in

<sup>49</sup> Ibid., ‘NA deputies’ two-day discussion on draft amendments to the Constitution, which was broadcast live on national radio and TV, drew great attention from voters around the country.’ For a discussion of the drafting process, see Bui Hai Thiem, ‘Pluralism Unleashed: The Politics of Reforming the Vietnamese Constitution’ (2014) 9(4) *Journal of Vietnamese Studies* 19–22; Pip Nicholson, ‘Vietnamese Constitutionalism: The Reform Possibilities’ (2016) 11 *Asian Journal of Comparative Law* 199–207.

<sup>50</sup> Beijing Youth Newspaper, ‘Former Chief Justice of the Supreme People’s Court Suggesting the Establishment of a Constitutional Court’, available at [www.chinalawinfo.com/news/NewsFullText.aspx?NewsId=70635&NewsType=0](http://www.chinalawinfo.com/news/NewsFullText.aspx?NewsId=70635&NewsType=0).

<sup>51</sup> According to Hand, one of the main reasons not to introduce a constitutional committee within China’s NPC to police the legislative order is the concern that creating such a constitutional committee will further generate citizen activism and offer a forum for politically sensitive questions. Keith Hand, ‘An Assessment of Socialist Constitutional Supervision Models and Prospects for a Constitutional Supervision Committee in China: The Constitution as Commander?’, in John Garrick and Yan Chang Bennett (eds.), *China’s Socialist Rule of Law Reforms Under Xi Jinping* (London: Routledge, 2016); See also Rogier Creemers, ‘China’s Constitutionalism Debate: Content, Context and Implications’ (July 2015) 74 *The China Journal* 91–109.

<sup>52</sup> The Party issued a document which lists seven topics which are off limit in public discussion, commonly referred to as seven prohibitions. It is telling that the Party classified the said document as a state secret and sentenced Ms Gao Yu, a seventy-year veteran journalist, to seven years’ imprisonment for leaking the document. See 22 April 2013, ‘Report Concerning the Present Situation in the Ideological Area’; Stanley Lubman, ‘Document No. 9: The Party Attacks Western Democratic Ideals,’ *Wall Street Journal* China Real Time Report, 27 August 2013.

<sup>53</sup> Dang Ngoc Tung, president of the Vietnam General Confederation of Labor, and Tran Thi Quoc Khanh, a Hanoi deputy, also said they agreed with the suggestion that the Bill on Demonstrations be effective in 2016. ‘In the context that China has committed wrongdoings that violated our country’s sovereignty, many people want to express their patriotism and aspirations,’ Tung said. Tuoi Tre News, 28 May 2015, ‘Vietnam lawmakers want

any referendum declared by the National Assembly (article 70) and organised by the Standing Committee of the National Assembly (article 74). Although there have not been any referendums to date, the matter was warmly debated at a series of three conferences in 2015, including by legal academics and members of the Ho Chi Minh City Bar Association.<sup>54</sup> Though unlikely to be implemented in the near future, such a move would be a remarkable leap in socialist constitutional development. In terms of Vietnamese constitutional text, it would help promote ‘the People’s mastery’ (article 2) and assist the VCP in developing ‘close ties with the People’, ‘submitting to People’s supervision’, and assure that the VCP is ‘accountable to the People in its decisions’ (article 4[2]).

In any event, it is probable that the Central Committee will continue to aggregate power after the upcoming 12th National Congress in 2016 if Dũng ascends to Party Chairman and the Central Committee can defend and maintain its ability to conduct confidence votes on top party officials. In concert, these developments indicate that the VCP appears to be relatively more open-minded and pluralistic in its exercise of political power within its authoritarian context, rendering its current state of reform progress more ‘politically consequential’ than that of China.<sup>55</sup>

### 6.3 Commitment to Socialist Rule of Law

Both China and Vietnam advocate the development of a so-called socialist rule of law. Since shedding their totalitarian approach decades ago, both parties have been more reluctant to exercise naked political power. They instead resort to legal institutions to manage and coordinate massive socioeconomic transitions and maintain credibility. Legal reform in authoritarian states is a contradictory process, however, because it can generate tremendous societal demand for individual rights and

Law on Demonstrations to be Passed Next Year,’ available at <http://tuoitrenews.vn/society/28354/lawmakers-want-law-on-demonstrations-to-be-passed-next-year>.

<sup>54</sup> Domestic commentators were quite clear in arguing that a referendum must be binding, because to make it advisory would change the definition of the word referendum to equate it with ‘consultation’. The majority of their efforts in drafting a recommendation paper to the government focused on narrowing substantive matters capable of submission to referendum. Foreign speakers from Sweden, Canada, and the United States presented alternative views, and the chairman announced that twenty sample referendum laws from other jurisdictions had been officially translated for sending to the government.

<sup>55</sup> Bui Ngoc Son, ‘The Discourse of Constitutional Review in Vietnam’ (2014) 9(2) *Journal of Comparative Law* 175–205.

government accountability. Thus, while the party-states employ law to achieve certain objectives, they attempt to limit legal reform so as to prevent any political spillover. Vietnam's experiment has been proceeding in a more internationalist fashion, however, as it has been more welcoming of foreign normative influences, especially in the field of human rights.

What comprises socialist rule of law is the subject of much debate. What classifies the Chinese and Vietnamese orders as 'socialist', perhaps more than anything else, is their self-identification; what separates them most obviously from European models is their Leninist political structure. Leninism includes a doctrine positing that vanguard communist parties do not have an interest independent of that of the 'People', as they completely discern and represent their common interest. As Nathan put it, the Party asserts that it and the people 'have a fundamental harmony of interests' which makes democracy and accountability redundant and potentially harmful.<sup>56</sup> A fundamental change occurred upon the collapse of this doctrine in China and Vietnam during the period of economic reform, which was accompanied by the surfacing of diverse, pluralistic social interests. Having recognised the perennial existence of social conflict, the parties must design rules and institutions to manage and preserve harmony. Both the CCP and the VCP have managed developments in response to complex socioeconomic circumstances and, as a result, there have been visible expansions or contractions of constitutional 'space'.

The main thread of constitutional change has been an emphasis on the rule of law and individual rights in promoting social and economic development. In China, significant constitutional amendments include the recognition of the privately-owned economy in 1988, the promotion of rule of law and construction of a socialist state of rule of law in 1999, and the duty of state to respect human rights in 2004.<sup>57</sup> The CCP Central Committee's Fourth Plenum in 2014 recommitted China to further development of a socialist rule of law system.<sup>58</sup> The new Vietnamese Constitution of 2013 contains significantly more phrasing of substantive

<sup>56</sup> Andrew Nathan, *Chinese Democracy* (Berkeley, CA: University of California Press, 1986), p. 228.

<sup>57</sup> 1982 Chinese Constitution, amendments of 1988 (first), 1999 (third), 2004 (fourth).

<sup>58</sup> Communiqué of the 4th Plenary Session of the 18th Central Committee of CCP (23 Oct. 2014), available at [www.china.org.cn/china/fourth\\_plenary\\_session/2014-12/02/content\\_34208801.htm](http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm).

rights than before. Meanwhile, legal reform in both countries has included an explosion of legislation, the professionalisation and institutionalisation of legal institutions, a growing number of legal professionals to channel disputes from society to state institutions and, above all, an effort to inculcate a new popular legal culture.<sup>59</sup>

Rule of law, in order to be credible in the eyes of the public, must be able to regularise, normalise and discipline the exercise of power. The CCP and VCP have thus established self-limiting and self-correcting mechanisms, such as the strengthening of intra-Party anti-corruption enforcement,<sup>60</sup> although the Chinese efforts have been much stronger in this regard. The Chinese central inspection system was strengthened in 1990 and codified in the CCP Constitution at the 17th Party Congress in 2007, with a series of new measures being unveiled since, especially after a renewed anti-corruption drive began with the ascendancy of Xi Jinping in 2012.<sup>61</sup> Meanwhile, the Vietnamese issued a resolution on 'urgent issues in Party building' at its fourth plenum of the 11th Party Conference in 2011, but elaboration has been relatively lacking, and a comprehensive 'Law on the Party' proposal put forward by the Fatherland Front was rejected in 2013.<sup>62</sup> The new 2013 Constitution did add two important stipulations to the old article 4, however, declaring the accountability of the VCP to the people in its decision-making capacity,

<sup>59</sup> See Fu Hualing, 'Access to Justice in China: Potentials, Limits and Alternatives', in Gillespie and Chen, *Legal Reforms in China and Vietnam*, pp. 163–187; Brian J. M. Quinn, 'Vietnam's Continuing Legal Reform: Gaining Control Over the Courts' (2003) 4(2) *Asian Pacific Law & Policy Journal* 431, 449–457.

<sup>60</sup> Earlier, the fourth plenum of the 11th Communist Party Central Committee issued a resolution on 'urgent issues in Party building'. These measures aimed to create a sort of checks and balances mechanism within the CPV with the goal of resolving the challenges the party faces. (<http://thediplomat.com/2015/02/2015-challenges-for-the-communist-party-of-vietnam/>).

<sup>61</sup> Given that the commanding heights of Chinese elite politics are now more monolithic than in Vietnam where power is more diffuse among factions, this perhaps indicates that such 'anti-corruption' measures can be hijacked and conflated with more political purposes.

<sup>62</sup> Hoàng Thái, a former standing member of the VFF Central Committee, made a very sharp comment in 2013: 'There are laws all on the State, the NA, the VFF, but no law on the party. There must be a law on the party to ensure openness and transparency as well as to avoid arbitrariness' in 'Góp ý sửa Hiến pháp: Phải có luật về sự lãnh đạo của Đảng' ['Contribution to the Constitutional Amendments: There Must be a Law on the Party's Leadership'], *VnEconomy*, February 2013, cited in Bui Hai Thiem, 'Pluralism Unleashed: The Politics of Reforming the Vietnamese Constitution' (2014) 9(4) *Journal of Vietnamese Studies* 16.

as well as the subjugation of VCP members to the Constitution and the law.<sup>63</sup> Incentives for such self-regulation exist despite the lack of an institutionalised system of checks and balances. Indeed, both countries appear to have reached a stage where their party-states must figure out how to commit themselves to the rule of law systems they themselves created. This is not because of a serious and credible commitment to the rule of law on the part of the party-state, but due to internal corruption scandals and a demand emanating from civil society to hold the party-state accountable to its own rhetoric.

The development of socialist rule of law in China and Vietnam differs from the liberal conception of rule of law in at least three other major respects: the prevalence of a statist stance in imposing legal norms and creating institutions, selective rights extension and thin (versus thick) legal protections. In developing socialist rule of law, China and Vietnam demonstrate unique characteristics that are strongly associated with their national cultures and ideological debates.<sup>64</sup> Yet, by placing both countries in the larger historical and comparative context, Peerenboom argues that they have been following a fairly typical East Asian Model (EAM) of development despite their professed allegiance to communism.<sup>65</sup> Thus, there are a number of similarities between the two countries in key areas of law reform and legal development.

First, owing to their statist stances in imposing legal norms and creating institutions, both states prioritise the 'supply side' of the rule of law and rights protection while managing a gradual shift to the demand side.<sup>66</sup> The supply side includes establishing both constitutional

<sup>63</sup> Bui Hai Thiem, 'Pluralism Unleashed', 13–19.

<sup>64</sup> Gillespie and Chen, *Legal Reforms in China and Vietnam*; and Sidel, *Law and Society in Vietnam*.

<sup>65</sup> That model begins with a state-led economic reform, followed by the development of commercial rule of law to facilitate a market economy. In the initial stage, the state promotes civil law rights (i.e., freedom of contract) and socio-economic rights (i.e., consumer and labour rights), while limiting collective rights and political rights. As the economy grows, the state invests more in institutions, improves education and professional training (including for legal professionals), and diverts resources to human development. From that stage onward – the argument goes – the state is on the defensive and starts to guard its power and privilege, refusing to make further concessions unless absolutely necessary, although there is persistent demand for rule of law, accountability, and an expansion of rights. Randall Peerenboom, 'Rule of law, democracy and the sequencing debate: lessons from China and Vietnam', in Gillespie and Chen, *Legal Reforms in China and Vietnam*, p.29.

<sup>66</sup> Fu Hualing, 'Challenging Authoritarianism through Law: Potentials and Limits' (2011) 6(1) *National Taiwan University Law Review* 331, 345–346.

and legal rules, and institutions (that is, courts) to apply them.<sup>67</sup> The demand side includes rights awareness on the part of the citizens, as well as the cooperation of lawyers and social organisations in channelling disputes into legal institutions that facilitate rights protection.<sup>68</sup> It is to be expected at the beginning of a rule-of-law-building process that rule making, as a top-down process, has priority. After all, rules must be in existence before they can be enforced. Once promulgated, the issue becomes whether those rules are actually enforced or remain mere 'window-dressing'.<sup>69</sup> Therefore, the second stage of reform regards institutional capacity building.

Both China and Vietnam have an adequate supply of baseline rules and institutions, but there seems to be insufficient channelling into dispute resolution forums.<sup>70</sup> This weak channelling function appears to be a critical bottleneck in both efforts towards law reform, as it has been in other developing countries.<sup>71</sup> As Epp argues, what distinguishes a weak legal system from a strong one is not rules or institutions, but what he refers to as the 'support structure', which includes the legal profession, legal aid, access to justice, NGOs and other intermediaries that perform a channelling function.<sup>72</sup> Both China and Vietnam are developing legal aid services, improving access to courts and other dispute resolution mechanisms, and otherwise strengthening the demand side of the rule of law. But, they are also deeply concerned about the political risk of increasing legal consciousness among the citizenry and at the same time placing the supply side of the legal system, the judiciary in particular, under the Party's firm control.<sup>73</sup>

Second, both party-states are selective in terms of which rights they liberalise. Within limited political contexts, both demonstrate that it is

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Tom Ginsburg and Alberto Simpser describe 'window dressing', in Tom Ginsburg and Alberto Simpser (eds.), *Constitutions in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2014), pp. 7–8.

<sup>70</sup> Scholars have observed that the problem is not with having laws to follow, but rather people disregarding the law. See James D. Seymore, 'Human Rights and the Law in the PRC', in Victor C. Falkenheim (ed.), *Chinese Politics from Mao to Deng* (New York, NY: Paragon House, 1989), pp. 271–299, 272.

<sup>71</sup> Fu Hualing, 'Access to Justice and Constitutionalism in China', in Balme and Dowdle, *Building Constitutionalism in China*.

<sup>72</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, IL: Chicago University Press, 1998), pp. 6–21.

<sup>73</sup> Mark Sidel, *Law and Society in Vietnam*, p. 60; see also Nicholson and Pham in this volume and Fu Hualing, 'Building Judicial Integrity in China' (2016) 39(1) *Hastings International and Comparative Law Review* 167–181.

possible for authoritarian states to respect some degree of personal freedom, individual rights and rule of law. Indeed, the CCP has proven itself adaptable and resilient in the eyes of the general public because of the promulgation and enforcement of a bundle of legal rights.<sup>74</sup> Meanwhile, the ratification of a new, more approachable 2013 Constitution signals that Vietnam has the will and capacity to pursue more progressive changes. But, like other transitional states, both China and Vietnam prioritise rule of law and the protection of rights in selective policy areas depending on perceived necessity and feasibility. There is greater rule of law in matters of commerce than in media, religion, criminal law and other politically sensitive areas.<sup>75</sup> It is therefore not surprising that Vietnamese constitutionalism was most forcefully asserted in the aforementioned motorcycle case,<sup>76</sup> while the Chinese Supreme People's Court chose to test the feasibility of constitutional review in a case regarding educational rights.<sup>77</sup>

In contrast, there are areas, such as anti-corruption and media governance, where formal law remains largely silent.<sup>78</sup> A dualism exists wherein professional justice serves the vast majority of ordinary cases, while politicised justice caters to a range of exceptional cases.<sup>79</sup> That

<sup>74</sup> See David Shambaugh, *China's Communist Party: Atrophy and Adaptation* (Washington, DC: Woodrow Wilson Center Press, 2008).

<sup>75</sup> During the 1990s, Vietnamese lawmakers borrowed or drew inspiration from laws multilateral international institutions such as the World Bank, including in drafting the 1993 Law on Business Bankruptcy, 1995 Civil Code, 1997 Commercial Law, and the 1999 Enterprise Law. Gillespie and Chen, *Legal Reforms in China and Vietnam*, 8.

<sup>76</sup> Bui Ngoc Son, 'Constitutional Developments in Vietnam in the First Decade of the 21st Century', in Albert H. Y. Chen, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014), pp. 206–07.

<sup>77</sup> In *Qi Yuling v. Chen et al.* (2001), China's Supreme People's Court (SPC) recognized a PRC citizen's constitutional right to education under Article 46 of the Chinese Constitution of 1982. After much controversy, the SPC unceremoniously abolished the case without explanation in December 2008. SPC Vice-President Judge Huang Songyou was also detained for corruption by the CCP. Robert K. Morris, 'China's Marbury: Qi Yuling v. Chen Xiaoli – The Once and Future Trial of Both Education and Constitutionalisation' (2012) 2 *Tsinghua China Law Review* 273–316.

<sup>78</sup> Fu Hualing, 'Wielding the Sword: President Xi's New Anti-corruption Campaign', in Susan Rose-Ackerman and Paul Lagunes (eds.), *Greed, Corruption, and the Modern State: Essays in Political Economy* (Cheltenham: Edward Elgar Publisher, 2015), pp. 134–157.

<sup>79</sup> Such as the high-profile trials of Bo Xilai, Zhou Yongkang and others in the current Xi Jinping anti-corruption campaign in China. Meanwhile, Vietnamese Prime Minister Nguyen Tan Dung also declared anti-corruption a priority, establishing a new anti-corruption agency to be headed by the Deputy Prime Minister. A major corruption scandal within the Ministry of Transport in 2006 led to high-level resignations and arrests, including the Vice Minister of Transport.

dualism causes a dilemma for the judiciary when facing cases of different political natures. For example, Chinese judges are beholden to political instructions in exceptional cases, but perhaps too independent in other ordinary cases.<sup>80</sup> Both China and Vietnam have been regularising and professionalising their court procedures,<sup>81</sup> but such measures encounter insurmountable difficulties inherent to the political system.<sup>82</sup> Dissident trials, which have become a regular practice in both countries, illustrate the pain of authoritarian states struggling with rule of law.

Third, in both countries, the present state of reform promotes a thin/formal version of the rule of law, without dealing with the hard questions posed by a thick/substantive rule of law. The thin version focuses on the internal qualities of law, such as the requirements that law must be public and accessible, generally applicable and largely consistent.<sup>83</sup> It also focuses on the institutional dimension of enforcement, and requires valid rules for law making, fair application, effective enforcement and general acceptance of rules.<sup>84</sup> Critics who challenge the existence of a thin rule of law point out that it does not provide a normative foundation, and is not supported by the sort of rights-based system commonly observed in a liberal democracy.<sup>85</sup> Indeed, legal reform in this context is largely illiberal in the sense that the legal system under construction is not rights-based. Instead, reform efforts have been concentrated on developing a system that better ensures certainty, clarity and, to some extent, procedural fairness. Such law reform is thus aimed at improving government effectiveness and enhancing state capacity.

Despite these underlying similarities, China and Vietnam differ in interesting ways on their official commitment to, and societal demand

<sup>80</sup> Fu Hualing, 'Putting China's Judiciary into Perspective: Is it Independent, Competent and Fair?', in Erik Jensen and Tom Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford University Press: 2003), pp. 193–219.

<sup>81</sup> See Gillespie and Chen, *Legal Reforms in China and Vietnam*.

<sup>82</sup> 'Vietnam's 2005 Anti-Corruption Law requires government officials to declare their assets and sets strict penalties for those caught engaging in corrupt practices. Implementation and enforcement, however, continues to remain problematic. Vietnam also signed the United Nation Convention on Anti-Corruption in July 2009.' U.S. Department of State, '2013 Investment Climate Statement – Vietnam', February 2013, available at [www.state.gov/e/eb/rls/othr/ics/2013/204760.htm](http://www.state.gov/e/eb/rls/othr/ics/2013/204760.htm).

<sup>83</sup> Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2005), pp. 3–7.

<sup>84</sup> *Ibid.*

<sup>85</sup> Brian Tamanaha, 'A Concise Guide to the Rule of Law', St. Johns University School of Law, Legal Studies Research Paper Series, Paper #07–0082, September 2007, pp. 16–20.

for, the rule of law. Rhetoric that praises the rule of law and the supremacy of the constitution is more often relied upon in China by emerging political leaders when facing challenges from more established authorities. Once those leaders consolidate their power, however, rule of law and constitutionalism typically become less relevant.<sup>86</sup> Due to the broader participation of, and fiercer competition among, different factions, Vietnam may depend more upon the rule of law as a fundamental code of the political game. This – and the apparent rise of a pro-reform faction – may help to explain why the Vietnamese Constitution evinces deeper normative commitments than its Chinese counterpart.

Though abuses persist, Vietnamese leaders have been more receptive to incorporating international best practices, especially in the field of human rights. Human rights received constitutional recognition in the Vietnamese Constitution of 1992, twelve years before it was added via amendment to the Chinese Constitution in 2004.<sup>87</sup> Prior to that, Vietnam ratified the International Covenant on Civil and Political Rights (ICCPR) in 1982.<sup>88</sup> Article 70(14) of the 2013 Constitution mentions a general commitment to international human rights treaties and fundamental citizens' rights,<sup>89</sup> while article 31 showcases a commitment to human rights norms vis-à-vis the practice of criminal justice at a level of detail matched by few national constitutions.<sup>90</sup> The partial entrenchment of the ICCPR has the potential to open the door for further reform. While the Basic Laws of Hong Kong and Macau incorporate the ICCPR,<sup>91</sup> it remains wishful thinking on behalf of Chinese constitutional scholars to entrench such core rights in the national Constitution. China signed the ICCPR sixteen years after Vietnam and has yet to ratify it.<sup>92</sup>

<sup>86</sup> Fu Hualing, 'Challenging Authoritarianism through Law'.

<sup>87</sup> Art. 50, Vietnamese Constitution 1992 read '[i]n the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social are respected, find their expression in the rights of citizens and are provided for by the Constitution and the law'.

<sup>88</sup> United Nations Office of High Commissioner for Human Rights, Status of Ratification [ICCPR], available at <http://indicators.ohchr.org/>.

<sup>89</sup> Art. 70(14), Vietnamese Constitution 2013.

<sup>90</sup> Art.31(1–5), Vietnamese Constitution 2013 include: presumption of innocence (1), timely access to trial (2), prohibition of double-jeopardy (3), access to attorneys (4), and right to punitive damages for unlawful prosecution (5).

<sup>91</sup> Article 39 of the Basic Law of the Hong Kong Special Administrative Region; Article 40 of the Basic Law of the Macau Special Administrative Region.

<sup>92</sup> United Nations Office of High Commissioner for Human Rights, Status of Ratification [ICCPR], available at <http://indicators.ohchr.org/>.

This may have practical effect. Vietnam appears relatively more committed to reforming the use of the death penalty. It abolished execution by firing squad in favour of legal injection more decisively than China.<sup>93</sup> Extraordinarily, in 2007 Vietnam abstained from the UN resolution calling for a global moratorium on execution with the ultimate goal of abolishing the death penalty, effectively making Vietnam the only Asian retentionist country that did not object to the resolution.<sup>94</sup>

#### 6.4 Responsiveness to Civil Society and Public Demands

Party-states must be responsive to popular will to ensure regime survival and political stability. While the promotion of rule of law generates further demand for rights in both countries, their limited legal systems are hard pressed to meet the challenges brought by massive socioeconomic transition due to a lack of capacity and credibility. The party-states must directly face those challenges and may at times choose to supplement or subvert the legal systems they have created. Chinese and Vietnamese constitutional practice therefore necessitates a responsive and proactive state, based on political expedience rather than established legal rules, in managing and coordinating popular demand for rights and interests. The Vietnamese party-state appears to be situated in a 'better' (that is, less defensive) posture than its Chinese counterpart, as the Vietnamese order is more tolerant of input from a more autonomous civil society. Indeed, some Vietnamese politicians have called for an even more resilient civil society.<sup>95</sup> Nonetheless, both systems often fail to meet such demands, resulting in extrajudicial action by the people themselves.

<sup>93</sup> An Dien, 'Vietnam Switched from Firing Squad to Lethal Injection in 2011', *Thanh Nien News*, available at [www.thanhniennews.com/politics/is-vietnam-ready-to-abolish-death-penalty-37916.html](http://www.thanhniennews.com/politics/is-vietnam-ready-to-abolish-death-penalty-37916.html).

<sup>94</sup> David T. Johnson and Michelle Miao, 'Chinese Capital Punishment in Comparative Perspective', in Bin Liang and Hong Lu (eds.), *The Death Penalty In China: Policy, Practice, and Reform* (New York, NY: Columbia University Press, 2015).

<sup>95</sup> <http://vneconomy.vn/thoi-su/da-den-luc-thua-nhan-xa-hoi-dan-su-20140429110559789.htm> (this article cites the statement of Mr Truong Dinh Tuyen, former Minister of Industry and Trade, at the 2014 Spring Economic Forum, a regular event of the Vietnamese National Assembly, that Vietnam should accept civil society to address shortcomings of a market economy and the bureaucratic government.); [www.thesaigontimes.vn/115717/Dai-bieu-Quoc-hoi-Dung-ao-tuong-ve-16-chu-vang.html](http://www.thesaigontimes.vn/115717/Dai-bieu-Quoc-hoi-Dung-ao-tuong-ve-16-chu-vang.html) (this article reports that Mr Ha Sy Dong, a delegate of the National Assembly, called in a plenary session that civil society be promoted. Interestingly, this call was made in the context of the China-Vietnam conflict in the Southeast China Sea.)

Constitutionally, the people are the master of the state in China, and they are the protector of the Constitution in Vietnam.<sup>96</sup> Thus, a feasible theory of socialist constitutionalism demands that law reflect and reinforce popular will in both countries. Both the CCP and VCP have proven responsive (sometimes over-responsive) to popular demand, yet the Vietnamese party-state is presently far more respectful of voices from civil society than its Chinese counterpart. That Vietnam would possess a more structured and vibrant public sphere is consistent with Vietnam's higher degree of political pluralism and deeper commitment to international norms. It boasts a healthier interface between the party-state and civil society, as evinced by: a more activist labour sector; a more vibrant religious community; and a more independent lawyers' bar association. In comparison, the Chinese party-state has been more decisive and harsher in cracking down on civil organisations and silencing dissenting voices.

#### 6.4.1 Labour

Labour unions in both countries are dominated by their respective communist parties and serve a 'transmission belt' of intelligence.<sup>97</sup> Faithful to their ideological roots, both constitutions devote special attention to protect the rights of the toiling people. For example, Chinese workers enjoy constitutional rights to work and rest.<sup>98</sup> In that sense, the Chinese Constitution is nominal, but its constitutional provisions are not fully implemented, due to the lack of resources and issues of implementation. The Vietnamese Constitution, meanwhile, grants constitutional status to a trade union intended to protect workers' rights.<sup>99</sup> In practice, Vietnam's labour relations regime

<sup>96</sup> Article 2(2), Vietnamese Constitution 2013 reads: 'The people are the masters of the Socialist Republic of Vietnam; all state powers belong to the people whose foundation is the alliance between the working class, the peasantry and the intelligentsia.' Preamble, paragraph 2, Chinese Constitution 1982, reads 'the Chinese people took state power into their own hands and became masters of the country'. The phrase is repeated in Article 42.

<sup>97</sup> Erwin Schweisshelm, 'Trade Unions in Transition – Changing Industrial Relations in Vietnam', Friedrich Ebert Stiftung, Vietnam Office Briefing Paper, September 2014, available at [www.fes.de/gewerkschaften/common/pdf/2014\\_09Vietnamese\\_TU\\_in\\_Transition.pdf](http://www.fes.de/gewerkschaften/common/pdf/2014_09Vietnamese_TU_in_Transition.pdf), p. 1.

<sup>98</sup> Arts. 42 and 43, Chinese Constitution 1982.

<sup>99</sup> Art. 10, Vietnamese Constitution 2013 reads: 'The Trade Union is the socio-political organisation of the working class and labourers, established on a voluntary basis that represents the workers, looks after and protects the legitimate and legal rights and interests of the workers; participates in state administration and socio-economic management; participates in the control, inspection, and supervision of the activity of State bodies, organisations, units and enterprises with respects to the matters concerning the rights and duties of the workers; propagandises, mobilises learning, development of

more closely tracks the International Labour Organisation (ILO) standards. For example, Vietnamese labour law includes a National Wage Council that is modelled on a South Korean example, with technical assistance from the ILO. Composed of members from the government, unions and business associations, this tripartite body has been effective in advising decision makers on minimum wages.<sup>100</sup> Vietnam is thus ahead of China in legalising industrial action. These developments may come in handy as both countries experience interest-based industrial action and mass strikes, which are likely to increase in size and frequency.<sup>101</sup>

Vietnamese labour law has long authorised strikes under certain circumstances (although these conditions are hard to fulfil),<sup>102</sup> while unions and professional organisations, in spite of their dependence on the VCP, can be relatively more spontaneous and representative than their Chinese counterparts in representing workers' interests against both the state and employers.<sup>103</sup> For example, a significant difference between the two countries is that an enterprise's union chair is paid for by unions at the next level up in Vietnam, while their Chinese counterpart is paid for by the very enterprise the union chair serves.<sup>104</sup> This openness reflects the historical fact that Vietnamese unions, Vietnam General Confederation of Labour (VGCL), are more politically powerful in dealing with employers and structurally more independent from the VCP than their

abilities and professional skills, conformity of law, and construction and defence of the Fatherland among the workers.'

<sup>100</sup> Vietnamese Prime Minister Nguyen Tan Dung approved Decree 49/2013/ND-CP, which commissioned the establishment of a National Wage Council to oversee national wage levels throughout the country. Vietnam Briefing, 'National Wage Council Established in Vietnam, Minimum Wage Rises', 16 July 2013, available at [www.vietnam-briefing.com/news/national-wage-council-established-in-vietnam-minimum-wage-rises.html/#sthash.n13yVLtv.dpuf](http://www.vietnam-briefing.com/news/national-wage-council-established-in-vietnam-minimum-wage-rises.html/#sthash.n13yVLtv.dpuf).

<sup>101</sup> China Labour Bulletin, 'Worker Activism is Now the New Normal as Strikes and Protests Erupt Across China', 7 April 2015, available at [www.clb.org.hk/en/content/worker-activism-now-new-normal-strikes-and-protests-erupt-across-china](http://www.clb.org.hk/en/content/worker-activism-now-new-normal-strikes-and-protests-erupt-across-china); Vu Trong Khanh, 'Vietnamese Workers Strike Over End of Option on Retirement Money', *Wall Street Journal Asia*, 1 April 2015, available at [www.wsj.com/articles/vietnamese-workers-strike-over-end-of-option-on-retirement-money-1427889688](http://www.wsj.com/articles/vietnamese-workers-strike-over-end-of-option-on-retirement-money-1427889688).

<sup>102</sup> Trinh K. Y. Khanh, 'The Right to Strike in Vietnam's Private Sector' (2015) 2 *Asian Journal of Law and Society* 115–135.

<sup>103</sup> Anita Chan and Irene Norlund, 'Vietnamese and Chinese Labour Regimes: On the Road to Divergence', *China Journal*, July 1998, pp. 192–93, available at [www.researchgate.net/profile/Anita\\_Chan5/publication/260388138\\_Vietnamese\\_and\\_Chinese\\_Labour\\_Regimes\\_On\\_The\\_Road\\_to\\_Divergence/links/53fd46f00cf2364ccc08a891.pdf](http://www.researchgate.net/profile/Anita_Chan5/publication/260388138_Vietnamese_and_Chinese_Labour_Regimes_On_The_Road_to_Divergence/links/53fd46f00cf2364ccc08a891.pdf).

<sup>104</sup> *Ibid.*, p. 173.

Chinese counterpart, the All-China Federation of Trade Unions (ACFTU).<sup>105</sup>

The relative strength of Vietnamese workers is also reflected in the fact that, despite the large number of illegal wildcat strikes in Vietnam, few organisers have been prosecuted (although harassment does occur beyond view).<sup>106</sup> While there is a legal procedure for the government to petition courts to declare a strike illegal, the government has never utilised it. Instead, the dismissal of a striker often leads to renewed strikes, forcing management to reinstate the dismissed workers.<sup>107</sup> As Clarke points out, official tolerance of such strikes provides the most powerful incentive for Vietnamese workers to achieve what they want through extralegal means.<sup>108</sup> In Khanh's view, an over-responsive state 'has given rise to a negative precedent, making workers believe compliance with the official mechanism for collective labour dispute resolution is unnecessary'.<sup>109</sup>

#### 6.4.2 Religion

The relative open space for religion also reflects a more resilient and rigorous demand for religious freedom in Vietnamese society. Unlike the CCP, the VCP does not prohibit its members from exploring religious beliefs, as long as the religion is properly recognised by the state.<sup>110</sup> Unlike the CCP, it has not created a parallel Catholic Church that is independent of Rome; it does not force its Catholics to renounce allegiance to the Vatican; and it does not ordain bishops who are not endorsed by the Vatican, although it does occasionally veto the Vatican's

<sup>105</sup> A significant difference between the two countries is that an enterprise union chair is paid for by unions at the next higher level and the Chinese counterpart is paid for the enterprise the Chair serves. *Ibid.*, p. 185.

<sup>106</sup> *Ibid.* For further deliberations see Chapter 11 in this volume.

<sup>107</sup> Simon Clarke, 'The Changing Character of Strikes in Vietnam' (2006) 18(3) *Post-Communist Economies* 346, 355.

<sup>108</sup> *Ibid.*, 345–361.

<sup>109</sup> Khanh, 'The Right to Strike in Vietnam's Private Sector', 127.

<sup>110</sup> Art. 24, Vietnamese Constitution 2013; Eleanor Albert, 'Religion in China', Council on Foreign Relations, 10 June 2015, available at [www.cfr.org/china/religion-china/p16272](http://www.cfr.org/china/religion-china/p16272). For a comprehensive review of religious policy in Vietnam, see John Gillespie, 'Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam' (2014) 27 *Harvard Human Rights Journal* 107–149; and Thomas J. Reese and Mary Ann Gledon, 'How Vietnam Respects and Protects Religious Freedom has Implications beyond its Own Borders', (2016) *America: The Jesuit Review*, [www.americamagazine.org/issue/report-vietnam](http://www.americamagazine.org/issue/report-vietnam).

recommended candidates.<sup>111</sup> Where restriction and repression undoubtedly continue in Vietnam, the CCP has been far less tolerant of independent religious activities.

With the general improvement of relations between Vietnam and the Vatican, Vietnamese religious groups maintain stronger ties with foreign countries. While both party-states impose strong bureaucratic control over religious organisations, Vietnamese believers are allowed to openly practise their faith with greater confidence: they can be registered as independent religious organisations with the government and thereby authorised to operate legitimately in public, in parallel with directly state-controlled religious organisations. In China, no independent religious groups can legally exist outside of direct state control. They are either incorporated into the state-controlled institutions or they operate as house-churches in the long shadow of the state, suffering routine harassment and crackdown.<sup>112</sup>

The VCP started to loosen its grip over religious organisations and practices in 1990, and one key development was to accept and tolerate Party members from religious communities.<sup>113</sup> The removal of a religious ban on Party members was a recognition and reflection of the importance of religion in the Vietnamese society, and contributed to the creation of a more vibrant religious community that cuts across party-state and societal boundaries.<sup>114</sup> The participation of VCP members in religious activities legitimises religion in general, opens a space for interaction between the state and the religious sector, and makes police harassment of the faithful less likely. The ability of VCP members to practise religion may help to explain why Vietnamese believers practise largely in the open, while their Chinese counterparts do so 'underground'.

<sup>111</sup> Kevin Boyle and Juliet Sheen (eds.), *Freedom of Religion and Belief: A World Report* (London: Routledge, 1997), p. 256; Andrew Batson, 'China Set to Name Catholic Bishop without Consent', *Wall Street Journal*, 29 November 2006, available at [www.wsj.com/news/articles/SB116475889349535058](http://www.wsj.com/news/articles/SB116475889349535058).

<sup>112</sup> Vietnam to date has not suppressed any cult groups as China has done against Falun Gong and Vietnamese middle-class churchgoers have not suffered nearly as much as members of the Shouwang church in Beijing. David C. Schak, 'Protestantism in China: A Dilemma for the Party-State' (2011) 2 *Journal of Current Chinese Affairs* 71–106.

<sup>113</sup> Gillespie, 'Human Rights as a Larger Loyalty', 124; and Reese and Gledon, 'How Vietnam Respects and Protects Religious Freedom has Implications beyond its Own Borders'.

<sup>114</sup> The idea was mooted by some religious scholars in China but was never taken seriously by the CCP.

### 6.4.3 *The Legal Profession*

Legal professionals in both countries actively hold the party-state accountable to its rule of law rhetoric, despite tight government control over lawyers, law firms and bar associations.<sup>115</sup> Lawyers in both nations are endeavouring to achieve a degree of autonomy from government control but are met with a swift and harsh response, with leading lawyers selectively prosecuted for sedition, subversion or other offences.<sup>116</sup> Yet ad hoc evidence indicates that while Chinese rights lawyers are at least as zealous as their Vietnamese counterparts, their representative professional organisations are more timid.<sup>117</sup>

While the size of the legal profession is much smaller in Vietnam than in China,<sup>118</sup> the phenomena of ‘die-hard lawyers’ vigorously challenging the prosecution’s cases (on largely procedural matters) began in Vietnam at least as early as 2003,<sup>119</sup> several years before China. Meanwhile, the CCP is more aggressive at penetrating and controlling organised challenges from the legal profession, while the VCP appears relatively more tolerant of their institutional autonomy. Vietnam’s National Bar Association has little control over regional and local bar associations, as the latter openly challenge the former’s lack of autonomy from the government.<sup>120</sup> The Ho Chi Minh City Bar Association, in particular, is much more active than its Chinese counterparts in seeking autonomy from regulators, and is more responsive to the interests of its members when in conflict with the government.<sup>121</sup> Of course, it is hard to predict whether stronger challenges

<sup>115</sup> John Gillespie, ‘The Juridification of Cause Advocacy in Socialist Asia: Vietnam as a Case Study’ (2014) 31 *Wisconsin International Law Journal* 672–701.

<sup>116</sup> See e.g., ‘Vietnam Lawyer Charged with Subversion’, *BBC*, 24 December 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/8429351.stm>; ‘China Dissident Lawyer Gao Zhisheng “Destroyed by Jail”’, *BBC*, 14 August 2014, available at [www.bbc.com/news/world-asia-china-28793055](http://www.bbc.com/news/world-asia-china-28793055).

<sup>117</sup> Recently, however, having witnessed the increasing level of prosecution and harassment of human rights lawyers in China, some lawyers have petitioned the NPC to have the All China Lawyers’ Association abolished for failing to speak on behalf of its members. ‘Chinese Lawyers Call for the Abolition of Their Professional Body’, *Asian Pacific Star*, vol. 417, 8 October 2015, available at [www.asiapacificstar.com/index.php/sid/237422049](http://www.asiapacificstar.com/index.php/sid/237422049).

<sup>118</sup> Nguyen Hung Quang and Kerstin Steiner, ‘Ideology and Professionalism: the Resurgence of the Vietnamese Bar’, in Gillespie and Nicholson, *Asian Socialism and Legal Change*, p. 191.

<sup>119</sup> For a discussion of the aggressive defense against the prosecution of the Godfather of Saigon, see *Ibid.* and Sidel, *Law and Society in Vietnam*, pp. 166–194.

<sup>120</sup> Bui Thi Bich Lien, ‘Legal Education and the Legal Profession in Contemporary Vietnam: Tradition and Modification’, in Gillespie and Chen, *Legal Reforms in China and Vietnam*, p. 299.

from better organised lawyers' organisations will lead to deeper political reform and a more credible commitment to the rule of law.

Both party-states engage in the arrest and harassment of individual defence lawyers who take on politically sensitive cases. Le Cong Dinh, a Western-trained lawyer who won a major World Trade Organisation (WTO) case for Vietnam, was imprisoned from 2009 to 2013 and then disbarred for defending dissidents and bloggers.<sup>122</sup> In 2011, Cu Huy Ha Vu was sentenced to seven years in prison for filing lawsuits against the prime minister and defending clients that included a Roman Catholic parish.<sup>123</sup> But the scale and severity of repression against human rights lawyers in China has been far worse, as amply demonstrated by the 2015 crackdown that resulted in the criminal conviction and administrative punishment of dozens of lawyers.<sup>124</sup>

The question thus remains: Will a party-state rely on the formal legal system to resolve disputes according to proper procedures, or will it resort to repression or other unprincipled informal mechanisms based on political expedience? As numerous studies have shown, dispute resolution that bypasses the legal system eventually exacerbates social conflict and becomes a destabilising factor unto itself.<sup>125</sup> There is an emerging consensus among political elites that dispute resolution that is based on the rule of law and predictable legal principles is the most cost-effective way to resolve the vast majority of cases.<sup>126</sup>

<sup>121</sup> Jerome Cohen, 'Introduction to Part V', in Gillespie and Chen, *Legal Reforms in China and Vietnam*, p. 271.

<sup>122</sup> Sherif Mansour, Maria Snegovaya, Zachary Abuza, 'Stifling the Public Sphere: Media and Civil Society in Egypt, Russia, and Vietnam', Report by the International Forum for Democratic Studies, National Endowment for Democracy, 15 October 2015, available at [www.ned.org/stifling-the-public-sphere-media-and-civil-society-in-egypt-russia-and-vietnam/](http://www.ned.org/stifling-the-public-sphere-media-and-civil-society-in-egypt-russia-and-vietnam/).

<sup>123</sup> Ibid.

<sup>124</sup> Fu Hualing, 'The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State' (forthcoming 2018) *Journal of Contemporary China*; Alex W. Palmer, 'Flee at Once': China's Besieged Human Rights Lawyers', *New York Times*, 25 July 2017, available at [www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html](http://www.nytimes.com/2017/07/25/magazine/the-lonely-crusade-of-chinas-human-rights-lawyers.html).

<sup>125</sup> Liangjiang Li, Mingxing Liu and Kevin J O'Brien, 'Petitioning Beijing: The High Tide of 2003–2006' (2010) 210 *China Quarterly* 313–34; Carl F. Minzner, 'Xinfang'; Yanhua Deng and Kevin. J. O'Brien 'Relational Repression in China: Using Social Ties to Demobilise Protesters' (2013) 214 *China Quarterly* 533–552.

<sup>126</sup> Randall Peerenboom, 'The Future of Legal Reforms in China: A Critical Appraisal of the Decision on Comprehensively Deepening Reform', available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379161).

When discourse signals a constitutional commitment on the part of the party-state, citizens in both nations have responded by seizing that discourse. Constitutional rhetoric gives space for articulation and action by civil society, and has inspired people to fight for their rights, even in authoritarian states. The gap between a high normative standard of constitutional rights and low levels of practical enforcement sharpens the contrast between entitlement and reality, creating further incentives and opportunities for mobilisation. It is commonly agreed that rights awareness has been rising steadily, with political and legal consequences in both countries,<sup>127</sup> and aware citizens are demanding to exercise those rights through available institutions. If those institutions fail to deliver, people will create or resort to non-institutional means for remedies. Ultimately, the authoritarian party-state's flirtation with rule of law is a double-edged sword that has been wielded with great caution, mindful of law's inherent threat to authoritarian rule.

## 6.5 Conclusion

Constitutional rights are on the agenda in both China and Vietnam, as grassroots constitutional demands unfold on a daily basis. While judicial development is severely constrained, citizens actively interpret and implement constitutional rights in forums across both countries, including in the streets, factories, churches and classrooms. This Chapter conceptualised the similarities and differences between three substantive foundations of constitutional practices in both states – the leadership of the communist party, faith in developing a socialist rule of law and the requisite state responsiveness to popular will.

Regime survival is the ultimate goal for any single party that desires to perpetuate its command of power. The party-state model is adapting to new circumstances and continues to evolve incrementally to develop and defend its credibility and legitimacy. One core strategy is reliance upon legal rules to discipline the state and impose order on society. While the party-state purposely maintains a weak legal system to satisfy its own political agenda,

<sup>127</sup> See e.g., Michael Dowdle, 'Introduction to Part II', in Gillespie and Chen, *Legal Reforms in China and Vietnam*, p. 106; Zheng Ge, 'Toward Regulatory Neutrality in a Party-state? A Review of Administrative Law Reforms in China', in Gillespie and Chen, *Legal Reforms in China and Vietnam*, p. 119; Dang Xuan Hop, 'Vietnam: The Past 25 Years, the Present and the Future', in E. Ann Black and Gary F. Bell (eds.), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge: Cambridge University Press, 2011), p. 210.

a weak system cannot contain the socio-economic problems it is designed to resolve. The resort to extrajudicial forums undermines the state's legal system while delegating some degree of constitutional enforcement to the people.

Both constitutional orders are presently locked in a cycle of mobilisation and counter-mobilisation, in which societal forces demand change that the party-state considers, manages and, occasionally, concedes. This requires the Party to constantly balance its position against popular action that pushes for a redistribution of interests or incremental change while the legal system attempts to impose a degree of regularity. Where civil society is consulted, rather than resisted, the process is more likely to run smoothly. The Sino–Vietnamese comparison indicates that the limits of the Chinese experiment with constitutionally-based legal reform over the past several decades seem to have hardened, at least for the time being. While China and Vietnam may share common constraints, the scope for reform appears greater in Vietnam, whose system currently has the advantage of being more receptive to new ideas, both internal and external in origin. Thus, the 'socialism with Vietnamese characteristics' outlined herein may allow the Vietnamese party-state to rejuvenate itself while overcoming some of the institutional barriers that have stalled reform in China.

PROOF