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Constitutional Mobilisation in China

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Abstract

This paper examines recent constitutional mobilisation in China, embodied in the weiquan (right defence) movement, Charter 08 and the 2013 constitutionalism debate. It contrasts Chinese and Vietnamese experience of constitutional mobilisation. This paper argues that constitutional mobilisation in China presents both convergence and divergence with those in Vietnam. The convergence stems from domestic dynamics, the impact of globalisation and the shared features of socialist/communist institutional settings. The divergence is due to Chinese constitutional exceptionalism and Vietnam's instrumentalist approach to global constitutionalism. Particularly, without necessary constitutional opportunity created by the constitution-making process, constitutional mobilisation in China has not created a national constitutional dialogue as has happened in Vietnam. This paper draws attention to the new function of socialist constitutions as a frame for social mobilisation and has general implications for the comparative inquiry into the social dynamics of constitutional law.

I. Introduction

China, like Vietnam, has successfully repudiated the third wave of democratisation and has remained a socialist/communist regime. Under the rule of the Communist Party, China has experienced four constitutions promulgated in 1954, 1975, 1978 and 1982, respectively. The current 1982 Constitution was amended several times in 1988, 1993, 1999 and 2004 (Jihong, 2009).

Despite the authoritarian environment, social mobilisation for constitutional change is active in China. In the early twentieth century, under the authoritarian rule of the dynastic government of the Qing, public intellectuals mobilised for the creation of a constitutional government in China to replace the dynastic government, evidenced by the Institutional Reform Movement, the Constitutional Reform Movement and Xinhai Revolution, and the War to Defend the Republic and Uphold the Constitution (Wang, 2003, p. 72). Especially, Western constitutionalism provides the basis for Chinese mobilising actors to frame new constitutional arguments and mobilise for their fruition on Chinese soil (Xiaohong, 2010, p. 56). During the communist rule of Mao, in 1974, a group of young people under the pseudonym of Li Yizhe released a manifesto entitled 'On Socialist Democracy and the Legal System', demanding for constitutional protection of human rights and 'reestablishment' of the rule of law, for which they were arrested by communist authorities but released and rehabilitated under post-Mao leadership (Chan *et al.*, 1985). During the Post-Mao era, the declining popular trust in communism engendered stronger social mobilisation for social change (including constitutional change). Notable is the 1989 democracy movement culminating in the Tiananmen Square protests that were decimated by the communist authorities. The mobilising actors (the students in this case) called for not only economic change, but also constitutional change with the practice of democracy and the rule of law (Zhao, 2001).

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The Tiananmen Square Massacre does not frustrate the subsequent social mobilisation for social change in China. It however changes the approach of the Chinese mobilising actors from confrontational to dialogical. Such social mobilisation for constitutional change presents in the *weiquan* movement, Charter 08 and the 2013 Constitutionalism Debate. Chinese and international scholars have offered intensive and helpful treatments on these phenomena. However, this literature suffers two important shortcomings. First, theories in social science on social mobilisation have not yet been substantively integrated to explore these phenomena. Second, scholars have focused mainly on the domestic context and neglected comparative discussions of similar phenomena occurring under similar communist settings. The neglect of comparative discussions of these stories limits our more generalised understanding of the possibility and limitation of social mobilisation for constitutional change under the contemporary communist world.

Therefore, I will situate the recent Chinese stories within a theoretical and comparative context. Theoretically, I draw from three theories in social science regarding social mobilisation, namely political process, framing and mobilisation resource (McAdam *et al.*, 1996). However, social scientists have largely neglected constitutional law and failed to account for a distinctive phenomenon that can be called constitutional mobilisation. Elsewhere, I define constitutional mobilisation as the process by which social actors employ constitutional norms and discourses to advocate for constitutional change (Bui, 2018). Within constitutional terms, the political process refers to the political opportunity for social actors to mobilise for constitutional change; the framing theory concerns how social actors frame their constitutional arguments; and the mobilisation resource involves state actors that social actors as rational actors approach to mobilise for constitutional change (Bui, 2018).

Comparatively, I contrast the Chinese experience with the Vietnamese experience. Vietnam and China, together with Cuba, Laos and North Korea, are the socialist regimes that have existed since the collapse of the Berlin Wall. Constitutional adaption is an important element of their continued resilience in the globalising world. Social mobilisation is also a component of constitutional dynamics in the two countries. But, despite the same political regime, constitutional divergence between Vietnam and China is dramatic. In particular, the ways in which the two communist governments react to constitutional mobilisation are significantly divergent, which deserves scholarly attention. Scholarly inquiry into these convergences and divergences can help to better understand the constitutional dynamics and limits in the contemporary communist world and enrich the growing comparative constitutional knowledge. The case of Vietnam has been examined in detail elsewhere, focusing on constitutional mobilisation, by seventy-two intellectuals (known as Petition 72), 'free citizens', organisations of civil society and religious groups emerging in early 2013 when the party-state released the draft Constitution for public comments (Bui, 2018; Bui and Nicholson, 2016). Social actors in Vietnam appropriate the opportunity created by constitution-making to mobilise a national constitutional dialogue in which authoritarian leaders and the public openly and frankly interchange, exchange their ideas and opinions, and deliberate constitutional questions, which is constructive to cultural and reformative constitutional change (Bui, 2018; Bui and Nicholson, 2016).

In this study, I will discuss the Chinese experience compared with the Vietnamese experience. I argue that constitutional mobilisation in China presents both convergence and divergence with that in Vietnam. The convergence stems from domestic dynamics, the impact of globalisation and the shared features of the socialist institutional settings. The divergence is due to Chinese constitutional exceptionalism and Vietnam's instrumentalist approach to global constitutionalism. Particularly, without the necessary constitutional opportunity created by the constitution-making process, constitutional mobilisation in China has not created a national constitutional dialogue as has happened in Vietnam.

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This study contributes to our better understanding of constitutional dynamics and limits in China and in the contemporary socialist world generally. It draws attention to a new function of socialist constitutions as a frame for social mobilisation. Moreover, this study has general implications for the constitutional studies from a sociological constitutional perspective. Comparative constitutional studies must go beyond the narrow focus on courts and their adjudication to inquire into the social dynamics of constitutional law.

Following this introduction, I will describe constitutional mobilisation in China (Section II), analyse and compare the Chinese experience with the Vietnamese stories (Section III) and conclude with more general reflections (Section IV).

II. Constitutional mobilisation in China

2.1 *Weiquan* movement

The Chinese *weiquan* (rights defence) movement exemplifies what Louis Henkin calls 'the age of rights' (Henkin, 1990) even in a communist atmosphere. The Chinese *weiquan* movement, which emerged in the early 2000s, refers to a type of group action in which social actors (including lawyers, legal scholars, intellectuals and other activists) use the legal process (including both litigation and non-judicial mechanisms such as public protests) to mobilise for the protection and defence of civil rights against the government (Pils, 2015; Benney, 2012; Fu and Cullen, 2008).

The Sun Zhigang incident in 2003 is considered the starting point of the Chinese *weiquan* movement (Hand, 2006). In April 2003, the public clamoured when Chinese media spread the news on the death of a young man named Sun Zhigang while in police custody. Taking this opportunity, three young legal scholars submitted a formal petition to China's Standing Committee of the National People's Congress, calling for this body's review of the legality and constitutionality of the Custody and Repatriation Measures, a legal instrument issued by the State Council in 1982. In addition to reasons concerning national legislative laws, the petitioners argued that the custody and repatriation system violates Article 37 of China's Constitution, which prohibits 'unlawful deprivation or restriction of citizens' freedom of person by detention or other means'. This legal mobilisation effectively resulted in the repeal of the China's custody and repatriation system – the result of the confluence of a number of factors, which, according to Keith J. Hand's persuasive explanation, includes the political environment concerning China's leadership transition and the SARS crisis, the impact of online media, institutional conflict between the National People's Congress and the State Council, the flexibility in the government's policy concerning the issue and the effective work of legal intellectuals within the existing legal framework (Hand, 2006, pp. 131–148).

The Sun Zhigang incident kicked off the Chinese *weiquan* movement – 'a comprehensive movement involving all social strata throughout the country and covering every aspect of human rights' (Chongyi, 2012, p. 129). As Feng Chongyi documents:

> 'Most cases of this right defense movement aim to protect economic and social rights, including protests by peasants against excessive taxes, levies, and forced seizes of farmland; strikes by workers against low pay, arrears of pay, and poor working conditions; protests by laid-off unban workers against unfair dismissal by their employers; protests by homeowners against forced eviction by government and developers; protests by residents against forced relocations; campaigns by citizens against unpaid social entitlements; campaigns for the rights of women and children; and protests by affected residents against environmental pollution.' (Chongyi, 2012, pp. 129–130)

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The Chinese *weiquan* movement, however, also covers cases pertaining to civil and political rights, including:

> '. . . campaigns by lawyers, journalists, and writers for freedom of speech and press; campaigns by Christian house churches and Falun Gong practitioners for freedom of religion, belief, assembly, and association; campaigns against arbitrary detention, re-education through labor, torture, and excessive use of the death penalty; campaigns against injustice and abuses of public power by victims of Party-state agents, particularly by the thousands of petitioners who flew to the national capital or provincial capitals from all over the country to seek redress from perceived injustice; protests by migrant workers against the household registration system and other discrimination; and protests by peasants against irregularities and manipulation in village elections.' (Chongyi, 2012, p. 130)

One feature of the Chinese *weiquan* movement, which resonates to a certain extent with American social movements, is the involvement of public-interest lawyers and their use of litigation as a strategy for mobilisation (Fu, 2012). Importantly, there is a 'small but growing body of constitutional case law' produced as a result of the efforts of *weiquan* movement lawyers in using courts as a mechanism for constitutional litigation (Kellogg, 2009, p. 218). One typical example is the *Zhang Xianzhu* case in 2003, which involved litigation against hepatitis B discrimination law on a constitutional basis. Zhang passed the civil exam offered by a local bureaucracy but was denied the position according to the provincial physical exam regulation because physical text indicated that he was a hepatitis B carrier. The activist lawyer in this case argued that the local government's physical exam regulation violates Article 33 of China's Constitution, which protects the citizen's right to equality (Kellogg, 2009, p. 219). The court ruled that Zhang symbolically won the case not on a constitutional basis, but on a factual basis. The court held that it did not have the competence to offer remedy, as the position had been filled (Kellogg, 2009, pp. 240–241).

What are the effects of the *weiquan* movement? The picture has both bright and dark sides. Positively, scholars have indicated that the movement is instrumental to the development of constitutional petitions, popular constitutional consciousness, citizen empowerment, greater pressures on legal reforms and continued inspiration of rights-based social mobilisation (Hand, 2006, p. 148). On the negative side, scholars demonstrated the communist authorities' detainment, persecution and arrest of *weiquan* movement lawyers and other activists (Pils, 2012, pp. 233–234). Pils (2012, p. 230) argues about 'the *weiquan* movement's early success and its current repression'. He concludes that 'grassroots activism thus has a tendency to helpless, self-destructive violence; it often lives in darkness, in a large measure produced by state persecution and oppression' (Pils, 2012, p. 239).

Constitutional mobilisation is an element of the *weiquan* movement. In some cases, movement actors frame constitutional arguments and mobilise for the protection of constitutional rights. In most other cases, although social actors do not explicitly address constitutional arguments, their mobilisation indirectly breathes air into constitutional rights. The government's response is mixed, with both dialogical and repressive methods.

2.2 Charter 08

Charter 08 was conceived as 'an enlightened alternative to the popular political opposition's and *weiquan* movement's darker sides, because its agenda is non-violent and non-vindictive' (Pils, 2012, p. 230). On 10 December 2008, 350 Chinese intellectuals and human rights activists published a political manifesto in the occasion of the 100th China's Constitution and the 60th anniversary of the Universal Declaration of Human Rights (China's Charter 08). Adopting the name and style of Czech's Charter 77, China's Charter 08, subsequently signed by more than 10,000 people inside

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and outside China, called for substantive transformation of Chinese constitutional order. It is comprised four parts: preamble, fundamental principles, basic positions and conclusion. Its preamble establishes the rationale of its release, focusing on the problems internal to the existing Chinese communist constitutional order, such as corruption, 'absence of human rights', and other social, economic, moral and environmental problems. It attributes these problems to 'the political reality, which is plain for anyone to see, is that China has many laws but no rule of law; it has a constitution but no constitutional government' (China's Charter 08).

The Charter then moves on to set out its underlying constitutional principles, namely freedom, human rights, equality, republicanism, democracy and constitutionalism. On this ground, the Charter articulates detailed constitutional proposals, namely amending the nation's Constitution; separation of powers and checks and balances; legislative democracy; judicial independence; civilisation of the military; human rights protection; democratic elections with free competition and citizen participation; abolishing the household registration system to realise the constitutional rights to equality and freedom of movement; multiparty system; freedom of assembly; freedom of expression; freedom of religion; civic education; protection of private property rights; fiscal decentralisation; social security; environmental protection; federal republic; and transitional justice. In the conclusion, the Charter calls for public support (China's Charter 08).

The government's response to Charter 08 is described as 'aggressively repressive' (Potter and Woodman, 2012, p. 107), with forty signatories being questioned in the first week of its release, more than 100 being harassed or detained during the following year (Potter and Woodman, 2012, p. 107) and Liu Xiaobo, one of the initiators of the Charter, being sentenced to eleven years in jail for 'incitement to subversion of state power' (Anonymous, 2012, p. 1). In 2010, Liu was awarded the Nobel Peace Prize and the Chinese government's first reaction to this was arresting several dissidents who gamely held a celebration party (Lam, 2012, p. 251).

In short, Charter 08 is a form of constitutional mobilisation directly aimed at constitutional change. Social elites work collectively to release a manifesto and call for the public support of peaceful and dialogical transformation of the constitutional system in China. The authoritarian government, however, denied a constitutional dialogue and chose to oppress the mobilising actors.

2.3 2013 constitutionalism debate

The authoritarian defeat of Charter 08 does not completely frustrate social mobilisation for constitutionalism in China. The 2013 constitutionalism debate echoes some constitutionalist values mobilised by Charter 08 actors. In this 'nationwide debate that last[ed] for months', through popular media, liberal intellectuals mobilised for implementation of constitutionalism (*xianzheng*) in China, while its opponents operating in the party-state's constitutional line castigated constitutionalism as a Western concept inimical to China (Creemers, 2015, pp. 91–92).

The timing and political opportunity of the 2013 constitutionalism debate are relatively similar to those of Charter 08: the anniversary of China's Constitution. Speaking at the 30th anniversary of China's 1982 Constitution on 4 December, Xi Jinping stated that: 'The life and authority of the constitution depend on its implementation' (Holbig, 2014, p. 54). Seizing this opportunity, seventy-two liberal intellectuals published online on Christmas Day an open letter entitled 'A Proposal for a Consensus about Reform' (Bandurski, 2013). Rather than calling for constitutional amendment or new constitution-making, these constitutionalists proposed reforms based on the existing 1982 Constitution.

The letter begins by suggesting that the Chinese citizenry can reach to 'a fundamental consensus on democracy, the rule of law, respect for human rights and other principles of constitutionalism demanded in a modern society' (Bandurski, 2013). On this ideational basis, the intellectuals demonstrated many problems of the existing order, such as the lack of separation between the party and the government, the symbolic position of the legislature, the restriction of freedom of

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expression, the monopoly position of state-owned enterprises (SOEs), the lack of courts' independence and the dormant constitutional supervision system (Bandurski, 2013). They then proposed six reforms: governance according to the Constitution, implementing electoral democracy, respecting the freedom of expression, deepening the market economy, realising judicial independence and guaranteeing the effect of the Constitution (Bandurski, 2013).

This open letter forms the base of the New Year Greeting of the *Yanhuang Chunqiu* [*China Through the Ages*] (hereinafter, the *YHCQ*) – 'a political journal associated with more liberal, pro-reform elements within the Chinese Communist Party' (Bandurski, 2013). Being entitled 'The Constitution Is a Consensus for Political Reform', the Greeting called for the implementation of constitutionalism in China, which means implementing the 1982 Constitution, with relatively similar proposals put forward in the seventy-two intellectuals' open letter. This Greeting kick-started the constitutionalism debate in China, which lasted until August 2013. Writing mobilising constitutionalism was disseminated in such journals as the *YHCQ*, which published writings on constitutionalism in nearly every issue of 2013, the journal *Caijing* and other official journals (Creemers, 2015, p. 96). However, cyberspace operated as the main medium for the mobilisation of constitutionalism in China in 2013. As Creemers (2015, p. 96) documents:

> 'The original open letter advocating for the implementation of the Constitution and many other writings were published, disseminated and shared via blogs, social media and intellectual websites such as *Love Thinking* (*Ai Sixiang* 爱思想) and *Consensus Net* (*Gongshiwang* 共识网). The debate aroused considerable interest online, outstripping news about the Chinese moon probe. The vast majority of commentators demonstrated support for the pro-constitutionalist position.'

Popular attention compelled party media to enter the array. Three party media outlets, namely *Red Flag Manuscripts*, *People's Daily* and *Party Building*, published a number of anti-constitutionalist writings, conceiving constitutionalism as a Western product noisome to China, and accusing pro-constitutionalists as those attempting to Westernise the Chinese political system (Creemers, 2015, pp. 95–96). Pro-constitutionalist journals such as the *YHCQ* published a series of pieces that seemingly aimed to convince the leadership that constitutionalism should not be feared, but was a logical stage in China's social-political development (Creemers, 2015, p. 98). However, the party's response was strongly negative. By the middle of May 2013, a confidential document by the party's Central Committee identified 'constitutionalism' as one of seven ideological problems (China Copyright and Media, 2013). The document tends to consider intellectual mobilisation for constitutionalism as subversive. The party considers constitutionalism as a 'bourgeois concept of the State' that embraces the elements of 'the tripartite separation of powers, the multi-Party system, universal suffrage, judicial independence, nationalization of the military and other such matters' (China Copyright and Media, 2013). The party castigates:

> 'The danger of propagating Western constitutionalist democracy lies in setting the Party's leadership against the implementation of the Constitution and the law, denying Party leadership with Western constitutionalist democracy and abolishing the people's democracy, essentially, this aims to deny our country's Constitution and the system and principles determined in it, realize a change of banners in the end, and bring the Western political system and model to China.' (China Copyright and Media, 2013)

In August 2013, party media continued to publish pieces of writing against constitutionalism, regarding it as 'a US farce' – a weapon of the 'public opinion war' (Creemers, 2015, p. 101). These pieces of writing ended the constitutionalism debate in China in 2013. 'Constitutionalism' has

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become a taboo subject in Chinese public discourse (Gang, 2014). A Chinese law professor was even dismissed for teaching constitutionalism (Wickenkamp, 2013). A recent response to the anti-constitutionalism movement was made by constitutional law professor at Peking University Law School, Zhang Qianfan, a prominent constitutionalist voice during the 2013 constitutionalism debate, who said: 'The anti-constitutional standpoint is ridiculous, because its essence is against humanity' (Gu, 2015).

China's 2013 constitutionalism debate is characterised by the intellectual conflicts between socialist and universal constitutionalism (Wu, 2016, p. 685). While the socialist constitutionalists advocate for implementation of the current Constitution of China so as to limit the party power, the universalist constitutionalists 'believe in American-style constitutionalism and ultimately, a transition to multi-party democracy' (Wu, 2016, p. 686). But China's 2013 constitutionalism debate is not merely theoretical or ideological friction. It is a form of social mobilisation for constitutionalism. In this case, constitutionalism is a socially mobilised value, evidenced by the social elites' address of an open letter calling for constitutionalism and the public attention and engagement of popular constitutional advocacy through mass media. The constitutionalism movement is influential enough to force the party to engage in a limited conversation about constitutionalism.

III. Comparative analysis

3.1 Convergence

Vietnamese citizens actively mobilised for constitutional change during the constitution-making process in 2013, as evidenced by the activism of the 72 group and other social actors (Bui and Nicholson, 2016). Similarly, Chinese citizens have been active in constitutional mobilisation under the authoritarian condition in which the Communist Party holds monopoly over the public power. Despite the abnegation of the third wave of democratisation, the communist regime in China, as in Vietnam, has to acclimate to the globalising era, which explains its resilience. Institutional and legal acclimation provides a political environment facilitative to the rise of constitutional mobilisation in both countries.

As Fu Hualing (2012, p. 187) demonstrates, the opening policy initiated by Deng Xiaoping facilitated economic development, which puts pressure on legal and political adaption by incorporating 'democratic values and the rule of law'. Importantly, China's constitutional amendments in 1999 and 2004 incorporate the ideas of 'socialist rule of law state' and human rights, respectively. This domestic legal and political reform is accompanied by China's greater integration into the global political economic community with China's signing of major international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICECR) and participation in major international economic institutions such as the World Trade Organization (WTO) (Fu, 2012, pp. 189–190). Domestic and international dynamics engender the rise of civil society 'characterized by the mushrooming of associations and non-governmental organizations (NGOs), along with a new wave of volunteerism, civil culture, and moral reasoning' (Fu, 2012, p. 190). Fu Hualing (2012, p. 190) also underlines that 'within the context of cultural and institutional changes, there is also a growth in demand for rights and the rule of law'. Moreover, as in Vietnam, the rise of social media and the Internet offers the cyberspace for civil society to mobilise for rights and the rule of law.

Thus, China and Vietnam have offered relatively similar political environments for the emergence of the social struggle for constitutional change. As in Vietnam, social actors in China appropriate the gap between political and legal commitment and social reality to mobilise social changes, including constitutional change (Fu, 2012, p. 191). They appropriate different legal and

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political processes to mobilise for constitutional construction, including litigation in courtrooms, petition to the legislative bodies and even violent protests.

Chinese and Vietnamese constitutional intellectuals and activists have framed similar constitutional arguments about the problems internal to the existing regime, and they also frame similar constitutional proposals. This is particularly so when we compare China's Charter 08 and Vietnam's Petition 72. The identical constitutional problems identified by social actors in the two countries are the monopoly of power of a single Communist Party, the concentration of power, the loyalty of the arm force to the Communist Party, restriction of human rights, the lack of judicial independence, the control of the SOEs and the state's control of land. They also frame similar constitutional proposals, namely the multiparty system, separation of power and checks and balances, human rights protection, judicial independence, market economy and private property rights, which substantively contest the fundamental constitutional ideology of the party-state. This convergence indicates that the communist authoritarianism in China and Vietnam has faced similar problems, and the social actors are aware of these, for which they mobilise for constitutional transformation.

To mobilise for constitutional change, social actors in China, like their counterparts in Vietnam, employ constitutional rhetoric such as 'socialist rule of law state', 'human rights', 'democracy' and 'equality', adopted in the existing constitutional text and repeatedly restated by political leaders to frame their substantive constitutional arguments. Even the most radical constitutional proposals are also framed in line with official constitutional rhetoric. To illustrate, the six principles of Charter 08, namely freedom, human rights, equality, republicanism, democracy and constitutional rule, are all reflected in the 1982 Constitution (Potter and Woodman, 2012, p. 99). Chinese constitutionalists in the 2013 debate also frame their arguments for reforms based on the existing constitutional text and political leadership's constitutional rhetoric. The dialogical connection to the official constitutional language allows social actors to avoid punishment and to gain more support from political leaders when they mobilise for substantive change under the hard conditions of communist authoritarianism.

But, like their Vietnamese counterparts, Chinese constitutional intellectuals and activists construct substantive meanings of the official constitutional language in a different line with the party-state's understanding. To frame substantive constitutional meanings, they, like the Vietnamese actors, draw on transnational sources or foreign constitutional experience. In particular, international human right laws operate as the frame for the social actors to develop reforming constitutional arguments. Importantly, Chinese constitutional intellectuals and activists construct the substantive constitutional meaning on the grounds of fundamental principles of Western liberal constitutionalism in contrast to the socialist construction adopted by political leaders. For example, the official language of 'ruling the county according to the Constitution' is construed by the constitutionalists in the 2013 debate as 'constitutionalism' with the liberal meaning of constraining the arbitrary power to protect fundamental rights. Similarly, the language of 'human rights' is interpreted by the 08 Charter actors as universal rights inherent to everybody rather than rights bestowed by the state to its subjects as socialist statism's construction of rights (China's Charter 08).

Western liberal constitutionalism operates as the framework for both Chinese and Vietnamese constitutional intellectuals to develop their constitutional arguments. 'Constitutionalism' is an obvious principle of Charter 08, understood in the Western liberal sense as limited government in the name of human rights protection. Its detailed proposals are framed based on Western liberal constitutional ideals, such as institutional separation of powers and judicial independence, and individual rights. The 2013 debate exclusively focuses on 'constitutionalism' also understood in the Western liberal meaning, for which it is accused by anti-constitutionalists of Westernising the Chinese constitutional system. Although the mobilising actors in Vietnam do not often use the term 'constitutionalism' like their Chinese counterparts do, they share the commonality in promoting fundamental ideals defined by Western liberal constitutionalism. This indicates the

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global appeal of Western constitutionalism. In the last three decades, Western liberal constitutionalism has provided the general framework for constitutional building around the world (Yeh and Chang, 2009). It also offers the framework for social mobilisation for constitutional change in places where it has not been established, such as China and Vietnam.

As in Vietnam, social actors in China approach political leaders as a resource to mobilise changing the Chinese legal political system dialogically. The nature of the communist authoritarian regime and the Confucian tradition of meritocracy make political elites attractive resources for mobilising actors. The *weiquan* movement includes some violent protests but these protests focus on individual rights rather than substantive constitutional transformation. In other cases, such as the Sun Zhigang incident and the *Zhang Xianzhu* case, social actors engage in a constitutional dialogue with legislative and judicial actors to define the meaning of some constitutional rights provisions.

Actors of Charter 08 and of the 2013 debate turn to political leaders as the mobilisation resources. In the case of Charter 08, social actors attempted to convince political leaders to engage in dialogue with the society to challenge the political system peacefully. Similarly, the constitutionalists in the 2013 debate also hoped to engage in a dialogue with political leaders to exchange positions about detailed remedies for constitutional implementation. Like their Vietnamese counterparts, the Chinese mobilising actors also use dialogical strategies and communicative methods to approach political elites, such as releasing open letters and manifestoes and submitting constitutional petitions. The repressive nature of the authoritarian regime, the profile of dissidents in prison and the Tiananmen Square Massacre remind social actors to avoid confrontational approaches in mobilising for substantive constitutional change, such as well-organised opposition or mass demonstrations.

In terms of consequence, social mobilisation for constitutional construction in China, as in Vietnam, has failed to result in meaningful constitutionalisation, but has contributed to the change in constitutional culture. The Chinese government remains repressive to the mobilising actors and rejects the call for substantive constitutional change. However, the government has also engaged in a narrow constitutional dialogue with its citizens to define the meaning of the nation's existing Constitution, as in the Sun Zhigang incident and the *Zhang Xianzhu* case, or the meaning of constitutionalism, as in the 2013 debate. At least, this minimal constitutional dialogue is instrumental in fortifying constitutional consciousness among the citizenry. Thanks to such dialogue, the people are increasingly aware of the role of the Constitution in their life, their fundamental rights embodied in the national Constitution, the problems in the existing constitutional system and the constitutional ideals. This constitutional awareness is conducive to continued constitutional mobilisation.

The aforementioned convergence demonstrates that, despite constitutional acclimation to the globalising era, the contemporary communist world, at least in China and Vietnam, has been confronted with similar constitutional problems, which mainly stem from the inherent nature of communist authoritarianism. Social actors expose these problems to the public and draw on global sources to mobilise for new constitutional construction. To survive under these unfavourable conditions, they have to adopt a dialogical approach to the communist government. In response, the government adopts the mixture of both repressive and dialogical approaches. The dance between repression and dialogue allows the government to consolidate its power without significantly undermining its sociological and moral legitimacy. Constitutional dialogue fails to result in meaningful constitutionalisation, but is instrumental in the incremental flourishing of constitutional culture.

There are several important factors that result in convergence. First, the social complexity generated by nearly three decades of implementation of the reformist policy in the two nations has resulted in institutional adaption and social dynamics including social mobilisation for

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constitutional change. Second, the force of globalisation is influential. Globalisation compels the communist government to adjust their legal and political system, which offers a more spacious environment for civil society's constitutional mobilisation. Globalisation also offers new technology for the constitutional dynamics from below. Especially, the digital age allows social actors to operate widely in cyberspace. Globalisation also includes constitutional globalisation that diffuses Western constitutional ideas throughout the globe and motivates social actors living under authoritarianism to struggle for constitutional change. Third, despite the constitutional acclimation, communist authoritarianism retains its essential features, such as the exclusive leadership of the Communist Party, the political control of civil society and the judicial system. These authoritarian conditions result in the convergence of social actors' adoption of the dialogical model in their constitutional mobilisation, and the state's mixture of repressive and dialogical responses.

3.2 Divergence

Despite the convergence, there is a great divergence between China and Vietnam in constitutional mobilisation. Vietnamese constitutional intellectuals and activists, like the 72 group, have seized the opportunity of constitution-making to mobilise for a national constitutional dialogue in which the government and social actors engage in relatively open conversations, and the government does not punished even the actors who call for radical constitutional change (Bui and Nicholson, 2016). In contrast, constitutional mobilisation in China has failed to result in a national constitutional dialogue and meets with the government's more vehement repressive response.

The lack of the moment of constitution-making and the opportunity created by public constitutional consultation in China is the key factor in explaining that divergence. Compared to China, the constitutional environment in Vietnam is more conductive to constitutional mobilisation. In the globalising era, Vietnam is the only country in the contemporary communist world to initiate the comprehensive project of constitution-making with the most participatory (albeit controlled) process and eventually adopt a new Constitution in the twenty-first century. China, like other communist nations (Cuba, Laos and North Korea), retains its old Constitution, with some partial amendments after the collapse of the Soviet bloc. The constitutional amendment process in China significantly lacks public participation. Chen Jianfu (2004, p. 3) considers China's constitutional amendment process as 'patently undemocratic', as 'the people have no right to participate in such fundamentally important political matters'. In the last amendment in 2004, for example, Chinese scholars were consulted at the early stage of the process but, later:

> '... a secret instruction was soon issued by the Party to stop all conferences and publication of academic papers on constitutional reform, and leading economists and legal scholars actively involved in presenting their views were reported to have been harassed by the security forces.' (Chen, 2004, p. 4)

Chen (2004, p. 4) concludes that the constitutional consultation in China 'was only conducted within the strictly limited circles of the authorities and the elite'.

In addition to the constitutional environment, the institutional resource is also an important factor explaining the dramatic divergence in social mobilisation for constitutional change in China and Vietnam. While Chinese social actors tend to use the judicial venue, the Vietnamese counterparts focus on the legislative platform. Fu Hualing argues that 'without the opportunity to participate in political movements in China, [public interests] lawyers were virtually forced to use the courts as the *only* platform to achieve their objectives' (Fu, 2012, p. 198, emphasis in original).

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So, the lack of political opportunity compels mobilising lawyers to turn to the judicial sites when some chances for constitutional litigation arise. However, the movement of 'judicialzation' of the China Constitution is abortive (Kellogg, 2009, pp. 221–226). China, like Vietnam, vests the constitutional supervision and interpretation power to the standing committee of the legislative body. After the *Qi Yuling* case in 2001, comparatively rendered as 'China's Marbury', in which, for the first time in the constitutional history of China, the Supreme People's Court invoked the Constitution in order to render a decision protecting a fundamental right, but the decision was then repealed, judicial citation of the Constitution is officially prohibited (Morris, 2010). This explains why, in the *Zhang Xianzhu* case, the court refuted to frame the rule in constitutional terms. The attempt to judicialise the China Constitution failed because this challenges the constitutional role of political institutions. Political leaders are not ready to give up their prerogatives in the monopolisation of constitutional meaning and to be bound by what courts say about the Constitution.

Differently from China, Vietnam does not have a movement of judicialisation of the Constitution, mainly because social actors in Vietnam have alternative political institutional resources, especially the National Assembly. Like China's National People's Congress (NPC), Vietnam's National Assembly (NA) operates as both a constitution-making and a law-making body. But, China's NPC meets only once annually for around a half month, and hence most of its decisions are made by its standing committee. Differently, Vietnam's NA is the main legislative body and meets twice a year. Each session usually lasts from one to one and a half months. The NA's sessions are relatively transparent, with live television and the direct observation of social groups and organisations. In addition, the NA's interpellation and vote of confidence on the government's members were highly active and televised live. The NA also rejected several bills and national projects proposed by the government. Although under the party's control, the NA is tied more to the public and operates as the forum for the public to check the use of public power (Bui, 2014). Consequently, the NA offers the institutional resource for mobilising actors to address their concerns. Public intellectuals who later constituted the 72 group had already addressed letters concerning national issues to the NA several times. Understandably, when the NA undertakes the task of constitution-making, it operates as the political site for the public intellectuals and other activists to mobilise for a national constitutional dialogue.

Without the necessary constitutional environment, opportunity and resources, social actors in China, unlike their Vietnamese counterparts, could not initiate a national constitutional dialogue. They, however, can only initiate some limited constitutional dialogue like the 2013 *xianzheng* debate. But, this is not a constitutional dialogue at the national level. Although the dialogue occurred nationwide through social media and drew the party-state's concern and some engagement through official media, substantial questions raised by Chinese constitutional intellectuals and activists were not debated in the national platform like the NPC. Unlike the story in Vietnam, the assembly delegates and political leaders in China have not appeared in public fora to discuss and exchange their views on substantial constitutional questions mobilised by social actors.

The Chinese government not only denies a national constitutional dialogue, but also imposes serious sanctions on social actors mobilising constitutional change, such as the punishment of Liu Xiaobo, the harassment or detainment of the Charter 08 signatories, and the censorship and firm quelling of the 2013 constitutionalism debate. Unlike this story, the Vietnamese government did not punish initiators and signatories of such radial proposals as Petition 72 and the Declaration of Free Citizens, although it has the legal basis to do so. The Penal Code in Vietnam criminalises those who make, store and/or circulate documents and/or cultural products with contents against the Socialist Republic of Vietnam. Scholars have offered reasons for the Chinese government's repressive reaction to social mobilisation for constitutional change, including the sensitive

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circumstances of leadership transition, the influence of dissidents like Liu Xiaobo, the threat of Internet-based opposition movements, the danger of foreign interference and so forth (Lam, 2012, pp. 252–255). In fact, the Vietnamese communist government could have invoked relatively similar reasons for oppressing constitutional activists like the 72 figures or the 'free citizens', but they chose not to do so, as they had committed themselves to a 'no-taboo' constitutional discussion.

Why does the Chinese government reject a national constitutional dialogue while the Vietnamese government allows this to happen? The key factors of this divergence are Chinese constitutional exceptionalism and the Vietnamese instrumentalist approach to global constitutionalism.

Chinese constitutional exceptionalism is an ingredient of the general picture of Chinese exceptionalism. The Chinese government attempts to construct 'socialism with Chinese characteristics', the national project of the sinolisation of Marxist ideals of socialism, as an alternative model of social development to the West. Economically, China has practised the 'socialist market economy'. The success of economic reform means that China's socialist market economy 'becomes the world's second largest economy by normal GDP, and it is expected to surpass the US' to become the largest economy by 2016 (Holodny, 2015). China not only attempts to become the alternative economic power to the US in the global economic order. The Chinese government has supported revitalisation of the nation's cultural values, such as some elements of Confucianism deemed to compatible with socialism, as an alternative to Western culture (Page, 2015). Technologically, China is also capable of creating alternatives to Western innovations like Google or Facebook (Krishnan, 2016). It is in this context that China becomes more confident to develop its own constitutional system as opposed to the Western model of constitutional government.

The ideological fundamentals of Chinese constitutional exceptionalism are articulated in the preamble of China's Constitution together with the amendments. They are 'Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents' (China Constitution, Preamble). The ideological ground is the foreign Marxism-Leninism sinolised by 'thoughts' and 'theories' articled by different generations of Chinese communist leaders. Especially, Chinese constitutional 'theories' developed by Chinese leaders during the reformist era are distinctive to the Chinese context, as alteratives to Western constitutional models. Deng Xiaoping, for example, developed the 'theory' of separation of power that features the separation of the party power from the government power so as to limit the Communist Party's interference with the government actions, which is an alternative to the Montesquieuian model of tripartite government (Backer, 2012, p. 369). The 'theory' of 'Three Represents' proposed by Jiang Zemin in 2000 was approved by the Communist Party in 2002, and then incorporated into the constitutional preamble through the amendment in 2004 (Communist Party of China, 2006). The vision underlines that the Communist Party in China presents the most advanced productivity, Chinese culture and fundamental interests of the majority of Chinese people (Killion, 2005, p. 43). Its constitutional significance lies in its attempt to tie the use of public power by the party to public interest.

In addition to that, Hu Jintao's 'Scientific Outlook on Development', presented in 2003, was incorporated into the party's Constitution in 2012 (Huang, 2012) – the document that, together with the state Constitution, forms the dual living Constitution in China (Xin, 2013). Hu's 'scientific development' is emphasised to the people as the people-centred, comprehensive, coordinated and sustainable development, which resonates with the Three Represents but focuses on the economic side of the public interests that the government and the party attempt to pursue (Backer, 2012, p. 375). A related developmental vision proposed by Hu is 'harmonious society', which aims to establish an ideological framework for the relationship between the party, the

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government and the people, in which the leadership of the Communist Party is conceived as necessary for a 'harmonious socialist society' (Backer, 2012, p. 376). Its gist is rooted in social equality as an alternative to political equality (Backer, 2012, p. 376).

Recently, in 2015, Xi Jinping unveiled his own 'theory' called 'four comprehensives' whose main elements are to comprehensively build a moderately prosperous society, deepen reform, govern the nation according to law and strictly govern the party (Gore, 2015). Xi's vision continues the aspirations towards the promotion of public welfare and formal law, and particularly focuses on discipline of the party members, which leads to his vehement anti-corruption campaign that punishes even the party's most senior leaders, such as Zhou Yongkang and Xu Caihou (Garrick and Chang, 2016).

Chinese leaders' articulation of their distinctive constitutional ideology has inspired some scholars such as Backer (2012) and Jiang Shigong (2013) to explore the possibility of a Chinese model of 'party-state constitutionalism'. It should be noted that these intellectual debates on 'party-state constitutionalism' are limited to a very small group of elites.[1] This is not a proper place to thoroughly discuss the theories of 'party-state constitutionalism', but suffice it to say that they rely mainly on the official constitutional ideology and the constitutional text and depart significantly from the Chinese constitutional reality, which undermines the legitimacy of their theories. Constitutionalism is not merely about the ideas and the text, but principally about the effective restraints of the public power (Friedrich, 1950). How can a regime be qualified as taking constitutionalism seriously when it seriously punishes its citizens for their serious talking about constitutionalism? There may be some nascent practices of constitutionalism in China (Caldwell, 2012), but the idea of a Chinese model of 'party-state constitutionalism' is extremely contestable.

I contend that the meaning of the investigation of the Chinese official constitutional ideology lies in a positive understanding of Chinese constitutional exceptionalism rather than normative construction of 'Chinese constitutionalism'. The meaning is that, due to economic success, the Chinese leaders are confident of their own constitutional path and articulate their own constitutional vision as an alternative to Western constitutionalism. They aim to advance a Chinese constitutional alternative to Western constitutionalism rather than copy Western ideas and institutions. The political consequence is the strong oppression of intellectuals and activists who mobilise for constitutional reform in China in line with Western constitutional standards. Charter 08 actors and constitutionalists of the 2013 debate are oppressed or opposed by political authorities, as they violate the Chinese constitutional exceptionalism endorsed by political elites. The intrusion of Chinese constitutional exceptionalism undermines the ideological foundation of the Chinese constitutional legitimacy and challenges the power of political elites. This explains the regime's serious sanctions of social actors who dare to mobilise for Western constitutionalism, even when they use official constitutional language but with Western meanings.

But, when oppressing mobilising actors so as to protect Chinese constitutional exceptionalism, do Chinese political leaders also undermine their constitutional legitimacy? To borrow Richard H. Fallon's (2005) typology of constitutional legitimacy, Chinese constitutional legitimacy is mainly rested on a sociological rather than a legal basis. 'Economic growth, social stability, strengthening national power, and "good governance"' constitute the sociological foundation for the popular acceptance of the Chinese communist political leadership (Zhu, 2011, p. 123). This is the sociological base for the authorities to suppress social constitutional mobilisation without substantially undermining the legitimacy.

1 I am indebted to the reviewer of the *International Journal of Law in Context* for this suggestion.

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When we turn to Vietnam, the picture is dramatically different despite the same communist regime. Unlike their Chinese counterparts, Vietnamese political leaders do not pursue a visible genre of constitutional exceptionalism. Instead, they adopt an instrumentalist approach to global constitutionalism to enhance domestic legitimacy. To be sure, Vietnam's Constitution also refers to Marxism-Leninism and Ho Chi Minh's Thought as the general dominant ideology of the Communist Party. Officials and establishment constitutionalists refer to Ho Chi Minh's 'constitutional thought' to argue for constitutional reform. But the ideas explored and restored from Ho Chi Minh's prerevolutionary constitutional statements are global ideas such as constitutional referendum, popular sovereignty and private property rights (Bui, 2015). Post-Renovation Vietnamese political leaders do not articulate distinctive constitutional 'theories' or ideology like the Chinese leaders. The rhetoric of 'socialist rule of law state' adopted by the Vietnamese political leaders is not a concrete theory or vision, but a vague language in which both distinctive socialist ideas and global ideas can be filled. Especially, 'socialist rule of law state' is the basis for public intellectuals to argue to global ideas. Importantly, in 2013, Vietnamese communist leaders and constitution-makers committed themselves to revising the nation's Constitution consistently with 'the development trend of the age' (Anonymous, 2011). In particular, constitution-makers underlined the necessity for the domestic Constitution's conformity to the international human rights treaties the Vietnam had signed (Vu and Tran, 2016).

The fact that Vietnamese leaders tend to support the discussion of global constitutionalism rather than constitutional exceptionalism enables the emergence of a socially mobilised national constitutional dialogue. This support enables not only the discussion of global constitutional ideas among the officials and establishment constitutionalists, but also social mobilisation for global constitutional values by constitutional activists and dissidents. The consequence is mobilised national constitutional dialogue in which socialist ideas and global ideas interact.

Why do communist leaders in Vietnam tend to support the discussion of ideas of global constitutionalism and engage in a national constitutional dialogue? Unlike China, Vietnam is neither a global economic power nor a global political power, and it therefore does not long to be an alternative to the Western power. Instead, socialising the regime to the global community is an important strategy for communist resilience in Vietnam. But the dilemma is that global integration is both instrumental to the domestic legitimacy but also has the potential risk of destroying the communist regime by alternative values. To deal with this, the communist government in Vietnam adopts an instrumentalist approach to global constitutionalism. Global values of constitutionalism are supported not because of their intrinsic virtue, but because they are instrumental to Vietnamese communist resilience. From this instrumentalism, social actors are allowed to mobilise for global constitutionalism and political leaders agree to engage in a dialogue with the global voices so as to consolidate the legitimacy of the existing regime.

As is China, the constitutional legitimacy of the communist power in Vietnam relies on a sociological rather than a legal basis. Similarly, economic development is the significant factor of this basis. However, around the 2010s, Vietnam witnessed a significant decline in social trust of the regime and the Communist Party. The crisis of sociological legitimacy is a result of a complex mixture of different domestic and international factors: significant slowdown of the economy, extremely serious corruption cases, international conflicts with China at the East Sea, and other social and moral problems. The party and political leaders explicitly acknowledged the situation. At its eleventh National Congress in 2011, the party explicitly admitted that corruptions, economic mismanagement, and many other social and moral evils had 'reduced people's trust to the Party and the State, threatening the stability, and development of the nation' (Anonymous, 2014). Speaking to the people in a meeting on 26 December 2012, President of the State Trương Tấn Sang also stated: 'I am sad and shy when the people's trust [to the party and the state] has been declined' (Lê, 2012). The Vietnamese government would not aggregate the situation by

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depressing mobilising actors while it is committed to open constitutional discussion. Instead, to engage in a national dialogue with the public is instrumental in restoring and enhancing sociological legitimacy. But the instrumentalist approach ultimately suggests that the constitutionalisation of mobilised global constitutional ideas is impossible because this has the potential to destroy the existing regime.

IV. Conclusion

This study discussed constitutional mobilisation in China compared with Vietnam. I conclude with two general reflections. The first concerns rethinking socialist constitutions. Social constitutions have been conventionally viewed as symbolic documents instrumental to the party-state (Kellogg, 2016). The implication tends to be that socialist constitutions are less relevant to society, and hence social actors would not pay attention to the Constitution and constitutional change. The Chinese as well as the Vietnamese experience indicates the opposite. Constitutional developments in these two societies are socially dynamic. If the socialist constitutions are purely instrumental to the party-state, then they would not draw social attention. Social actors tend to realise that socio-economic development would not be accomplished without certain necessary constitutional change. Their engagement in constitutional mobilisation stemmed from the recognition that there are constraints to socio-economic development that lie somewhere in the constitutions. Social constitutions, at least in China and Vietnam, are not merely instrumental to those at the top and must be revisited with a more dynamic concept associated with the bottom sources: they operate as the framework for social mobilisation.

The second point has to do with the societal approach to constitutional law. Comparative constitutional studies should pay attention to social mobilisation. The field has been court-focused. Even non-judicial constitutional studies have also tended to focus on institutional questions or constitutional texts. A complete picture of comparative constitutional inquiry requires going beyond judicial, institutional and textual approaches. Social actors also play a role in constitutional development, although their role is different in different constitutional settings. Integrating constitutional theories with social science theories is fruitful for understanding the social dynamics of constitutional law.

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