

# Article

## Confucian Constitutionalism in Imperial Vietnam

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### ABSTRACT

*The phantasm of “Oriental despotism” dominating our conventional views of East Asian imperial government has been recently challenged by the scholarship of “Confucian constitutionalism.” To contribute to our full discovery of the manifestations of Confucian constitutionalism in diverse Confucian areas, this paper considers the case of imperial Vietnam with a focus on the early Nguyễn dynasty. The investigation reveals numerous constitutional norms as the embodiment of the Confucian li used to restrain the royal authority, namely the models of ancient kings, the political norms in the Confucian classics, the ancestral precedents, and the institutions of the precedent dynasties. In addition, the paper discovers structuralized forums enabling the scholar-officials to use the norms to limit the royal power, including the royal examination system, the deliberative institutions, the educative institution, the remonstrative institution, and the historical institution. In practical dimension, the paper demonstrates the limitations of these norms and institutions in controlling the ruler due to the lack of necessary institutional independence. At the same time, it also suggests that the relative effectiveness of these norms and institutions could be achieved thanks to the power of tradition. The*

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*study finally points out several implications. First, the availability of the constitutional norms and institutions in the tradition is the cultural foundation for the promotion of modern constitutionalism in the present-day Vietnam. Second, the factual material concerning the Vietnamese experiences can hopefully be used for further study of the practice of Confucian constitutionalism in East Asia and further revision of the “Oriental despotism” —based understanding of imperial polity in the region. Third, the findings may also be useful for a more general reflection on pre-modern constitutionalism.*

**Keywords:** *Confucianism, Constitutionalism, Confucian Constitutionalism, Nguyen Dynasty, Vietnam*

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## I. INTRODUCTION

Up until the mid-twentieth century, imperial government in the history of East Asia was conventionally understood under the lens of “Oriental despotism” according to which all powers were conceived to be concentrated on the hands of a single unlimited ruler. In a comprehensive survey of “Oriental despotism”, Karl A. Wittfogel tries to argue for the “absence of effective constitutional checks” of the imperial ruler. Although, there were systematic law codes, Wittfogel writes,

[T]he ruler who exercises complete administrative, managerial, judicial, military, and fiscal authority may use his power to make whatever laws he and his aides deem fit. Expediency and inertia favor the perpetuation of most of these laws, but the absolutist regime is free to alter its norms at any time.<sup>1</sup>

However, recent scholarship has considerably challenged that traditional understanding of East Asian imperial regime. Scholars in different disciplines, such as philosophy, history, political science, and particularly constitutional law and theory, have engaged in discussions on the practice of the form of “Confucian constitutionalism” in imperial East Asia.

In an article published in 1995, Theodore de Bary, a renowned American sinologist, examined the attitude towards law held by both the Confucians and Legalists, and treating Tang and Ming dynastic codes as the basic laws of the imperial dynasties, submitted that traditional China practiced constitutional politics.<sup>2</sup> More recently, Jaeyoon Song points out that in the late-eleventh-century Northern Song (960–1127) in China, the *Zhou Li* (*Rites of Zhou*), a Confucian classic, functioned as “meta-constitution” and “the structure and organization of the *Zhou Li* allowed Southern Song political thinkers to develop systematic constitutional theories of government” which “could also have placed constitutional limits on government.”<sup>3</sup> Pierre-Étienne Will’s recent examination of “virtual constitutionalism” in the late Ming dynasty is also relevant here.<sup>4</sup>

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1. KARL A. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* 101-02 (1963). This view can be tracked back to C. S. Montesquieu’s description of imperial China as a despotic state. See CHARLES-LOUIS DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 125 (Thomas Nugent trans., 1962) (1748).

2. Wm. Theodore de Bary, *The ‘Constitutional Tradition’ in China*, 9(7) J. CHINESE L. 7, 7-8 (1995).

3. Jaeyoon Song, *The Zhou Li and Constitutionalism: A Southern Song Political Theory*, 36(3) J. CHINESE PHIL. 13 (2009).

4. Pierre-Étienne Will, *Virtual Constitutionalism in the Late Ming Dynasty*, in *BUILDING CONSTITUTIONALISM IN CHINA* 261, 261-74 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

Apart from the Chinese experience, it has been equally argued that traditional Korea has practiced the Confucian form of constitutionalism. In this regard, the creditable studies by Korean constitutional law scholar Chaihark Hahm are noteworthy.<sup>5</sup> Hahm concentrates on the disciplinary dimension of the Confucian *li* (ritual or propriety). Consequently, Confucian constitutionalism in Hahm's theory "refers to the application of *li* as a regularized restraint on the ruler through disciplining his body and mind."<sup>6</sup> On this theoretical ground, Hahm elaborates on the practice of Confucian constitutionalism in Choson Korea.

Generally speaking, there is a tendency to rethink East Asian Confucian polity. The phantasm of Oriental despotism dominating our conventional thinking of East Asian imperial government has been significantly challenged. Notwithstanding that, the manifestations of Confucian constitutionalism has not yet been fully examined in many Confucian areas. In particular, while traditional Vietnam has been internationally recognized as a Confucian society,<sup>7</sup> international constitutional discourses on the practice of Confucian constitutionalism in imperial East Asia tend to ignore the Vietnamese experience.

Some Western scholars have studied the Confucian government in the history of Vietnam but from a historical rather than constitutional perspective.<sup>8</sup> Some rare studies on human rights and rule of law in the Vietnamese tradition are relevant to a certain extent. For example, Tạ Văn Tài, a Vietnamese-American legal scholar and lawyer, examined the traditional legal system in Vietnam from a human rights perspective in *The Vietnamese Tradition of Human Rights*. He concludes that "the legal norms and practices of traditional Vietnam, even centuries ago, adhered to many of today's international human rights" and that "old Vietnam under the emperors fostered a strong tradition of respect for human rights."<sup>9</sup> The

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5. Chaihark Hahm, *Confucian Constitutionalism* (2000) (unpublished SJD dissertation, Harvard Law School) (On file with Harvard Law School Library, Harvard University) [hereinafter Hahm, *Confucian Constitutionalism*]; Chaihark Hahm, *Constitutionalism, Confucian Civic Virtue, and Ritual Propriety*, in *CONFUCIANISM FOR THE MODERN WORLD* 31, 31-53 (Daniel A. Bell & Hahm Chaibong eds., 2003); Chaihark Hahm, *Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?*, 1(2) *J. KOREAN. L.* 151 (2001) [hereinafter Hahm, *Korean Constitutionalism*]; Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 *AM. J. COMP. L.* 135 (2009).

6. Hahm, *Confucian Constitutionalism*, *supra* note 5, at 153.

7. SHAWN FREDERICK MCHALE, *PRINT AND POWER: CONFUCIANISM, COMMUNISM, AND BUDDHISM IN THE MAKING OF MODERN VIETNAM* (2004); *RETHINKING CONFUCIANISM: PAST AND PRESENT IN CHINA, JAPAN, KOREA, AND VIETNAM* (Benjamin A. Elman et al. eds., 2002); Liam C. Kelley, "Confucianism" in *Vietnam: A State of the Field Essay*, 1(2) *J. VIETNAMESE STU.* 314 (2006).

8. ALEXANDER WOODSIDE, *VIETNAM AND THE CHINESE MODEL: A COMPARATIVE STUDY OF NGUYEN AND CH'ING CIVIL GOVERNMENT IN THE FIRST HALF OF THE NINETIETH CENTURY* (1988); J. K. Whitmore, *The Development of Le Government in Fifteenth Century Vietnam* (Sept., 1968) (unpublished Ph.D. dissertation, Cornell University) (on file with Cornell University).

9. TẠ VĂN TÀI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* 233 (1988).

tradition of respect for human rights under the imperial government suggests the existence of some limitations on royal authority. In a similar vein, Stephen B. Young and Nguyen Ngoc Huy argue that there exist limitations on state authority and the respect of human rights in Sino-Vietnamese traditions.<sup>10</sup>

Notably, Tạ Văn Tài, in his recent paper, has gone further to examine the Confucianized legal system in traditional Vietnam in light of the modern rule of law theory.<sup>11</sup> He contends that in the later dynasties in Vietnam, the Confucian state promoted “the RULE OF LAW by elaboration of the various standards equivalent to those in the Western concept and practice of rule of law.”<sup>12</sup> To illustrate, he suggests that, in imperial Vietnam, the Confucian principle of Mandate of Heaven functioned as a fundamental basis of rule, equivalent to a constitutional foundation.<sup>13</sup>

Even though the studies on the relations of Confucianism to human rights and rule of law in Vietnamese tradition have provided some sporadic ideas relevant to the experimentation of Confucian constitutionalism, they failed to systematically investigate various constitutional norms and structuralized institutions, which limited the imperial power.

While studies on Vietnamese Confucianism are abounding in Vietnam,<sup>14</sup> a paucity of attention has been given to the Confucian relevance to the institutions of the imperial government.<sup>15</sup> This can be explained by the isolation of research spheres. Remarking on the situation of study on Asia-Pacific constitutional systems, Graham Hassall and Cheryl Saunders lament that “there are few studies of constitutionalism within anthropological literature, and somewhat surprisingly, much political science literature avoids consideration of the constitutional framework. Legal literature, in turn, can tend to ignore the vital evidence supplied by social

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10. STEPHEN B. YOUNG & NGUYEN NGOC HUY, *THE TRADITION OF HUMAN RIGHTS IN CHINA AND VIETNAM* 370 (1990).

11. Tạ Văn Tài, *Confucian Influences in the Traditional Legal System of Vietnam, with Some Comparisons with China: Rule by Law and Rule of Law*, 1 *VIETNAMESE SOC. SCI. REV.* 11, 11-34 (2009).

12. *Id.* at 12 (original emphases).

13. *Id.* at 22.

14. TRỊNH KHẮC MẠNH & CHU TUYẾT LAN, *THƯ MỤC NHO GIÁO VIỆT NAM [A BIBLIOGRAPHY ON CONFUCIANISM IN VIETNAM]* (2007).

15. Recently, under the sponsorship of the Harvard-Yenching Institute, there were notable international conferences on Vietnamese Confucianism held in Vietnam and the proceedings were published. *CONFUCIANISM IN VIETNAM* (Vietnam National University at Ho Chi Minh City ed., 2002); *NHO GIÁO Ơ VIỆT NAM [CONFUCIANISM IN VIETNAM]* (Institute of Hán-Nôm Studies & Harvard-Yenching Institute eds., 2006); *NGHIÊN CỨU TƯ TƯỞNG NHO GIA VIỆT NAM TỪ HƯỚNG TIẾP CẬN LIÊN NGÀNH [THE STUDY OF CONFUCIAN THOUGHT IN VIETNAM: INTERDISCIPLINARY PERSPECTIVE]* (Institute of Hán-Nôm Studies & Harvard-Yenching Institute eds., 2009). There are just a few accounts of the Confucian relevance to law and government in traditional Vietnam in these works.

science literature.”<sup>16</sup> The comment is applicable in the case of Vietnam. The compartmentalization begets the blameworthy fact that while Confucianism has been mostly considered the territory of philosophy, constitutional matters have been mostly studied within the legal bailiwick. Furthermore, it would be a matter of great hermeneutical sophistication for most of Vietnamese constitutional law scholars, who work mainly in Russian and modern Vietnamese languages, to relate Confucianism to constitutional issues since most of the originals of the quasi-classic Vietnamese Confucianism were written in the *Hán- Nôm* (Sino-Vietnamese) language with a rather daedal style.

To fill in that academic gap, this paper investigates the practice of Confucian constitutionalism in imperial Vietnam. The platform for the present study is my philosophical generalization of classical foundations of Confucian constitutionalism which has been elaborated in great lengths elsewhere. Here I just summarize the main points.

I have examined the classical Confucianism, or pre-Qin Confucianism established by Confucius (551-479 BC) and developed by Mencius (372-289 BC) and Xunzi (312-230 BC) during the late Spring and Autumn Period (770-476 BC) and Warring States Period (475-221 BC) in the history of China, to systematically generalize the classical theoretical foundations of Confucian constitutionalism. I agree with Hahm and others that to understand Confucian constitutionalism, we must take the idea of *li* into account, but I do not think that *li* is the central concept of Confucian constitutionalism. From my point of view, *li* is just a practical continuation of another consequential doctrine in Confucianism, namely *zheng ming* (*rectification of names*). On this ground, I have alternatively suggested that to comprehend the philosophy of Confucian constitutionalism we must seize the doctrine of *zheng ming* as the pivot. My logic runs as follows.

Like any other forms of constitutionalism, Confucian constitutionalism is generated due to the apprehensiveness of despotic government. There is ample evidence in the *Shu Jing* (*The Book of Historical Documents*), the *Liji* (*Book of Rites*), the *Analects*, the *Works of Mencius*, and the *Works of Xunzi*, which addresses the antagonism to despotism.

In searching for an antidote to despotic government, the classical Confucians suggested a *zheng ming* government which can be understood as a constitutionalist government. *Zheng ming*, or rectification of names, means to maintain the concordance between the real actions of the governors, like sovereigns and ministers, with the standards defining their duties, authority, and expected values. In that sense, a government that operates under the

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16. GRAHAM HASSALL & CHERYL SAUNDERS, *ASIA- PACIFIC CONSTITUTIONAL SYSTEMS* 1 (2002).

*zheng ming* doctrine tends to become a limited government. The Confucian idea of rectification of names is similar to the western constitutionalist idea of “limitation” in that they pursue the same constitutionalist aspiration, that is to ensure that the political institutions will function in accordance with the defined boundaries so as to enable proper use of power and prevent misuse of power. However, the Confucian concept of “rectification” is different from the western liberal concept of “limitation” in several ways.

Firstly, the purpose of the Confucian rectifications is to ensure governmental responsibility for the public good of people while western limitations aim to protect individual rights. This is evident in the Confucian concept of *minben* (*people-as-base*).

Secondly, the Confucian rectifications, like the western limitations, depend on the articulation of the established rules, but is different in that the Confucian rules are a set of traditional norms and institutions - the *li* (ritual) - that are not codified in a single document like modern written constitutions.

Thirdly, the Confucian rectifications denote the idea of limitations or restraints but are practiced by special positive means which are different from the western negative means of constitutional limitations or restraints. The Western pessimist view of human nature of abusing power leads to a negative approach of limitations by the separation of powers and other forms of checks and balances. The Confucian concept of rectification of public power adopts a more positive view on human nature and hence proceeds to a corresponding positive approach to means of limitations. Unlike the Western liberal concept of limitations, the Confucian concept of rectifications does not operate in a dark picture of human being. The three classical Confucians namely Confucius, Mencius, and Xunzi, in spite of their different perspectives on human nature, all believed in the educability of humans and hence heavily emphasized the importance of education. On that ground, the Confucian theory of rectification of name is a distinctive approach to limitations. To rectify the power is actually to limit or restrain it not by negative forms but by more positive forms, namely through the ruler’s self-cultivation and wise and virtuous scholars’ education, criticism, and remonstrance of the ruler through both institutionalized forums and free scholarship.<sup>17</sup>

In the present paper, I will test the degree to which several of the above classical Confucian constitutionalist ideas were put into practice in imperial Vietnam. As the constitutionalist ideas in classical Confucianism have been elaborated on in great lengths, they will just be restated briefly in the appropriate sections of the present paper as the analytical framework for

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17. Bui Ngoc Son, *Confucian Constitutionalism: Classical Foundations*, 37 AUSTRALIAN J. LEG. PHIL. 61 (2012).



following considerations.

Some premises for study of constitutionalism should be highlighted first. Thomas C. Grey underlines that: “The object of discourse in the study of constitutionalism should be constitutional *norms*, not entire constitutions.”<sup>18</sup> Therefore, in this paper, I will focus on the constitutional norms and the institutional settings to enforce these norms in a Confucian regime in imperial Vietnam. Next, we should admit the fact that there are no fixed standards to justify a norm as constitutional and that it is unlikely that constitutional studies necessarily depend on such standards. Grey states: “The group of ideas, institutions, and practices gathered under the terminological umbrella of the term ‘constitution’ may bear ‘familiar resemblances’ to each other without necessarily sharing any single quality or small group of quality as their common essence.”<sup>19</sup> Hence, such qualities as “textuality”, “endurance”, or “justifiability,” should not be regarded as the *sine qua nons* of constitutional norms. However, we can agree on the minimal understanding that constitutional norm must be the one that regulate and restrain the sovereign.

To a certain extent, more specific investigations of the Confucian constitutional norms and institutions in imperial Vietnam in this paper are conceptually based on Hahm’s study of “ritual constitutionalism” in the Choson dynasty and Will’s study of “virtual constitutionalism” in the late Ming dynasty. Particularly, Hahm’s study suggests that *li* (ritual) should be seriously taken into account in the study of Confucian constitutionalism in imperial East Asia. I accept Hahm’s idea that *li* could function as constitutional norms in Confucian polities as it encompasses a set of political and moral rules, percepts, principles, and conventions that regulated and limited the royal power.

However, I do not focus on the “disciplinary” dimension of *li* as Hahm did. I admit that *li* could be used to discipline the ruler as Hahm suggests, but I contend that the idea of “discipline” does not well denote the constitutionalist purpose of application of *li*. I would suggest the alternative lexicon namely “rectification” understood in the very Confucian sense, which, I believe, is more appropriate. My previous consideration of classical foundations of Confucian constitutionalism suggests that *li* is derivatively linked to the Confucian doctrine of rectification of names (*zheng ming*). A *zheng ming* government is a limited government in which the physical power holders are required to function in accordance with their “names” or the metaphysical normative and institutional standards defining their authorities,

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18. Thomas C. Grey, *Constitutionalism: Analytic Framework*, in CONSTITUTIONALISM, NOMOS XX 190, 190 (J Roland Pennnock & John W. Chapman eds., 1979) (original italic).

19. *Id.* at 190-91 (original italic).

duties, and expected virtues. *Li* is the embodiments of such standards.<sup>20</sup> *Li* is articulated and enforced to rectify (*zheng ming*) the ruler to ensure their responsibility for the people (*minben*). The rectification of the use of public power in accordance with the *li* in a Confucian polity might be achieved by positive means, including internal cultivation, and institutionalized external advice, education, criticism, remonstrance, and praise-and-censure.

Within this paper, I will limit the study to the case of the Nguyễn dynasty, one of the major Confucian monarchies and the last dynasty in imperial Vietnam, with a focus on its early development. The Nguyễn dynasty existed 143 years in total from 1802 when Nguyễn Ánh acceded to the throne after defeating the Tây Sơn dynasty to 1945 when emperor Bảo Đại abdicated the throne after the August Revolution led by the Indochina Communist Party (presently, the Communist Party of Vietnam). The Nguyễn dynasty independently ruled the country in the early period of its existence from 1802 to 1884 with the successive emperors Gia Long, Minh Mệnh (also spelled as Minh Mạng), Thiệu Trị, and Tự Đức. In the latter period from 1884 to 1945, the French colonized Vietnam and the position of the Nguyễn court was titular. The independent Nguyễn dynasty governed the country with great *éclat* under the reign of Emperor Minh Mệnh from 1820 to 1841.<sup>21</sup> This study focuses on the independent period of the dynasty.

In terms of material, to study constitutional norms and institutions in a Confucian polity in pre-modern times like the Nguyễn dynasty, we cannot expect that there existed a single constitutional document positively promulgated like a written constitution in many mature modern constitutionalist states. To be sure, the Nguyễn dynasty enacted a highly systematically law code namely Gia Long Code, but the Code was basically a criminal code rather than a source of constitutional law. Instead, the constitutional norms and institutions in the Nguyễn dynasty were the unwritten traditional norms and institutions. The absence of a written code meant that these norms and institutions were not positively enacted and codified in a monistic document. This does not mean that the norms and institutions were not written down at all. Many norms constitutive to the Nguyễn dynasty are articulated in the Confucian works like the *Five Classics* and the *Four Books*. Other norms and institutions were written down in historical works by Nguyễn dynasty's National Historian Office, which are the reliable sources for the investigation of the constitutional norms and institutions of the dynasty, including: *Đại Nam Thực Lục* (*Veritable Records of Đại Nam*), *Đại Nam Hội điển Sừ lệ* (*Collected Institutions of Đại Nam*), and *Minh Mệnh Chính yếu* (*Minh Mệnh's Principal Policies*). In addition,

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20. Bui, *supra* note 17, at 72.

21. NGUYỄN MINH TƯỜNG, *Cải CÁCH HÀNH CHÍNH DƯỚI TRIỀU MINH MỆNH (1820-1840)* [ADMINISTRATIVE REFORM UNDER THE REIGN OF MINH MỆNH (1820-1840)] (1996).

some historical records written by individual scholars, which articulated the structure of the imperial government and were formally recognized by the court, can also be regarded as important sources for the study of the constitutional norms and institutions of the dynasty. The notable one is the *Lịch triều Hiến chương Loại chí* (*Categorical Records of Institutions of the Precedent Dynasties*) authorized by the Confucian scholar Phan Huy Chú. All of those works were originally written in the *Hán-Nôm* (Sino-Vietnamese) language and are translated into the modern Vietnamese language. In this study, I mainly rely on the aforementioned works in the modern Vietnamese versions, and the English translations are my own.

Apart from the introduction, part II of the paper will briefly describe the history of Confucianism in traditional Vietnam, which I believe is the necessary background for subsequent considerations. Part III turns to the main theme. In this part, I will elaborate on Confucian constitutional norms of the Nguyễn dynasty and the Confucian structural institutions to enforce these norms and then provide some evaluations on their effectiveness. I conclude the paper by summarizing the main findings and discussing some implications of these.

## II. TRAJECTORY OF CONFUCIANISM IN IMPERIAL VIETNAM

Confucianism was introduced from China into Vietnam during the millennial period of Chinese dependency (“*Bắc thuộc*”, 111 BC-AD 905)<sup>22</sup> by Chinese governors including Xi Guang (Tích Quang), Ren Yan (Nhâm Diên),<sup>23</sup> and Shi Xie (Sĩ Nhiếp),<sup>24</sup> and hundreds of Han Confucian scholars<sup>25</sup> who were expatriates in Vietnam. The influence of Confucianism

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22. The period was signaled by the fact that in 111 BC Zhao Tuo (known in Vietnam as Triệu Đà), a Chinese military commander who gained autonomy upon the collapse of the Qin Dynasty and established the Nanyue (Vietnamese: Nam Việt) dynasty, conquered Vietnam (known as Âu Lạc at that time) and divided the colony into two districts namely Chiao-chih (Giao Chi) and Chiu-chen (Cửu Chân). It was ended in 905 when a military governor named Khúc Thừa Dụ regained the national sovereignty from the Tang dynasty (618-907). During this period, there were brief independent times after some revolts, such the time of the Trưng Sisters (40-43) and the kingdom of Vạn Xuân (541-602). For a comprehensive study on this period, see KEITH WELLER TAYLOR, *THE BIRTH OF VIETNAM* (1976).

23. Tích Quang (Xi Guang) and Nhâm Diên (Ren Yan), the Chinese governors of Chiao-chih (Giao Chi) and Chiu-chen (Cửu Chân) respectively, educated the local people with Confucian righteousness (Chinese: *yi*; Vietnamese: *nghĩa*) and ritual (Chinese: *li*; Vietnamese: *lễ*). NGÔ SĨ LIÊN ET AL., 1 *Đại Việt Sử Ký Toàn Thư* [COMPLETE ANNALS OF Đại Việt] 145 (Ngô Đức Thọ trans., 2004). This *Annal* is an authoritative work on Vietnamese history written in Chinese by court historian Ngô Sĩ Liên and the others under the Lê dynasty (1428-1527, 1533-1789).

24. Sĩ Nhiếp (Shi Xie) was reportedly an expert of the Book of Poetry, the Book of Historical Documents, and the Spring and Autumn Annals. For his contribution to Vietnamese Confucianism, later generations of Vietnamese Confucians honorably addressed him as “*Nam Giao học tổ*” (“the Founder of Southern Confucianism”). *Id.* at 160.

25. They established schools in the capital city Luy Lâu and other places such as Long Biên, Từ Phố, Cư Phong and their students came from not only their own families but also wealthy local

in Vietnam during this time, albeit with a long history, was rather limited.<sup>26</sup> The fact that “Chinese officials occupied only the district level positions, leaving Vietnamese in village posts”<sup>27</sup> allowed the local people to follow autonomously their own institutions, habits, and customs, which were sometimes very different from Confucian morality.<sup>28</sup>

Entering the new era of national independence with successive dynasties of Ngô (938-967), Đinh (968-980), Former Lê (980-1009), Lý (1009-1225), and Trần (1225-1400), Vietnam witnessed the coexistence in harmony of Buddhism, Confucianism, and Daoism, but Buddhist influence prevailed. However, such dynasties as Lý and Trần initiated important activities to promote the development of Confucianism. To illustrate, the Lý dynasty constructed the *Văn Miếu* (Temple of Confucius)<sup>29</sup> in 1070 to honor Confucius and other major Confucians, inaugurated the Confucian royal examination in 1075, and in the subsequent year (1076) established the *Quốc tử giám* (Imperial Academy), the first university in Vietnam. In addition, Emperor Trần Thái Tông (1225-1258) founded the *Quốc học viện* (Institute of National Studies) responsible for teaching the *Four Books* and the *Five Classics*, the original works of Confucianism.<sup>30</sup>

After the Trần dynasty, the Hồ dynasty (1400-1407), which was established by Hồ Quý Ly- a mentor of the Trần dynasty who seized the throne in 1400, continued to contribute to the propagation of Confucianism by several activities, such as establishing a number of schools and conferring lands to the teachers.<sup>31</sup>

The Ming dynasty of China, under the guise of banishing the Hồ usurpation and restoring the Trần, invaded Vietnam in 1406 and occupied the country from 1407 to 1427. During 20 years of domination, the Ming

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families. ĐAI CƯƠNG TRIẾT HỌC VIỆT NAM [INTRODUCTION TO VIETNAMESE PHILOSOPHY] 63-64 (Nguyễn Hùng Hậu ed., 2005).

26. Trần Nghĩa, *Thư bản về Thời điểm Du nhập cùng Tính chất, Vai trò của Nho học Việt Nam thời Bắc thuộc* [On the Introduction, the Nature, and Role of Vietnamese Confucianism in the Chinese Colonial Period], in NHO GIÁO Ờ VIỆT NAM [CONFUCIANISM IN VIETNAM], *supra* note 15, at 92.

27. *Id.*, *supra* note 11, at 14-15.

28. The Book of the late Han (*Hou Han Shu*) records that the people of Chiao-chih did not differentiate between seniors (*trưởng*) and juniors (*ấu*), did not know the marriage ceremony, and did not know the moral rules of husband and wife. Cited in VŨ VĂN MẪU, 1 CỎ LUẬT VIỆT NAM VÀ TƯ PHÁP SỬ ĐIỀN GIẢNG, QUYỀN THỨ NHẤT [THE EXPLANATION OF VIETNAMESE ANCIENT LAW AND HISTORY OF PRIVATE LAW] 132 (1975). (Citing SAN KUO CHIH [ANNALS OF THE THREE KINGDOMS], which states that levirate marriage custom (marrying sister-in-law) was practiced among the Việt people at Mê Linh, Cừ Chân và Đồ Lung suburban districts).

29. According to *The Complete Annals of Đại Việt*, in year of 1070, during the reign of King Lý Thánh Tông, the Temple of Confucius was constructed, the statues of Confucius, his four best disciples (*tứ phối*) Yan Hui (*Nhan Uyên*), Zengzi (*Tăng Sâm*), Zisi (*Tử Tư*), and Mencius (*Mạnh Tử*), as well as the Duke of Zhou (*Chu Công*), were carved, and the statues of 72 other Confucian scholars (*thất thập nhị hiền*) were painted. NGÔ ET AL., *supra* note 23, at 291.

30. TRẦN TRỌNG KIM, NHO GIÁO [CONFUCIANISM] 724 (2001).

31. Trần Văn Giàu, 1 Sự Phát Triển của Tư tưởng ở Việt Nam [THE DEVELOPMENT OF THOUGHTS IN VIETNAM] 68 (1973).

governor on the one hand devastated local culture by aggressively confiscating Vietnamese books and on the other hand introduced cultural assimilation by actively propagating Neo-Confucianism in the colony. The foreign governors established more than one thousand schools and brought to Vietnam a number of copies of Confucian books- including the *Four Books* and the *Five Classics* and other works of the neo-Confucians of the Sung dynasty and distributed these to the schools.<sup>32</sup> Consequently, Sung Confucianism was widely disseminated in Vietnam during that given period.<sup>33</sup>

After the Lam Son insurrection, Lê Lợi regained national independence from the Chinese invaders and established the Lê dynasty (1428-1527, 1533-1789) also called Later Lê dynasty (Hậu Lê), which lasted 360 years until 1788 with six years (1527-1533) of interruption by Mạc Đăng Dung's usurping the throne. The Lê dynasty included two periods namely, Lê Sơ (Early Lê)- the time of unity, and Lê Trung Hưng (Restored Lê)- the time of North-South partition with the Lê-Mạc struggle (1533-92) at first followed by the Trịnh Lords- Nguyễn Lords rivalry (1600-1788). The unified Lê government reached its apogee under emperor Lê Thánh Tông's reign (1460-1497). In this golden age, the dynasty gained great achievements concerning governmental institutions, law-making, cultural and educational developments, and especially Confucianism's development.<sup>34</sup>

The early Lê rulers further reinforced the Confucian system of education and examination to train personnel for the mandarin administration. In 1428, Lê Lợi established the *Quốc tử giám* (*Imperial Academy*) which hosted students from mandarin families and some selective excellent students from the plebeian families, and a number of local schools which were widely opened to the public. In 1483, Lê Thánh Tông reconstructed the Temple of Confucius and founded its concomitant *Nhà Thái học* (*House of Advanced Study*), which concurrently served as a lecture theatre, library and dormitory.<sup>35</sup> In addition, he institutionalized the civil service examination system consisting of three levels namely, *thi hương* (provincial examination), *thi hội* (metropolitan examination), and *thi đình* (palace examination), which were regularly held. The highest academic degree was named as *tiến sĩ* (doctoral laureate). Interestingly, in 1483, in order to honor

32. NGÔ ET AL., *supra* note 23, at 477.

33. TRẦN, *supra* note 30, at 724.

34. See generally HOÀNG ĐỀ LÊ THÁNH TÔNG: NHÀ CHÍNH TRỊ TÀI NĂNG, NHÀ VĂN HÓA LỖI LẠC, NHÀ THƠ LỚN [EMPEROR LÊ THÁNH TÔNG: A TALENTED POLITICIAN, A BRILLIANT CULTURALIST, AND A GREAT POET] (NGUYỄN HUỆ CHI ED., 1998); LÊ ĐỨC TIẾT, LÊ THÁNH TÔNG- VỊ VUA ANH MINH, NHÀ CANH TÂN VĨ ĐẠI [LÊ THÁNH TÔNG- A PERSPICACIOUS KING AND A GREAT REFORMER] (2007) [HEREINAFTER LÊ, A GREAT REFORMER]; LÊ KIM NGÂN, TỔ CHỨC CHÍNH QUYỀN TRUNG ƯƠNG DƯỚI TRIỀU LÊ THÁNH TÔNG, 1460-1497 [ORGANIZATION OF THE CENTRAL GOVERNMENT UNDER THE REIGN OF LÊ THÁNH TÔNG, 1460-1497] (1963).

35. TRẦN, *supra* note 31, at 73.

the doctoral graduates and to spur Confucian studies, Lê Thánh Tông constructed “*bia tiến sĩ*” (“*the doctoral steles*”) in which the names of doctoral laureates were inscribed. This tradition was followed by subsequent dynasties.<sup>36</sup>

Once in control of the educational system, Confucianism incrementally expanded its influences on the governmental system. The rising class of Confucian scholars played important roles in the mandarin administration. In the early Lê dynasty, the patricians were still offered with material perquisites but had limited access to governmental positions since the appointment mechanism through royal examination was normative. The legal document called “*Dụ Hiệu chỉnh Quan chế*” (*Ordinance on Adjustment of the Mandarin System*) enacted by Lê Thánh Tông provided that every appointee of mandarin positions must be the graduates of the examinations.<sup>37</sup> This norm resulted in the increasing influence of the class of Confucian scholars in the mandarin system.

In addition, Confucianism extended its impacts on the legal system of the Lê dynasty. The Confucianization of the Lê’s law has been widely discussed. Scholars have illustrated the impact of Confucianism on the imperial code called *Lê Triều Hình Luật* (*Criminal Code of Lê Dynasty*), popularly recognized as the *Hồng Đức Code* promulgated by Lê Thánh Tông.<sup>38</sup>

Consequently, in the early Lê dynasty, it has been argued that there was a metamorphosis of the axiological and cultural substructure of the entire society.<sup>39</sup> Particularly, the profound transformation was undergirded by normative documents, which were intentionally enacted to comprehensively inculcate the entire society with Confucian values. To illustrate, Lê Thánh Tông enacted twenty-four instructions on Confucian moral values and correspondingly ordered local mandarins to explain and to supervise the practice.<sup>40</sup> In addition, there were a number of edicts and royal proclamations detailing Confucian values, which systematically and normatively influenced the social conscience and practice.<sup>41</sup>

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36. LÊ, A GREAT REFORMER, *supra* note 34, at 46-60.

37. *Id.* at 47.

38. TẠ, *supra* note 11; TẠ VĂN TÀI & NGUYỄN NGỌC HUY, THE LE CODE: LAW IN TRADITIONAL VIETNAM (1987); Nguyễn Minh Tuấn, *Ảnh hưởng Tích cực của Nho giáo trong Bộ Luật Hồng Đức* [*Positive Effects of Confucianism on the Hồng Đức Code*], 3 TẠP CHÍ KHOA HỌC XÃ HỘI ĐẠI HỌC QUỐC GIA HÀ NỘI- KINH TẾ VÀ LUẬT [VNU J. OF SOC. SCIENCE- ECON. & LAW] 38 (2005).

39. Trần Ngọc Vương, *Phác thảo Nho giáo ở Việt Nam Giai đoạn Thế kỷ XV-XVII* [*Description of Confucianism in Vietnam During the Period from 15<sup>th</sup> Century to 17<sup>th</sup> Century*], in *Một Số Vấn Đề Về NHO GIÁO VIỆT NAM* [SOME ISSUES ON VIETNAMESE CONFUCIANISM] 15, 36 (Phan Đại Doãn ed., 1999).

40. ĐẠI CƯƠNG LỊCH SỬ VIỆT NAM, TOÀN TẬP [INTRODUCTION TO VIETNAMESE HISTORY, COMPLETE VOLUME] 330 (Trương Hữu Quýnh et al. eds., 2006).

41. Trần, *supra* note 39, at 36.

After the golden age of Lê Thánh Tông, Confucianism suffered a decline in the period of North-South partition. Although the Trịnh Lords and Nguyễn Lords in the two polar parts continued to base their governance on the Confucian ideology, due to the context of national division, Confucianism did not witness any considerable development.<sup>42</sup>

Defeating the Tây Sơn force, Nguyễn Ánh founded the Nguyễn dynasty in 1802. The Nguyễn dynasty completely put an end to the national partition and consolidated the traditional monarchical government in a united territory. The new peaceful context provided an advantageous environment for the reinvigoration of Confucianism, especially when such Nguyễn rulers as Minh Mệnh and Tự Đức, like Lê Thánh Tông, were ardent proponents of Confucian school. In fact, the Nguyễn dynasty initiated various activities to reinforce Confucianism and return it to the ideologically dominant position. First, the dynasty rearranged and further developed the Confucian educational system, and organized the Confucian examinations to select candidates for the administrative system. Second, it reformed the Confucian institutions like the *Quốc tử giám* (*Imperial Academy*) and the *Quốc sử Quán* (*National Historian Office*).<sup>43</sup> Third, it legalized Confucian values by enactment of the *Bộ Luật Gia Long* (*Gia Long Code*). Fourth, it popularized Confucian values by other normative documents. For example, following Lê Thánh Tông, Minh Mệnh enacted an imperial proclamation called *Huấn dịch Thập điều* (*Ten Articles of Instruction*), which were actually the ten instructions for the practice of Confucian moral values. Tự Đức further helped widely disseminate the instructions to the public through a poetic version.<sup>44</sup> In addition to imperial patronage, there were active public forums of Confucian scholars like *Bạch Dương Thi Xã* and *Bạch Mai Thi Xã*, which significantly stipulated Confucian studies and practice.<sup>45</sup>

It has been seen that Confucianism was introduced from China into Vietnam in earlier times but not until the early Lê dynasty and the Nguyễn dynasty did it become the dominant ideology of the imperial government. In that context, Confucianism was taught in all levels of the education system. The students studied simple and rhyming Confucian texts, such as the *Tam Tự Kinh* (*Book of Three Characters*) in the primary level and then in upper levels were educated on Confucian classics such as the *Four Books* and the *Five Classics* together with the Chinese Neo-Confucians' annotations of these works. The graduates of royal examinations were appointed as mandarins in the court or in provinces. The laws, composed by the Confucian

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42. *Id.* at 46.

43. NGUYỄN KHẮC THUẬN, TIẾN TRÌNH VĂN HOÁ VIỆT NAM Từ Khởi Thủy Đến Thế Kỷ Thứ XIX [THE PROCESS OF VIETNAMESE CULTURE FROM ANTIQUITY TO 19TH CENTURY] 873-83 (2007).

44. HUẤN DỊCH THẬP ĐIỀU [TEN ARTICLES OF INSTRUCTION] (Lê Hữu Mục trans., 1971).

45. NGUYỄN, *supra* note 43, at 870-86.

scholar-officials and enacted by the emperor, were understandably influenced by Confucianism. Furthermore, the ruler was supposed to govern the kingdom and control his daily behavior in concordance with the Confucian teachings. In short, when Confucianism gained the dominant position, it influenced comprehensively the educational system, the administrative and political systems, and the legal system in traditional Vietnam.

One may wonder why Confucianism was attractive to the traditional Vietnamese. First, the social adoption of “lively” Confucianism can be explained by the commonality of the Vietnamese indigenous values with the Confucian values. The autochthonous humanism of the local people, for example, was highly congenial to the central percept of Confucianism namely *ren* (*humaneness*). In addition, the Vietnamese familial morality was in many cases compatible with the Confucian morality. Interestingly, the similarity between Vietnamese indigenous values and Confucian values is so remarkable that some even argued on the contribution of Vietnam to the generation of Confucianism.<sup>46</sup> However, Vietnamese culture possessed its own identities, and this resulted in what culturalist Phan Ngọc calls “deflection” of Confucianism in the context of Vietnam.<sup>47</sup> As a corollary, Vietnamese Confucianism had its own characteristics in comparison with the Chinese counterpart.<sup>48</sup>

With respect to the governmental aspect, we can explain the fact that the Vietnamese rulers, especially in the Lê and Nguyễn dynasties, gravitated toward Confucianism. After founding a new dynasty, the Vietnamese rulers had to confront practical matters concerning how to organize the government and govern the kingdom. They could actually seek assistance from local governing experiences. However, what they really needed was a systematic theory, which could serve as the ideological foundation of the dynasty. There were alternative schools of thought for them to consider. First, Buddhism might be an option. However, because Buddhism is originally a religion and a human life philosophy rather than a political philosophy, it is better for use in personal cultivation than for national governance. Daoism qua a

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46. Kim Định, a priest and a philosopher who lived in South Vietnam prior to 1975, idiosyncratically believed that the original ideas of Confucianism were generated in Vietnam. KIM ĐỊNH, *Việt Lý Tổ NGUYỄN* [PROVENANCES OF VIETNAMESE RATIONALISM] 107-44 (1970); KIM ĐỊNH, *NGUỒN GỐC VĂN HÓA VIỆT NAM* [ORIGINS OF VIETNAMESE CULTURE] 4 (1973); KIM ĐỊNH, *Vấn Đề Quốc Học* [THE ISSUE OF NATIONAL CULTURE] 65 (1971). Recently, Trần Ngọc Thêm, a scholar of cultural studies, also believes in the contribution of Vietnam to the creation of Confucianism. TRẦN NGỌC THÊM, *Tìm Về Bản Sắc Văn Hóa Việt Nam* [A RETROSPECTIVE TO THE CHARACTERISTICS OF VIETNAMESE CULTURE] 482 (2001).

47. PHAN NGỌC, *Bản Sắc Văn Hóa Việt Nam* [THE CHARACTERISTICS OF VIETNAMESE CULTURE] 209 (1998).

48. *Id.* at 209-44; Nguyễn Hùng Hậu, *Một số Đặc điểm của Nho Việt* [Some Characteristics of Vietnamese Confucianism], 1 J. RELIGIOUS STUD. 36 (2005).



philosophy could also be a choice. But its non-actionism seemed less interesting for the rulers who were necessarily engaged in various governing matters. As far as Legalism is concerned, the Vietnamese rulers in fact made use of its idea of rule by law in their legislation. Nonetheless, it seemed for them that the Legalist teachings could only be regarded as the additional rather than the principal remedy as it was unlikely that Legalism could provide meaningful directions for a harmonious social order and the propriety rules for the various relations of the members of the government and the society. It was in such circumstances that the Confucian governmental theory came to prevail. In this case, the Vietnamese governors conceived Confucianism not as the production of the invaders but as a tradition of philosophy created by the ubiquitous thinkers, which could provide universal principles for good governance, institutional orchestration, order of the society, and progress of national culture and education.

### III. CONFUCIAN CONSTITUTIONALISM IN EARLY NGUYỄN DYNASTY

#### A. *Constitutional Norms*

Elsewhere, I have argued in length that in the classical Confucianism, *li* that includes traditional norms and institutions which directly or indirectly control the distribution and the operation of the public power can be recognized as a “Confucian constitution.”<sup>49</sup> In this section, I shall examine the constitutional norms of the Nguyễn dynasty as the embodiment of the Confucian *li*.

Grey distinguishes written and unwritten constitutional norms. The written constitutional norms are those that derive their status from the fact of their “enactment of some authorized body” and their content is derived by “interpretation” of the enacted constitutional text.<sup>50</sup> In contrast, the unwritten constitutional norms have sources of authority other than enactment, and correspondingly their content must be identified by means other than interpretation.<sup>51</sup> Grey further divides the unwritten constitutional norms into two categories. First are norms whose authority is based on their “general acceptance” and their content is elucidated by “investigation, impressionistic or scientific, of the usages generally accepted as binding the community in question.”<sup>52</sup> Second are those norms whose authority rests on their status as “moral and political truths” and the content of these norms is determined by some method of “arriving at true moral and political value

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49. Bui, *supra* note 17, at 78-88.

50. Grey, *supra* note 18, at 202.

51. *Id.*

52. *Id.*

judgments.”<sup>53</sup>

With the above conceptual framework, we can proceed to study constitutional norms in Confucian polity. Certainly, there is no enacted single charter like a modern written constitution in a Confucian regime. However, there actually existed unwritten norms that regulated and limited the actions of the ruler and hence can be regarded as “unwritten constitutional norms.” They derived from two sources, to borrow Grey’s category, namely “universal and immutable moral or political truth” and “the shared and strongly felt values and beliefs of the community” (usage and acceptance).<sup>54</sup> They were traditional norms expressing political and moral truths and generally accepted values and beliefs, gathered under the Confucian terminological umbrella, namely *li* (ritual).

Hahm has illuminatingly elaborated on constitutional norms in Confucian polity. He reveals that law in Confucian polities in the imperial history of China and Korea included three types of norms or codes, namely ritual (*li*), penal, and administrative. Within the tripartite legal framework of the Confucian governments, *li* can be understood as a set of constitutional norms as they were used to regulate and restrain the ruler.<sup>55</sup> Hahm compares: “Indeed, the ruler’s observance of ritual regulations was of paramount importance in Confucian political theory, much like the duty of a modern-day president to uphold the constitution . . . Ritual was norm that even the king was expected to obey.”<sup>56</sup> He then goes on to elaborate three constitutional principles or norms of the Confucian government as the embodiment of *li*, viz., “the way of former kings”, political norms in the Confucian classics, and the ancestral precedents.

By the case of the Ming dynasty, Will also discovers three elements of the “dynastic constitution”, namely the values and precedents embodied in the Confucian classics; the ancestral institutions of the dynasty; and the administrative constitution as embodied in certain official treatises, and in a body of penal and administrative law, which controlled the activities of the bureaucracy.<sup>57</sup>

It can be seen that Hahm and Will share the commonalities that the political principles in the Confucian classics and the ancestral norms could function as constitutional norms but hold different views on the constitutional status of the penal and administrative laws. I agree with Hahm that, for constitutionalist purpose, the penal and administrative laws were less meaningful as they were only applied to the commoners and the officials

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53. *Id.*

54. *Id.* at 204.

55. Hahm, *Korean Constitutionalism*, *supra* note 5, at 169-79.

56. *Id.* at 174.

57. Will, *supra* note 4, at 262.

respectively rather than the ruler.<sup>58</sup> The norms to be constitutionally meaningful must be the ones that affect (regulate and limit) the power of the sovereign.

Let us consider in more detail the discursive constitutional norms. The first is “the way of former kings.” The former kings referred to the mythical sage kings including Yao and Shun in the ancient history of China whom the classical Confucians eulogized as the paradigm of governance. The constitutional importance of the way of the ancient kings is that the scholar-officials were able to use the way of the ancient kings to restrain their ruler. By the case of the Choson dynasty, Hahm writes:

They constantly urged the monarch to discipline himself by take the ancient kings as his model. They capitalized on the ancient past as the criterion by which to judge and criticize the present. If there were disruption of peace and order in the realm, it was attributed to the current king’s deviation from the way of the former kings.<sup>59</sup>

The second are political norms in the Confucian classics. In the Choson dynasty, according to Hahm, “the Confucian classics such as the *Five Classics* and the *Four Books* did function as sources for political norms.”<sup>60</sup> Similarly, in the Ming dynasty, as Will demonstrates,

[T]hey [the classics] had important political implications, because they constituted a sort of superior orthodoxy and because the ones who considered themselves to be in charge of interpreting *The Classics* and protecting the orthodoxy were the literati. The intellectual power of the literati derived from their social position made them, in a way, the functional equivalents of guardians of the ‘constitution’—except that in this case it was not a legal document that they guarded, but the scriptures with which dynastic policies were supposed to be in conformity.<sup>61</sup>

The third are the ancestral precedents. The contents of ancestral institutions were the complex mixture of proclamations, laws, legislations, and structural institutions created by the dynastic founder or sometimes by the first few emperors of a dynasty.<sup>62</sup> What characterizes these institutions as ancestral is the fact that it was considered highly difficult for the

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58. Hahm, *Korean Constitutionalism*, *supra* note 5, at 174-75.

59. *Id.* at 182.

60. *Id.* at 182-83.

61. Will, *supra* note 4, at 262 (original italic).

62. *Id.* at 263.

contemporary ruler to alter them without risking an accusation of lack of *xiao* (filial piety).<sup>63</sup> However, this does not mean that changes to ancestral laws were impossible. Hahm notes: “Even in the tradition-bound constitutional culture, changes in laws were inevitable and indeed necessary.”<sup>64</sup>

Like the Choson dynasty of Korea and the Ming dynasty of China, the Nguyễn dynasty of Vietnam also had the three sorts of constitutional norms mentioned above. However, I would add a fourth set of norms that controlled the early Nguyễn rulers, namely the institutions of the precedent dynasties. The four types of unwritten constitutional norms are the embodiment of *li* as a set of normative rules used to rectify the ruler.

### 1. *The Way of Former Kings*

As adherents of Confucianism, the early Nguyễn rulers acknowledged the principle of following the ancient kings.<sup>65</sup> To illustrate, Minh Mệnh’s ambitious aspiration was to be comparable to “the precedent sages and enlightened kings.”<sup>66</sup> Thiệu Trị also committed to this percept, as described by a Confucian mandarin: “The present-day Emperor clearly understands the wills of the precedent emperors, follows the sage and enlightened kings, and accords with the way of the mean of King Yao. His morality is unadulterated, such as the respect to King Wen [of Zhou.]”<sup>67</sup> The model of the Chinese ancient kings- their governments, institutions, laws, and conduct which were mainly recorded in the *Shu Jing* (*Book of Historical Documents*)- provided normative precepts for the Nguyễn rulers in their legislations, policy-decisions, and daily behaviors. It is in this sense that the model of the ancient kings could superimpose limitative effects upon the royal authority. The scholar-officials of the Nguyễn dynasty often invoked the models of the ancient kings to rectify their ruler.

### 2. *Political Norms in the Confucian Classics*

Early Nguyễn rulers publicly articulated particular political norms

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63. *Id.*; Hahm, *Korean Constitutionalism*, *supra* note 5, at 184.

64. Hahm, *Korean Constitutionalism*, *supra* note 5, at 182.

65. TRẦN, *supra* note 31, at 306. The Confucian concept of the way of the mean is principally expressed in the work entitled *Doctrine of the Mean*, one of the *Four Books*, reportedly authorized by Zisi, a grandson of Confucius. JAMES LEGGE, 1 THE CHINESE CLASSICS WITH A TRANSLATIONS, CRITICAL AND EXEGETICAL NOTES, PROLEGOMENA, AND COPIOUS INDEXES – CONFUCIAN ANALECTS, THE GREAT LEARNING, THE DOCTRINE OF THE MEAN (1960).

66. NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, 7 KHẨM ĐỊNH ĐẠI NAM HỘI DIỄN SỰ LỆ [COLLECTED INSTITUTIONS OF ĐẠI NAM] 477-78 (TRẦN HUY HÂN & NGUYỄN THẾ ĐẠT TRANS., 1993). [hereinafter COLLECTED INSTITUTIONS, VOLUME 7].

67. TRẦN, *supra* note 31, at 307.

emanating from the Confucian classics. To illustrate, drawing from the Confucian classics, Minh Mệnh declared four indispensable norms of rule, namely: *kính thiên* (respecting the Heaven), *pháp tổ* (following the ancestors), *cần chính* (being diligent in political affairs), and *ái dân* (loving people).<sup>68</sup> How these norms practically controlled his legislations and his policies were meticulously described in the “*Minh Mệnh Chính yếu*” (Minh Mệnh’s Principal Policies)<sup>69</sup> composed by the *Quốc sử quán* (National Historian Office) of the Nguyễn dynasty which recorded principal policies implemented by Minh Mệnh. Following his father, Thiệu Trị publicly proclaimed his loyalty to these four norms. He composed an anthology in which he collected statements from the Confucian classics which directly express the meaning of the norms and disseminated the work among the community of Confucian scholars and officials.<sup>70</sup> The subsequent emperor Tự Đức was also amenable to the four norms and supplemented four others, namely, *thân hiền* (cherishing the talents), *đồ trị* (arranging the order), *chí thiện* (having great virtues), and *đôn thân* (supporting the relatives). He even composed a poem to popularize the eight norms.<sup>71</sup>

The political norms stemming from the Confucian classics could function as “constitutional norms” in the sense that they were paramount standards for rectifying the practice of the royal power. Scholar-officials of the Nguyễn dynasty often used the political norms in the Confucian classics as normative standards to judge and criticize the ruler. The ruler was supposed to legislate, formulate national policies, lead the administrative system, and cautiously control his quotidian behaviors in such a way as to be in concordance with the political norms in the classics. To illustrate, let us consider how the two important norms called *kính thiên* (respecting the Heaven) and *ái dân* (loving people) could control the political discourse and practice of the emperors.

The norm *kính thiên* (respecting the Heaven) originated from the Confucian concept of “Mandate of Heaven” (Vietnamese: *thiên mệnh*; Chinese: *tianming*), which suggests that the king is “the Son of Heaven”

68. NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, 23 *Đại Nam Thực Lục Chính Biên* [Veritable Records of Đại Nam] 145 (Institute of Historical Studies trans., 1970) [hereinafter VERITABLE RECORDS, VOLUME 23].

69. NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, *Quyển 1, Thiên thứ nhất- Kính thiên* [Book 1, First Chapter- Respecting the Heaven], in 1 *MINH MỆNH CHÍNH YẾU* [MINH MỆNH’S PRINCIPAL POLICIES] 23-50 (Translation Committee trans., 1994); NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, *Quyển 1, Thiên thứ hai- Pháp tổ* [Book 1, Second Chapter- Following the Ancestors], in *id.* at 51-62; NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, *Quyển 5, Cần Chính* [Book 5- Being Diligent in Political Affairs], in *id.* at 205-30; NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, *Quyển 6, 7, Ái dân* [Books 6 and 7, Loving People], in *id.* at 231-347 [hereinafter HISTORIAN OFFICE, VOLUME 1].

70. TRẦN, *supra* note 31, at 289-91.

71. *Id.* at 292.

receiving the Mandate from the Heaven to govern the kingdom to benefit the people.<sup>72</sup> Tạ Văn Tài pointed out that as a kind of fundamental constitution, or as equivalence to a constitution, the founders of the major dynasties in Vietnam ( Lý, Trần, Lê and Nguyễn) repeatedly used the Confucian notion of the Mandate of Heaven to claim legitimacy of rule.<sup>73</sup> However, he failed to discover the other aspect of the constitutional significance of the practice of the concept of the Mandate of Heaven, which is more practical. That is the commitment to the concept could control the ruler's concrete policies and his daily behaviors. In the case of the early Nguyễn dynasty, the doctrine of the Mandate of Heaven was not merely invoked to justify the legitimacy of the enthronement. Beyond that, the doctrine induced the principal norm *kính thiên* (*respecting the Heaven*) which practically controlled the royal authority in concrete matters and the conduct of the ruler.

In theory, the legitimate rule in concordance with the Mandate of Heaven demands the ruler to respect the Heaven in the concrete sense that he must meticulously observe natural phenomena which are supposedly the indicators of the heavenly feeling.<sup>74</sup> The abnormal phenomena, for example, might be the manifestation of divine anger. Furthermore, the ruler is required to keep watch on the living conditions of the people. As popular will is the embodiment of heavenly will, the annoyance of the people, which normally stemmed from high tax, harsh punishment, officials' corruption, might be evidence of Heaven's dissent of the governance of the contemporary ruler. In these cases, the ruler has to rectify his policies to satisfy the desires of the public and to further cultivate his personal morality. It is in this sense that the commitment to respecting the Heaven potentially induced the limitations of the practice of imperial power.

Importantly, the norm "*kính thiên*" is consequential in its relations to other norms of the Nguyễn dynasty. To respect the Heaven, the ruler should limit the annoyance of the people by *ái dân* (*loving the people*), *cẩn chính* (*being diligent in political affairs*), *thân hiền* (*cherishing the talents*), and *chí thiện* (*having great virtues*). Let us consider in more details the norm "*ái dân*" ("*loving people*") as the consequence of the norm "*kính thiên*".

Minh Mệnh, Thiệu Trị, and Tự Đức simultaneously regarded "*ái dân*" as the essential norm for national governance. Particularly, during the regime of Minh Mệnh, "to love people" was the overriding principle.<sup>75</sup> In this regard, the two books entitled "*ái dân*" ("*loving people*") in *Minh Mệnh's Principal*

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72. SOR-HOON TAN, CONFUCIAN DEMOCRACY: A DEWEYAN RECONSTRUCTION 136-44 (2003).

73. Tạ, *supra* note 11, at 22-26.

74. Inside the Nguyễn government, there was a specialized institution helping the emperor in this task, named as *Khâm Thiên Giám* (*Astronomical Office*). NGUYỄN DYNASTY'S NATIONAL HISTORIAN OFFICE, 15 KHÂM ĐỊNH Đại NAM Hội Điện Sự Lễ [COLLECTED INSTITUTIONS OF Đại NAM] 444 (Trần Huy Hân & Nguyễn Thế Đạt trans., 1993).

75. NGUYỄN, *supra* note 21, at 64.

*Policies*, which addressed Minh Mệnh's commitment to the Confucian *minben* together with his practical policies to implement this principle, should be examined.

For classical Confucianism, to love the people means to work for their happiness.<sup>76</sup> On the occasion of his fiftieth birthday, Minh Mệnh delivered nationwide a royal proclamation in which, drawing from the Confucian classics, he professed adherence to that concept: "The kingly way is to consider peace the criterion and to accumulate five happinesses for the people."<sup>77</sup> "Five happinesses" refers to the ninth division of "the Great Plan" in the *Shu Jing*, which consists of long life, riches, soundness of body and serenity of mind, the love of virtue, and an end crowning the life.<sup>78</sup> Generally, following the classical teachings of Confucianism, Minh Mệnh believed that good government should be responsible for public standards of decent life for the people.

To work for the people means that the ruler should not be selfish and should be sympathetic to the will of the people. In the aforementioned declaration, Minh Mệnh stated that: "Consider people's wishes our wishes. Therefore, consider the people's joys our joys."<sup>79</sup> These sentences are based on the teaching in the *Great Learning* that: "when a prince loves what the people love, and hates what the people hate, then is he what is called the parent of the people."<sup>80</sup> In *Minh Mệnh's Principal Policies*, there are a number of statements further illustrating his unselfish spirit and the sense of responsibility for the people. For example, Minh Mệnh said: "Since I have ascended the throne, I neglect eating and clothing all day long, just taking care of rescuing the people . . . On the business of loving the people and nurturing the people, I am never parsimonious."<sup>81</sup> In a similar vein, he said in another occasion: "When the people are miserable or faced with catastrophe, I further cultivate myself, and only consider how to lavish favor and nurture the people, all day long I mediate, and do not dare to relax. How can I enjoy luxury and ignore loving the people !"<sup>82</sup> He explained that:

[B]eing an affluent king, I do not worry about how to satisfy my wishes but I think about my people who are suffering destitution, widowhood, orphanhood, and uneasy livelihood. To satisfy the wishes of one person not only implicates his own body but also

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76. Bui, *supra* note 17, at 73-78.

77. HISTORIAN OFFICE, VOLUME 1, *supra* note 69, at 341-42.

78. JAMES LEGGE, 3 THE CHINESE CLASSICS WITH A TRANSLATIONS, CRITICAL AND EXEGETICAL NOTES, PROLEGOMENA, AND COPIOUS INDEXES, THE SHOO KING [SHU JING] (1960).

79. HISTORIAN OFFICE, VOLUME 1, *supra* note 69, at 341-42.

80. LEGGE, VOLUME 1, *supra* note 65, at 374.

81. HISTORIAN OFFICE, VOLUME 1, *supra* note 69, at 233.

82. *Id.* at 241.

inculcates the people with that bad habit.<sup>83</sup>

Apart from *Minh Mệnh's Principal Policies*, Minh Mệnh's deep solicitude for the people was reflected in his thousands of poems. With 5000 pages of woodblock, Minh Mệnh's poems expressed his concern for the living conditions of the people, especially, the misery that the people had to suffer due to catastrophes and the corruption of the mandarins.<sup>84</sup>

Interestingly, as the highest examiner of the royal examination, Minh Mệnh tended to formulate the questions in close relation to the mechanisms to practice the Confucian requirement of responsible government for the people. To illustrate, it is useful to cite one of his examination questions:

I think that for the Son of Heaven, the Heaven is the Father, the Earth is the Mother, and he is the Son. The mass of people are compatriots and are consanguineous. Therefore, it is said that the king is the firstborn child. The firstborn child inherits the throne from his parent to become the king of the people with great responsibilities. Certainly, he has to have the way to nurture and educate the people so that the people in the whole of the country can all be peaceful. Only when he can do that, he completes his tasks . . . Now, I receive the Mandate of Heaven to maintain the great achievements of the ancestors and all day long concentrate on how to complete the responsibilities of the firstborn child to compare with the precedent sages and enlightened kings. On the sequence to practice this, what are the priorities? You, students who have fully studied classics and historical works and now are waiting to be questioned, are supposedly knowledgeable. Please compose a careful essay and I will myself examine it.<sup>85</sup>

### 3. *The Ancestral Precedents*

As previously mentioned, the early monarchs of the Nguyễn dynasty considered *pháp tổ* (following the ancestors) the ruling norm. Emperor Thiệu Trị helpfully depicted the norm:

The ancestors established the dynasty and arduous careers. The

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83. *Id.* at 283.

84. Nguyễn Minh Tường, *Vua Minh Mệnh với hai Tư tưởng Chính trị lớn của Ông: Củng cố Nền Thống nhất Quốc gia và Yêu Dân* [King Minh Mệnh and His Great Political Thoughts: Reinforcing the National Unity and Loving the People], in *NHỮNG VẤN ĐỀ LỊCH SỬ VÀ VĂN CHƯƠNG TRIỀU NGUYỄN* [HISTORICAL AND LITERACY ISSUES OF THE NGUYỄN DYNASTY] 31 (Nguyễn Phong Nam ed., 1997).

85. COLLECTED INSTITUTIONS, VOLUME 7, *supra* note 66, at 477-78.



echo of their virtues has been smooth . . . They must be comprehended, followed, studied, and looked at. To the inferiors, it must be humble. To the people, it must be generous . . . The talented and virtuous must be all appointed as mandarins . . . Follow the ancestors to stabilize the dynasty.<sup>86</sup>

Who were the ancestors of the Nguyễn dynasty? The ancestry of the dynasty referred to both Gia Long- the dynastic founder and the Lords of Nguyễn family who ruled the Southern part of Vietnam during the time of Trịnh Lords- Nguyễn Lords rivalry.

To practice the principle of following the ancestors, the Nguyễn rulers particularly paid attention to recording the ancestral institutions and works, which led to the advent of the voluminous work entitled *Đại Nam Thực Lục* (*Veritable Records of Đại Nam*).<sup>87</sup> The work recorded the institutions and works of the rulers of the Nguyễn family, consisting of two components, namely, *Đại Nam Thực Lục Tiền Biên* (*Previous Compilation of Veritable Records of Đại Nam*) which covered nine Lords of the Nguyễn family during the time of Trịnh Lords- Nguyễn Lords rivalry, and *Đại Nam Thực Lục Chính biên* (*Primary Compilation of Veritable Records of Đại Nam*) which covered seven emperors of the Nguyễn dynasty from Gia Long to Khải Định. *The Previous Compilations and the Primary Compilation's First Era* (*Đệ nhất kỷ*) which concerns emperor Gia Long can be considered as the textualized embodiments of the ancestral precedents which were supposed to be followed by the later Nguyễn emperors.

In addition, the *Hoàng Việt Luật Lệ* (*Laws of Imperial Viet*) or *Luật Gia Long* (*Gia Long Code*)<sup>88</sup> promulgated by emperor Gia Long can be also considered as the ancestral precedents which were applicable to later rulers of the dynasty. The “constitutional” implication of the binding force of the laws of the founding emperor was that they constituted limitations on the practice of the legislative power of the later rulers. The contemporary ruler might introduce some new laws but it was not easy for him to change the laws established by his ancestors. Therefore, the arbitrariness in lawmaking was constricted. Practically, the Gia Long Code remained in effect throughout the time of the Nguyễn dynasty<sup>89</sup> despite the fact that subsequent emperors- Minh Mệnh, Thiệu Trị, and Tự Đức- also supplemented new laws which were codified in the other *Hoàng Triều Luật Lệ* (*Laws of the*

86. TRẦN, *supra* note 31 at 290-91.

87. VERITABLE RECORDS, VOLUME 23, *supra* note 68.

88. Hoàng Việt Luật Lệ (Luật Gia Long) [LAWS OF IMPERIAL VIET (GIA LONG CODE)] (Nguyễn Q. Thảng & Nguyễn Văn Tài trans., 1994) [hereinafter *Gia Long Code*].

89. LUƠNG NINH, LỊCH SỬ VIỆT NAM GIÃN YẾU [INTRODUCTION OF VIETNAMESE HISTORY] 318 (2000).

*Dynasty*).<sup>90</sup>

Finally, the structural institutions of the central government created by the founder of the dynasty can also be recognized as the ancestral precedents. Particularly, these structural institutions were characterized by the principle of “*tứ bất*” (“*four negations*”), which negated four titles namely, royals, prime minister, queen, and first doctorate laureate. The “*tứ bất*” principle was putatively established by Gia Long and became the normative percept of the dynasty.<sup>91</sup>

#### 4. *Institutions of Precedent Dynasties*

Early emperors of the Nguyễn dynasty particularly realized the need to inherit the institutions of the precedent dynasties, which, in their belief, were the expression of lasting political principles. This can be verified by their especial concern for recording them. To illustrate, Gia Long delivered a royal proclamation requesting the collection of materials concerning the institutions of the precedent dynasties, saying that:

On the way to govern a country, there must be permanent principles; on the way to order, it should be sought from old institutions. In our Viet nation, there were successive dynasties of Đinh, Lý, Trần, and Lê. In their politics, there were some things changeable and some things stable. During that period, should there be institutions and laws worthy of recording?<sup>92</sup>

Gia Long then demanded that among the public those who stored materials concerning the institutions, laws, and general history of the precedent dynasties should donate them to the court.<sup>93</sup> Gia Long’s campaign induced a nationwide movement of book donation. A number of valuable materials regarding the precedent dynasties, including the *Completed Annals of Đại Việt* and the *Hồng Đức Code*- were gathered in the imperial depository.<sup>94</sup>

A similar campaign was initiated under the early rule of Minh Mệnh. In a royal proclamation requesting the continuous collecting of materials

90. TRẦN VĂN GIÁP, 1 TÌM HIỂU KHO SÁCH HÁN NÔM [A STUDY OF THE SINO-VIETNAMESE DEPOSITORY] 97 (1970).

91. ĐỖ BANG ET AL., TỔ CHỨC BỘ MÁY NHÀ NƯỚC TRIỀU NGUYỄN (1802-1884) [ORGANIZATION OF STATE APPARATUS OF THE NGUYỄN DYNASTY (1802-1884)] 14-16 (1997).

92. NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, 1 ĐẠI NAM THỪC LỤC CHÍNH BIÊN [VERITABLE RECORDS OF ĐẠI NAM] 816 (Institute of Historical Studies trans., 1970).

93. *Id.*

94. Nguyễn Hữu Tâm, *Quá trình Hình thành Quốc sử Quán Triều Nguyễn* [The Birth of the Historian Office of the Nguyen Dynasty], 3 J. HISTORICAL STUD. 38, 42 (2008).

relating to the precursors' institutions, the emperor stated:

I think that when the precedent emperors emerged, there must be books of each dynasty recording their words, actions, and political affairs to bequeath to the later generations. Every house which stores the documents of the precedent dynasties, regardless of thoroughness or brevity, must submit the original versions to the government or let the government transcribe them.<sup>95</sup>

As a consequence of that, a number of books of the precedent dynasties stored in private families or works later composed by individual authors were discovered and delivered to the court.<sup>96</sup> Most notable was the lucubration entitled “*Lịch triều Hiến chương Loại chí*” [*Categorical Records of Institutions of the Precedent Dynasties*] authorized by Phan Huy Chú.

Phan Huy Chú was an erudite Confucian scholar widely celebrated in Vietnam. A son of a *tiến sĩ* (doctoral laureate) and Confucian scholar-official Phan Huy Ích notwithstanding, he just obtained *tú tài* (the degree of baccalaureate) after several attempts in the royal examinations. Failing in pursuing an advanced degree to gain access to the imperial government, Phan Huy Chú concentrated his time on studying the history of dynastic institutions, which led to the compilation of the *Categorical Records of Institutions of the Precedent Dynasties*. In 1821, emperor Minh Mệnh knew about him and as an exceptionally appointed him as an *biên tu* (editorial official) of the *Hàn Lâm Viện* (Hanlin Academy). Phan Huy Chú took this opportunity to submit the *Records* to the emperor. The emperor highly evaluated the work and rewarded him lavishly with the valuables.<sup>97</sup>

At the time, *The Records of Institutions of the Precedent Dynasties* was the most thorough work of the theme. This encyclopedic work consists of 49 books recording the institutions of the successive dynasties to the end of the Lê period, which were classified in ten categories, viz., geography, historical figures, mandarin system, rituals, examination system, public finance system, criminal laws, military system, literatures, and diplomatic relations.<sup>98</sup> Phan Huy Chú's *Records* can be regarded as the comprehensive

95. NGUYỄN DYNASTY'S NATIONAL HISTORIAN OFFICE, 2 *ĐẠI NAM THỰC LỤC CHÍNH BIÊN* [VERITABLE RECORDS OF ĐẠI NAM] 63 (Institute of Historical Studies trans., 1970) [hereinafter VERITABLE RECORDS, VOLUME 2].

96. Nguyễn, *supra* note 94, at 43.

97. VERITABLE RECORDS, VOLUME 2, *supra* note 95, at 128. For more details on the biographies of Phan Huy Chú and his father Phan Huy Ích, see Nguyễn Q. Thắng & Nguyễn Bá Thế, *Từ điển Nhân vật Lịch sử Việt Nam* [DICTIONARY OF VIETNAMESE HISTORICAL FIGURES] 762-64 (1991).

98. The work was originally in Sino-Vietnamese. In 1957, The Saigon University Law School published in the South Vietnam the modern Vietnamese translation of three parts of the Records concerning the mandarin system, public finance system, and criminal laws. See PHAN HUY CHÚ, *LỊCH TRIỀU HIẾN CHƯƠNG LOẠI CHỈ* [CATEGORICAL RECORDS OF INSTITUTIONS OF THE PRECEDENT

textualized embodiment of the precedent dynastic institutions that were supposed to be inherited by the Nguyễn dynasty.

Among various institutions of different precedent dynasties, early Nguyễn emperors particularly endorsed the ones established during the golden age of the early Lê dynasty under the reign of Lê Thánh Tông.<sup>99</sup> Especially, Minh Mệnh's ambition was to be a second "Lê Thánh Tông."<sup>100</sup> He said: "Among precedent kings in our country, Lê Thánh Tông can be considered the virtuous king who I constantly adore."<sup>101</sup> He even believed that Lê Thánh Tông established the laws and institutions, which could be forever bequeathed to the latter generations.<sup>102</sup>

The institutions of the predecessors were the embodiments of stable principles of government whose effectiveness was testified by the lasting endurance in the tradition. Therefore, practically, the early Nguyễn dynasty largely followed the established institutions of their precursors. Traditional rules of monarchial hereditary succession were followed. The governance based on the Confucian ideology were continually practiced. As far as the legal system is concerned, Gia Long when ordering his officials to draft the code of the dynasty stated that laws of the precedent dynasties should be considered the foundations.<sup>103</sup> In addition, the Nguyễn dynasty was largely amenable to the precedent model of the central government characterized by the recruitment of officials by the method of royal examinations, the six ministries system, and specialized institutions such as the imperial lecture, the censorial institution, and the historian office.

To be sure, the Nguyễn dynasty introduced unprecedented institutional reforms as evident under the rule of Minh Mệnh.<sup>104</sup> However, such administrative institutional changes were technical rather than substantial. The invocation of the precedent institutions remained the distinctive character of institutional arrangements. The principles of royal transmission through consanguineous heredity in normal situations and the fundamental

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DYNASTIES] (Cao Nãi Quang trans., 1957). The Records was completed translated into modern Vietnamese by Nguyễn Thọ Dực and published in the South Vietnam in 1972. See PHAN HUY CHÚ, LỊCH TRIỀU HIỂN CHƯƠNG LOẠI CHỈ, 10 Tập [CATEGORICAL RECORDS OF INSTITUTIONS OF THE PRECEDENT DYNASTIES, TEN VOLUMES] (Nguyễn Thọ Dực trans., 1972). Under the unified Vietnam, another Vietnamese version of the work was introduced by the Institute of Historical Studies. See PHAN HUY CHÚ, LỊCH TRIỀU HIỂN CHƯƠNG LOẠI CHỈ, 4 Tập [CATEGORICAL RECORDS OF INSTITUTIONS OF THE PRECEDENT DYNASTIES, FOUR VOLUMES] (Institute of Historical Studies trans., 1992).

99. Đỗ ET AL., *supra* note 91, at 44.

100. Nguyễn, *supra* note 21, at 44.

101. NGUYỄN DYNASTY'S NATIONAL HISTORIAN OFFICE, 10 ĐạI NAM THựC LựC CHÍNH BIÊN [VERITABLE RECORDS OF ĐạI NAM] 16 (Institute of Historical Studies trans., 1970) [hereinafter VERITABLE RECORDS, VOLUME 10].

102. *Id.* at 17.

103. GIA LONG CODE, *supra* note 88, at 2.

104. NGUYỄN, *supra* note 21.

characteristics of the organization of the central government substantially remained.

In short, the constitutional norms of the Nguyễn dynasty included four sorts, namely, models of ancient kings, the political and moral principles in the Confucian classics, the ancestral precedents, and the institutions of the precedent dynasties. They all derived from the tradition. They were unwritten in nature, which means that they were not enacted in a single charter. In the subsequent section, I will consider institutional settings designed to rectify the ruler in concordance with those Confucian unwritten constitutional norms.

B. *Institutionalized “Scholastic Constitutionalism”*

Grey asserts, “There are a number of mechanisms of constitutional enforcement.”<sup>105</sup> Modern constitutionalism largely relies on judicial review and the political mechanisms of the separation of powers and checks and balances to enforce constitutional norms.<sup>106</sup> However, constitutionalism in general needs not limit these mechanisms. With that in mind, we can proceed to consider the constitutional enforcement mechanisms of pre-modern constitutionalism of Confucian societies.

In Confucian regime, there were some mechanisms of constitutional enforcement which were neither judicial nor political but “scholastic.” It should be recalled that classical Confucianism considers the wise and virtuous scholars as the external forces to limit the actions of the ruler in concordance with the *li* or the constitutional norms. I have labeled this idea as “scholastic constitutionalism.”<sup>107</sup> In practice, the scholar-officials of imperial governments in East Asia, by their scholarship and through discursive structuralized forums, were responsible for ensuring the conformity of the ruler’s actions to the constitutional norms. These mechanisms were not political as the scholar-officials were just the members of the administrative system. Neither were they judicial as the scholar-officials were not the independent judges vested with the judicial review power. Instead, the Confucian mechanisms of constitutional enforcement were “scholastic” in the sense that they depended on special structural institutions which allowed the scholar-officials to use their scholarship to restrain the ruler.

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105. Grey, *supra* note 18, at 196.

106. Constitutional law scholars have recently tended to distinguish legal and political constitutionalism according to which the former depends on the court with the judicial review power to enforce the constitutional norms while the latter relies on the mechanism of separation of powers and various forms of checks and balances for constitutional enforcement. See Marco Goldoni, *Two Internal Critiques of Political Constitutionalism*, 10(4) INT. J. CON. L. 926 (2012).

107. For more details, see Bui, *supra* note 17, at 89-95.

Hahm's study helpfully demonstrates various such institutions, namely, the prime minister, the imperial lecture, the censorate, and the historian office.<sup>108</sup> In the case of the Nguyễn dynasty, the three latter institutions did exist, but the prime minister was abolished in accordance with the principle of "four negations" due to the fear that the prime minister might usurp the emperor's power. Alternatively, the dynasty established some deliberative institutions which can be regarded as potential checks of the emperor's power.

Apart from that, to examine the scholastic enforcement of constitutional norms in Confucian polities in East Asia, I suggest that we should take the royal examination system into account. First, this is because the system was the beginning of the scholastic enforcement of constitutional norms. It was largely dependent on this system that the wise and virtuous scholars could gain access to the government to restrain the power of the ruler. Second, the royal examination system itself was the restraint of the ruler on the matter of personnel. In theory, the ruler could not arbitrarily appoint persons without passing the exams to hold governmental positions. Therefore, in the subsequent section, the royal examination system will be examined before proceeding to examine other institutions.

### 1. *Royal Examination System*

Confucian elitism holds that government should be administrated by intellectuals who are previously educated about the *li*, which consisted of traditional principles of government discovered in ancient times by enlightened thinkers and traditional norms and institutions practiced by the sage kings.<sup>109</sup> To put this idea into practice, since the Han dynasty or perhaps earlier, imperial China developed the famous royal examination system as a strict gateway for Confucian scholars to gain access to governmental positions. As Franklin W. Houn remarks,

Facilitating social mobility and ensuring the government a continuing supply of the learned and, on the whole, capable personnel, this system soon became one of the most cherished Chinese political institutions. Consequently, to the old store of beliefs was added the new notion that holding unrestricted, competitive examinations regularly was an essential mark of good government and that discontinuing them would lead to social

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108. Hahm, Confucian Constitutionalism, *supra* note 5. For more details, see the subsequent sections.

109. Bui, *supra* note 17, at 89.

injustice and political disorder.<sup>110</sup>

As concomitance of Confucian influence, the system of royal examination was introduced in Vietnam in the Lý dynasty and remained a principal institution for recruiting officials in the subsequent dynasties of Trần, Lê, and Nguyễn.<sup>111</sup> Particularly, in concordance with the political norm *thân hiền* (*cherishing the talents*), the early Nguyễn dynasty considerably developed Confucian education and royal examination system to train competent personnel for the imperial government.<sup>112</sup>

To begin with, the early Nguyễn dynasty initiated various policies to reinforce Confucian education to prepare students for royal examinations. In addition to the *Quốc tử giám* (*national university*) which was moved from Hà Nội to the new capital at Huế, a number of local schools were established in provincial and district levels. Furthermore, to promote Confucian studies, the dynasty constructed the *văn miếu* (*temples of Confucius*) and the stone steles to inscribe the names of graduates in every province. The court even ordered the establishment of the societies of the *hội tư văn* (*Confucian scholars*) in every village.<sup>113</sup>

Along with the promotion of Confucian education and studies, the Nguyễn dynasty intensified the royal examination system with reference to the Chinese experience and especially the previous achievements of the Lê dynasty. The titles of the winners, the system of multi-stage examination consisting of *thi hương* (*provincial examination*), *thi hội* (*metropolitan examination*), and *thi đình* (*palace examination*), and rules of exam area were meticulously regulated.<sup>114</sup> Notably, the dynasty established stringent disciplines of the examination. Corruption and cheating at the exams would be seriously sanctioned as crimes. The regulations of the exam even excluded from the exam the students who violated the Confucian moral norms like lack of *xiao* (filial piety) or *li* (ritual) in their familial behaviors.<sup>115</sup>

110. FRANKLIN W. HOUN, CHINESE POLITICAL TRADITIONS 70-71 (1965).

111. For the royal examination system in imperial Vietnam in general, see NGUYỄN Q. THẮNG, KHOA CỬ VÀ GIÁO DỤC VIỆT NAM [VIETNAMESE EXAMINATION AND EDUCATION] (1993) [hereinafter NGUYỄN, VIETNAMESE EXAMINATION]; NGUYỄN THẾ LONG, NHO HỌC Ở VIỆT NAM: GIÁO DỤC VÀ THI CỬ [CONFUCIAN STUDIES IN VIETNAM: EDUCATION AND EXAMINATION] (1995); BÙI XUÂN ĐÌNH, GIÁO DỤC VÀ KHOA CỬ NHO HỌC THẮNG LONG-HÀ NỘI [THẮNG LONG-HÀ NỘI'S EDUCATION AND CONFUCIAN EXAMINATION] (2010); PHAN NGỌC LIÊN, GIÁO DỤC VÀ THI CỬ VIỆT NAM TRƯỚC CÁCH MẠNG THÁNG TÁM 1945 [EDUCATION AND EXAMINATION IN VIETNAM PRIOR TO THE AUGUST 1945 REVOLUTION] (2006).

112. See generally LÊ THỊ THANH HÒA, VIỆC ĐÀO TẠO VÀ SỬ DỤNG QUAN LẠI CỦA TRIỀU NGUYỄN TỪ NĂM 1802 ĐẾN NĂM 1884 [EDUCATION AND USE OF MANDARINS IN THE NGUYỄN DYNASTY FROM 1802 TO 1884] (1998).

113. NGUYỄN, VIETNAMESE EXAMINATION, *supra* note 111, at 37.

114. NGUYỄN, *supra* note 43 at 875.

115. VERITABLE RECORDS, VOLUME 10, *supra* note 101, at 340.

Throughout its existence, the Nguyễn dynasty held 47 thi hương (provincial examinations) with 6165 graduates entitled as cử nhân (bachelor) and tú tài (baccalaureate) and 39 thi hội (metropolitan examinations) with 558 tiến sĩ (doctoral laureates).<sup>116</sup> The holders of the titles of doctoral laureates would be invited to the palace for the thi đình (palace examination) in which the king would ask questions and read candidates' responses and then rank them.<sup>117</sup> In the course of the policy of "four negations" (tứ bất), the Nguyễn dynasty eliminated the title Trạng nguyên (first doctoral laureate) and just conferred 2 Bảng nhãn (second doctoral laureate) and 9 Thám hoa (third doctoral laureate).<sup>118</sup>

During the initiating time of the dynasty under emperor Gia Long, as the royal examination system had not been developed, the officials were selected among the meritorious men and the graduates in the exams organized by the precedent Lê dynasty. However, since the time of Minh Mệnh onward, as the royal examination system was significantly enhanced, the practice of recruitment of officials through the royal exams was mandatory,<sup>119</sup> except in some special cases, such as recommendation by incumbent officials at the request of the emperor.<sup>120</sup>

The constitutional significance of the royal examination system should be recognized. The system enabled the Confucian scholars from ordinary families to gain access to governmental positions. Appointment through royal exams might sometimes not be in the imperial interests, but because the practice was deeply rooted in the tradition as an embodiment of cultural politics and was underpinned by the great endorsements of the public and especially the community of Confucian intelligentsia, the emperor was not at ease to repudiate it.<sup>121</sup> The recruitment of officials through the mechanism of royal examination therefore constricted the imperial authority in the matter of personnel. Furthermore, the practice of this institution ensured that the emperor would be surrounded with Confucian scholars who would rectify the ruler in concordance with the constitutional norms.

## 2. *Deliberative Institutions*

Classical Confucian theory of government holds that the ruler should

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116. PHAN, *supra* note 111, at 104.

117. HỮU NGỌC & LADY BORTON, THI CỬ NHO GIAO [ROYAL EXAMS] 19 (2004) (Bilingual book).

118. NGUYỄN, *supra* note 43, at 878-79.

119. LÊ, *supra* note 112, at 169.

120. HISTORIAN OFFICE, VOLUME 1, *supra* note 69, at 161.

121. Even the princes and relatives of senior mandarins were also required to take royal exams to be appointed as officials. LÊ, *supra* note 112, at 182.



govern his kingdom with the advice of the wise and virtuous scholars.<sup>122</sup> Institutionalizing this theory, the Nguyễn dynasty established important deliberative institutions which allowed the Confucian scholar-officials to participate in the policy-making process.

During the period of the partially de facto control of the country in the Gia Định territory with a military government, Nguyễn Ánh (latter emperor Gia Long) introduced the institution called “*Nhà Công Đồng*” (literally *the house of public agreement*) in 1787. It was the assembly of key ministers where they deliberated and decided on military affairs and sometimes economic and social issues. The resolutions of the House were verified by the seal with the inscription 添言允協 (*thêm ngôn doãn hiệp-well-matched additional words*).<sup>123</sup> After his formal enthronement, Gia Long retained this institution in his early reign at the capital Huế.<sup>124</sup> In 1803, however, Gia Long replaced the *Nhà Công Đồng* with a more systematized institution, namely *Hội đồng Đình thần* (*Council of Courtiers*). The members of the Council consisted of senior ministers who resided in the capital. Four times a month, it assembled to resolve four categories of affairs, viz., trans-ministerial affairs, legal cases appealed to the court, petitions against local bullies, and denouncements of corrupted mandarins.<sup>125</sup>

Since the reign of Minh Mệnh onward, the Council of Courtiers experienced some reforms. According to a regulation in 1822, its members were more extensive, including not only the officials residing in the capital but also some selected provincial officials. In terms of its functions, the Council was the forum for the scholar-officials to debate and to propose national policies. Practically, such important national decisions as the abolition of the intermediate administrative unit Bắc Thành or the establishment of the *Đô sát Viện* (*Censorate*) were proposed and carefully deliberated by the Council and accepted afterward by the emperor. In addition, the Council was responsible for recommending candidates for important positions in the educational and supervisory institutions of the central government and the governors in the provincial and district levels. Finally, it was authorized to hear legal cases concerning felonies committed by senior ministers and other cases with capital punishment.<sup>126</sup>

Concerning its operation, the Council of Courtiers assembled monthly in the second, eighth, sixteenth, and twentieth days. The agendas of the session consisted of two categories of matters: the ones regularly put forward by the

122. Bui, *supra* note 17, at 90.

123. Lê Nguyễn Lưu, *Từ Ấn Công đồng và Đình thần đến Tiếng trống Đăng văn* [From the Seals of the Court to the Drumbeat of Claiming Innocence], 84 J. RESEARCH & DEVELOPMENT 19 (2011).

124. Đỗ ET AL., *supra* note 91, at 43.

125. *Id.*

126. *Id.* at 45–46.

Council and the ones occasionally raised by the emperor. To prepare for a session, the relevant institutions (ministries, departments, and boards) would draft and distribute the proposals two days in advance to the members of the Council. After each session, if the Council reached an agreement, it would prepare a suggestion with the signatures of the members and submit it to the emperor. Opposing opinions were recorded for later references. In some crucial sessions, the Censorate would attend and supervise the operation of the Council.<sup>127</sup>

The Council of Courtiers was seemingly a “dynastic parliament.” It can be considered the external scholastic check of the imperial authority. In fact, the decisions of the Council were advisory rather than definitive.<sup>128</sup> However, even though the emperor could in theory determine all national affairs, he was not at ease to practice this arbitrarily as the Council of Courtiers was the platform for the Confucian scholar-officials to restrain his discretion. A priori, practically, the emperor often accepted the decisions of the Council or just made some minor modifications.<sup>129</sup> Even, Minh Mệnh considered overriding the decisions of the Council autocratic. To illustrate, in 1827, he requested the Council to recommend some candidates for some districts, and when the suggestion was submitted, he said: “The Council of Courtiers is my arms and legs and my eyes. Once I authorize it to select the candidates, but still I retain the determination, is it autocratic?” He then followed the suggestion.<sup>130</sup>

The practice of the Council of Courtiers indicates that the Nguyễn rulers could not decide national policies on their own. The process of national policy-making required deliberation among the Confucian scholar-officials in the Council before definitive decisions could be made. In short, the Council can be considered the structural limit of the imperial power.

Another deliberative institution which allowed the Confucian scholar-officials to participate in the national policy-making process was the *Viện Cơ mật* (Privy Council). Emulating the Office of Military Plans of the Qing dynasty in China, in 1834, Minh Mệnh contrived the Privy Council “which will concern itself with secret strategies of a military country and confidential business.”<sup>131</sup> The members of the body were selected from

127. *Id.* at 46-47.

128. NHỮNG ĐẶC TRƯNG CƠ BẢN CỦA BỘ MÁY QUẢN LÝ ĐẤT NƯỚC VÀ HỆ THỐNG CHÍNH TRỊ NƯỚC TA TRƯỚC THỜI KỲ ĐỔI MỚI [THE BASIC CHARACTERISTICS OF THE MECHANISM OF NATIONAL GOVERNANCE AND THE POLITICAL SYSTEM IN OUR COUNTRY PRIOR TO THE RENOVATION PERIOD] 100 (Vũ Minh Giang ed., 2008).

129. Lê, *supra* note 123, at 22.

130. VERITABLE RECORDS, VOLUME 2, *supra* note 95, at 637.

131. NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, 15 ĐẠI NAM THỰC LỤC CHÍNH BIÊN, [VERITABLE RECORDS OF ĐẠI NAM] 335 (Institute of Historical Studies trans., 1970); NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, 1 KHÂM ĐỊNH ĐẠI NAM HỘI DIỄN SỰ LỆ [COLLECTED INSTITUTIONS OF ĐẠI NAM] 199 (Trần Huy Hân & Nguyễn Thế Đạt trans., 1993). [hereinafter

advanced Confucian scholar-officials. They consisted of four “*đại thần*” (“*great ministers*”) who served in other positions<sup>132</sup> concurrently and eight subordinate “*hành tẩu*” (“*apprentice*”) who were chosen by the Council of Courtiers among the personnel of the offices like the Six Ministries.<sup>133</sup>

In the early Nguyễn dynasty, the Privy Council was a rather powerful organ. It was the highest organ for the advanced Confucian scholar-officials to discuss and advise the ruler on a range of crucial issues concerning military, internal security, diplomatic relations, economic development and people’s livelihood. In addition, it was responsible for supervising the activities of the court. Finally, the Privy Council was the place where confidential documents and precious objects of the court were reserved.<sup>134</sup>

The Privy Council seemed to be a “dynastic cabinet.” Consequential national affairs, rather than individually decided by the ruler, required careful consideration by the advanced Confucian scholar-officials through the medium of the Privy Council. It is in this sense that the Privy Council together with the Council of Courtiers could constitute structural limits of the royal authority.

### 3. *Educative Institution: Imperial Lecture (Kinh diên)*

Lecturing to political leaders may be an audacious idea today but was actually a classical idea in Confucianism. It was the view of the classical Confucians that for a peace and orderly polity, the ruler should not only fully internalize moral principles but also be externally indoctrinated by wise and virtuous scholars.<sup>135</sup>

Practically, the history of imperial East Asia witnessed the phenomenon of “imperial lecture” which means “the doctrination session in which Confucian scholars taught the emperor moral principles of government while explicating Confucian classics and history.”<sup>136</sup> Its provenance was traceable back to the Han dynasty in the history of China. During this period, there were often informal sessions in which the emperor summoned Confucian scholars for expositions of the Confucian classics. But it was not until the Sung dynasty in tenth century China that the imperial lecture was institutionalized under a concrete form rendered in Chinese as *jingyan* (literally *the classics mat*). In the subsequent dynasties of China (Yuan, Ming, Qing) the institution continued to be an integral part of the imperial

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COLLECTED INSTITUTIONS, VOLUME 1]; WOODSIDE, *supra* note 8, at 96-97.

132. Practically, they were often the ministers of the Six Ministries. ĐỖ ET AL., *supra* note 91, at 60.

133. WOODSIDE, *supra* note 8, at 99.

134. ĐỖ ET AL., *supra* note 91, at 59.

135. Bui, *supra* note 17, at 90.

136. Yon-Ung Kwon, *The Imperial Lecture of Sung China*, 48 J. SOC. SC. HUM. 103 (1978).

government.<sup>137</sup> The institution of imperial lecture from the Sung dynasty was adopted in Korea, referred to in Korean as *kyong-yon*, at the beginning of the twelfth century during the reign of King Yejong of Koryo dynasty but remained rather nominal in the next two centuries before becoming effective under the Choson dynasty.<sup>138</sup>

The institution of imperial lecture, in Vietnamese *kinh diên*, was introduced in Vietnam in 1128 under the reign of King Lý Thần Tông (1128-1138) of the Lý dynasty<sup>139</sup> and remained a permanent institution in the government of the subsequent dynasties of Trần and Lê. In the Nguyễn dynasty, the institution was reestablished under the rule of emperor Thiệu Trị.<sup>140</sup> Thiệu Trị explained that the reason he constituted the imperial lecture stemmed from the proposal submitted by two censors of circuits Trần Văn Ý and Võ Tự. The proposal suggested that on days of leisure, the emperor should together with great ministers construe the meanings of the classics and discuss the principles of governance in order to comprehend the good things as well as the bad things of the past and to realize the annoyance of the people.<sup>141</sup> After reading the proposal, Thiệu Trị stated:

These mandarins said reasonable words. I think that the formerly sage and enlightened kings who created great achievements which have been consistently exalted were all hard learners . . . Now I, a junior who accedes to the throne to order the nation and rule the people, need assistance and establish the *kinh diên*.<sup>142</sup>

*Kinh diên* then became the forum for the Confucian scholar-officials to lecture the classics to the emperor and to discuss with him theoretical and practical issues concerning national governance.<sup>143</sup>

Inside the Nguyễn government, there was a special organ named *Viện Tập Hiền* (literally *the institute where the talented and virtuous assemble*) responsible for various affairs concerning the *kinh diên* (*imperial lecture*). Its directors were two advanced *kinh diên giảng quan* (*mandarin-lecturers*) selected among the great ministers. It had six *nhật giảng quan* (*daily mandarin-lecturers*) responsible for delivering the lectures. Additionally, there were various other scholars (with different titles, such as *Thị độc học*

137. *Id.*; see also WM. THEODORE DE BARY, NEO-CONFUCIAN ORTHODOXY AND THE LEARNING OF THE MIND-AND-HEART 29-38 (1981).

138. Yon-Ung Kwon, *The Royal Lecture of Early Yi Korea*, 50 J. SOC. SC. HUM 56 (1979); Hahm, Confucian Constitutionalism, *supra* note 5 at 179.

139. NGUYỄN, VIETNAMESE EXAMINATION, *supra* note 111, at 28.

140. ĐAI NAM ĐIỂN LỆ TOÁT YẾU [SUMMARY OF INSTITUTIONS OF ĐAI NAM] 7 (Nguyễn Sĩ Giác trans., 1993).

141. COLLECTED INSTITUTIONS, VOLUME 1, *supra* note 131, at 218.

142. *Id.* at 219.

143. *Supra* note 140, at 7.

*sĩ, Thị độc, Thừa chỉ, Trước tác, Tu Soạn*) whose functions were to prepare and reserve the materials of the lectures and to record the words and actions of the emperor during the sessions.<sup>144</sup>

The site for imperial lectures was located at the *Điện Khâm Văn* (*Hall of Imperial Literature*) during the rule of Thiệu Trị and later moved to *Điện Văn Minh* (*Hall of Civilization*) under the rule of Tự Đức.<sup>145</sup> This detail implied that the location of the imperial lectures was the place for enlightenment.

Annually, the imperial lecture was inaugurated in February and ended on 28 November with a royal ceremony. Monthly, six sessions were held in the second, eighth, twelfth, eighteenth, twenty-second, and twenty-eighth days.<sup>146</sup> Attendants of the imperial lectures consisted of the emperor, royals (*hoàng thân*) and all great ministers (*quan đại thần*).<sup>147</sup> In the sessions, the mandarin-lecturers were seated instead of standing,<sup>148</sup> implying that they were not acting as the servants of the emperor. Curriculum of the imperial lectures included the *Four Books* and the *Five Classics*. Some neo-Confucian texts were also studied, such as the *Extended Meaning of the Great Learning* (Chinese: *Daxue Yanji*, Vietnamese: *Đại học Diễn nghĩa*).<sup>149</sup> In addition, the Nguyễn *kinh diên* appropriated a number of books made use in the *jingyan* of the Qing dynasty. Finally, some particular textbooks prepared by the *Viện Tập Hiền* were also included in the curriculum of the imperial lectures.<sup>150</sup>

Scholars have pointed out the constitutional significance of the imperial lectures. By the case of traditional China, Yon-Ung Kwon believes that the imperial lectures played the role of moralizing the imperial government.<sup>151</sup> Hahm contends that the imperial lecture was “a forum in which the ruler could be educated and disciplined by Confucians in the ‘kingly way’” and “did not cease to function as constitutional check, or regularized restraint, on the ruler.”<sup>152</sup>

It can be anticipated that Confucian scholar-officials’ exposition of the principles of government, political norms, traditional institutions, and ruling models of the ancient kings recorded in the classics and other Confucian works could influence the understanding and action of the monarch. Through the medium of the imperial lectures, the Confucian scholar-officials became

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144. *Id.*

145. COLLECTED INSTITUTIONS, VOLUME 1, *supra* note 131, at 217-19.

146. *Id.* at 219.

147. ĐỖ ET AL., *supra* note 91, at 86.

148. COLLECTED INSTITUTIONS, VOLUME 1, *supra* note 131, at 222.

149. *Id.* at 220.

150. ĐỖ ET AL., *supra* note 91, at 87.

151. Kwon, *supra* note 136, at 113.

152. Hahm, Confucian Constitutionalism, *supra* note 5, at 180, 185.

the interpreters and the guardians of the classics as a source of the dynasty's "constitutional norms." They hence could constrict the ruler's monopolization of the interpretation of the Confucian classics for his egoistic interests. It is in this sense that the imperial lectures could play the role of constitutional protection. Another implication of the imperial lecture was its potential contribution to the discernibility of the "dynastic constitution." The imperial lectures were a fairly open forum for the Confucian scholar-officials to make clear to various members of the court the political principles, percepts, norms, and institutions which was controlling the operation of the polity, and this induced the latent limitation of the individual calculations of the ruler. In short, the imperial lectures can be recognized as an institutionalized forum for the scholar-officials to rectify the use of the royal power.

#### 4. *Remonstrative Institution: Censorate (Đô sát Viện)*

Remonstrance against the ruler is a constitutional principle in classical Confucian theory on government. Candid admonishment to the ruler to guarantee his practice of imperial power in accordance with the *li*-civilized norms and institutions is both the legitimate right and the humanizing duty of the Confucian scholar-officials.<sup>153</sup> Imperial government in the history of East Asia did practice this Confucian principle.

In Chinese imperial government, the entire officials of the mandarin system were expected to do the task of criticizing the ruler. According to Franklin W. Houn, every regular bureaucrat of the administrative system, apart from particularly assigned administration, might sporadically admonish the ruler either on his own initiative or in the course of response to a royal consultation.<sup>154</sup> In imperial China, there was, however, a specialized institution named censorate (*yushitai*, latter *duchayuan*) particularly designed for the group of scholar-officials called "talking officials" to impeach the corrupt or incompetent mandarins and to remonstrate against the emperor.<sup>155</sup> The specialized censorship in imperial China, according to Charles O. Hucker, was "highly organized, highly systemized, and highly institutionalized, concentrated in particular governmental agencies and officials whose prescribed function was to impeach or remonstrate or both, vested with high prestige and special sanctions, providing a routine surveillance over all governmental activities."<sup>156</sup> The Chinese censorial

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153. Bui, *supra* note 17, at 90-93.

154. HOUN, *supra* note 110, at 61.

155. *Id.* at 62.

156. Charles O. Hucker, *Confucianism and the Chinese Censorial System*, in *CONFUCIANISM IN ACTION* 187 (David S. Nivison & Arthur F. Wright eds., 1959).

system was traced back to the Qin dynasty, and, in the Ming dynasty, it achieved the high degree of complexity in terms of both its structure and its function.<sup>157</sup> In the subsequent many dynasties in China, the censorate, in spite of its changes in name, personnel, and institutional relation to other agencies, remained a permanent component of the Chinese imperial governments.<sup>158</sup>

Imperial Korea also institutionalized the Confucian principle of remonstrance. In the Choson dynasty, an institution named *Office of Remonstrance* (*Saganwon*) was a forum for the Confucian scholar-officials to criticize the ruler on all national affairs. In addition, there was another institution called *Office of Inspection* (*Sahonbu*) responsible for investigating and impeaching misconduct by officials. The two institutions normally operated in tandem, and hence were commonly rendered as an entity under the name *taegan* (*censorate*).<sup>159</sup>

In imperial Vietnam, generally speaking, occupants of the throne were adherent to the Confucian teaching of frank criticism to the ruler. The early Nguyễn rulers were also loyal to this tradition. To illustrate, when emperor Gia Long initially ascended the throne, he delivered a royal proclamation requesting *chiếu cần lời nói thẳng* (*straightforward words*).<sup>160</sup> Interestingly, Minh Mệnh composed a poem to mock the fact that Tang-dynasty emperor Xuanzong neglected the royal business because of his being amorous of concubine Yang Guifei, and Minh Mệnh then talked to his ministers:

Since I have ascended the throne, I have wholeheartedly taken care of the affairs . . . I do not dare to be leisured. But I do not know whether I can keep being like this in the future. The virtue of the king is not to be leisured. In case afterwards I am tired or not as diligent as before, you should read this poem to mock me. This will certainly make me repent.<sup>161</sup>

Practically, there were numerous historical evidence indicating that the Nguyễn rulers were often criticized by the scholar-officials, and even the common people.<sup>162</sup>

Apart from social criticism and the regular officials' criticism, there

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157. *Id.*

158. CHARLES O. HUCKER, CHINA'S IMPERIAL PAST 162-63, 308-14 (1975).

159. Hahm, Confucian Constitutionalism, *supra* note 5, at 187. For more illustrations, see Yongryn Mo, *The Challenge of Accountability: Implications of the Censorate, in* CONFUCIANISM FOR THE MODERN WORLD 54-68 (Daniel A. Bell & Hahm Chaibong eds., 2003).

160. ĐỖ ET AL., *supra* note 91, at 19.

161. VERITABLE RECORDS, VOLUME 10, *supra* note 101, at 29.

162. Văn Tạo, *Tổ chức và Thực hiện Nhiệm vụ 'Giám sát và Phán biện Xã hội' của Nhà nước Việt Nam trong Lịch sử* [Organization and Implementation of the Duty of 'Social Supervision and Critic' in the Vietnamese State in History] 4 TẬP CHÍ NGHIÊN CỨU LỊCH SỬ [J. HISTORICAL STUD.] 14 (2009).

existed a concentrating institution within the Nguyễn government for the Confucian scholar-officials to censure the ruler. The institution of censorate was introduced from China into Vietnam in the Lý dynasty, named as *Ngự sử đài* (equivalence of the Chinese *yushitai*). The successive Trần and Lê dynasties followed this practice.<sup>163</sup> In the Nguyễn dynasty, the censorial institution was established under the reign of Minh Mệnh in 1832, renamed as *Đô sát viện* (equivalence of the Chinese *duchayuan*). For convenience, in this study, it is referred to as “the Censorate”.

Minh Mệnh realized that the censorial institution was highly relevant to the *phong hóa kỷ cương* (morality and order) of the polity and requested the Council of Courtiers to discuss the founding of the institution. In the view of the Council,

[T]he establishment of the institution of talking officials (*ngôn quan*) was ancient. [In China], dynasties from Han, Tang, Sung to Ming and Qing all found it. Its name was different [in different dynasties] but its permanent functions were supervision and impeachment. With the advent of the *Collected Institutions* (*Hội Diển*) of the Qing dynasty, the regulations on the Censorate were sufficient. Our dynasty has institutions which are different from those of the Qing. Hence, it should be based on this to adjust what should be used.<sup>164</sup>

On this ground, it can be said that the establishment of the Censorate in the Nguyễn dynasty was critically drawn from the Chinese experience, especially the Qing’s censorial system.<sup>165</sup>

The structure of the Nguyễn Censorate was rather complex. Its leaders consisted of four senior officials entitled Tả đô Ngự sử (Censor-in-chief of the Left), Hữu đô Ngự sử (Censor-in-chief of the Right), Tả phó đô Ngự sử (Vice Censor-in -chief of the Left), Hữu phó đô Ngự sử (Vice Censor-in -chief of the Right). The institution was traditionally headed by the Censor-in-chief of the Left.<sup>166</sup> The Nguyễn Censorate sheltered six “lục khoa” (offices of scrutiny) led by six “chưởng ấn cấp sự trung” (senior supervising secretaries).<sup>167</sup> Each office of scrutiny supervised several

163. ĐỖ VĂN NINH, *Từ Điển QUAN Chức Việt Nam* [DICTIONARY OF MADARINATE IN VIETNAM] 449-50 (2002).

164. NGUYỄN DYNASTY’S NATIONAL HISTORIAN OFFICE, 11 *Đại Nam Thực Lục CHÍNH BIÊN* [VERITABLE RECORDS OF ĐẠI NAM] 151-52 (Institute of Historical Studies trans., 1970) [hereinafter VERITABLE RECORDS, VOLUME 11].

165. ĐỖ, *supra* note 163, at 227-28; see also WOODSIDE, *supra* note 8, at 71.

166. VERITABLE RECORDS, VOLUME 2, *supra* note 95, at 66.

167. In the Lê dynasty, the six “offices of scrutiny” (*lục khoa*) were independent agents responsible for correspondingly supervising six ministries (*lục bộ*). In the Nguyễn dynasty, they were incorporated in the Censorate.



specific central institutions. In addition, there were 16 “giám sát ngự sử” (investigating censors) assigned in 16 đạo (circuits), which included all Vietnam, which supervised the officials of the capital city in Huế and one or several provinces.<sup>168</sup>

The Censorate had important functions vis-à-vis the emperor. It could remonstrate with the emperor on misconduct of the court and submit recommendations with respect to the livelihood of the people and consequential and confidential affairs of the court.<sup>169</sup> By this power, the Censorate could put some limitations on the practice of the imperial power. The Censorate was the institutionalized forum for the Confucian scholar-officials to rectify the ruler in accordance with the Confucian principles of good governance. Through frank criticism, the Confucian scholar-officials could help restrain the usurpation of authority for personal benefits and hence ensure that the emperor’s policies were for the benefit of the people as required by the *minben* principle. The Censorate could also help guarantee the operation of the imperial royal power in accordance with traditional civilized norms and institution or the *li*. Finally, by rebuking the misconduct of the emperor through the medium of the censorial system, the Confucian scholar-officials could help ensure the conformity of the emperor’s personal conduct with the Confucian morality. In short, such structuralized disposition had the potentials of restraining the ruler from acting in concordance with his personal propensity.

Apart from the remonstrant function, the Nguyễn Censorate had the historiographical function which was highly relevant to both formal and informal activities of the emperor. It was allocated the task of recording every word and action of the ruler both in formal imperial audiences and in his outside trips. The original reference of this practice can be found in the *Liji* (*Book of Rites*), one of Five Classics: “His [the emperor’s] actions were written down by the recorder of the Left, and his utterances by the recorder of the Right.”<sup>170</sup> There existed special officials of the so-called “*qijuzhu*” (*Diaries of Activities and Repose*) which were maintained erratically throughout the imperial history of China, apparently from the beginnings in the Han dynasty.<sup>171</sup> The officials of *qijuzhu* were responsible for recording in detail all governmental actions of the emperor and all matters dealt with in

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168. VERITABLE RECORDS, VOLUME 11, *supra* note 164, at 153-54; WOODSIDE, *supra* note 8, at 72-73.

169. VERITABLE RECORDS, VOLUME 11, *supra* note 164, at 153. Apart from the functions concerning the emperor, the Nguyễn Censorate was empowered to supervise, investigate, and impeach the misconduct by the princes and all officials of the administrative system. *Id.*

170. JAMES LEGGE, 28 SACRED BOOKS OF THE EAST, THE SACRED BOOKS OF CHINA - THE LI KI (LII) 2 (1885).

171. HUCKER, *supra* note 158, at 135.

official imperial audiences.<sup>172</sup> This institution was practiced in the Nguyễn dynasty. According to the *Veritable Records of Đại Nam*, in the official imperial audiences, there were two censors appointed as officials of “*khởi cư chú*” (Vietnamese equivalent of the Chinese term *qijuzhu*) responsible for recording all words and actions of the emperor. Even in outside trips, the emperor was also accompanied by these two historiographers. At the end of each month, they compiled and handed the records to the *National Historian Office (Quốc Sử Quán)*.<sup>173</sup> The emperor was not allowed to read these records to guarantee the objectivity and truthfulness.<sup>174</sup> The records of the officials of Diaries of Activities and Repose served as the raw materials for the National Historian Office to compose the veritable records of the dynasty.

Remarking on the above quotation in the *Liji*, Wolfgang Franke helpfully identified the constitutional function of the historiographer: “This statement shows clearly the traditional Chinese conception of the task of the historiographer: to restrain the ruler from irresponsible or criminal actions by recording minutely and imperturbably all affairs coming to his knowledge.”<sup>175</sup> In the case of the Nguyễn dynasty, it is intriguing that the task of recording imperial diary was allocated to the Censorate and hence the censors become the historiographers. This can be explained by the fact that historiography implied censorial effect. By accompanying the ruler both in his imperial audience and in outside trips and meticulously recording his verbal transactions and physical motions, the censorial historiographers functioned as constant surveillance on the ruler.

##### 5. *Historical Institution: National Historian Office (Quốc sử Quán)*

Mention has been already made that the historiographers of the Censorate were the routine watchdogs of the ruler. There was however a special institution called the *National Historian Office (Quốc sử Quán)* within the Nguyễn government which provided the concentrating forum for the Confucian scholar-officials to fetter the imperial power by the special means of history.

It should be first noted that, history occupies an important position in Confucian political philosophy. As illustrated previously, in Confucianism, the rule of *li* actually means the rule of tradition. Traditionalist discourse in Confucian theory on government naturally leads to the emphasis on the role

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172. Wolfgang Franke, *The Veritable Records of The Ming Dynasty (1368-1644)*, in *HISTORIANS OF CHINA AND JAPAN* 61 (W. G. Beasley & E. G. Pulleyblank eds., 1961).

173. *VERITABLE RECORDS*, VOLUME 11, *supra* note 164, at 155.

174. Vũ, *supra* note 128, at 99.

175. Franke, *supra* note 172, at 61.

of history. Confucius particularly emphasizes the role of history in good governance. He recurrently invoked the historic paragons of governance recorded in the *Shu Jing* to extrapolate principles of government. Most notably, he composed the famous historical work *Spring and Autumn Annals* or *Chunqiu*, whose goals were not merely to record the history of the Lu state but more substantially to provide governing standards and prophecy for the contemporary and future generations of governors.<sup>176</sup> Tu Wei-ming helpfully generalizes that, in Confucian vision, history

[I]s ... not a chronological record of what happen ... Rather, history's function is that of wise counsel about the future as well as the present, which is offered as a communal verdict written by an informed observer and not as private opinion. The historian so conceived is the conscience of the collective memory we all share. His responsibility is not only to show what has already been done but also to suggest, whenever appropriate, what other possibilities may have existed and why the failure to realize them has led to disastrous consequences. To write history is therefore a political act committed in the name of the human community as a whole.<sup>177</sup>

Following the Confucian teachings, imperial governments in such Confucian nations as China and Korea practically took history seriously, which is mostly evident by the fact that in each dynasty in the two countries, there were regular historian offices in the imperial government.<sup>178</sup>

On the grounds of Confucian tradition and Chinese experience, imperial rulers of Vietnam also recognized the significance of history and institutionalized the historiography. Specialized historian institution variously named as *Historian Office* (*Sử quán*) or *National Historian Institute* (*Quốc sử Viện*) was a permanent agency in the imperial government from the Trần dynasty to the Lê dynasty.<sup>179</sup> Following this practice, the early emperors of the Nguyễn dynasty were highly conscious of the important role of history and established a specialized agency responsible for historical work. Gia Long established the *Historical Bureau* (*Sử cục*) in 1811. However, it was a small-scale agency and deficient in terms of its personnel.<sup>180</sup> It was not until the reign of Minh Mệnh that an extensive and well structuralized historian institution, namely *National Historian Office* (*Quốc*

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176. Bui, *supra* note 17, at 93-95.

177. TU WEI-MING, WAY, LEARNING, AND POLITICS: ESSAYS ON THE CONFUCIAN INTELLECTUAL 7-8 (1993).

178. Hahm, Confucian Constitutionalism, *supra* note 5, at 194.

179. Đỗ, *supra* note 163, at 447-48.

180. Nguyễn, *supra* note 94, at 42.

*sử Quán*), was established in 1820 and it existed until 1945 with great achievements. The institution is the author of voluminous annuals and a number of other works regarding Vietnamese culture, literature, and geology, government, and law. Most notable are the *Veritable Records of Đại Nam* (*Đại Nam Thực Lục*)- a 588- volume annual of the reign of the Nguyễn family, *Collected Institutions of Đại Nam* (*Đại Nam Hội điển Sù lệ*)- a 262- volume work describing the governmental structure of the Nguyễn dynasty, *Minh Mệnh's Principal Policies* (*Minh Mệnh Chính yếu*)- the records of essential policies implemented by Minh Mệnh, and *Imperial Annuals of Việt* (*Việt sử Thông giám Cương mục*) - 53-volume chronicle of Vietnamese history from antiquity to the Lê dynasty.

The historians of the Nguyễn dynasty in particular and of the Vietnamese imperial government in general, as students of Confucian school, normally regarded Confucius' *Chunqiu* as the model for their works. Like the *Chunqiu*, major historical works of imperial Vietnam like the *Completed Annuals of Đại Việt* by Ngô Sĩ Liên and other historians of the Lê dynasty, the *Veritable Records of Đại Nam* and *Imperial Annuals of Viet*, by the National Historian Office of the Nguyễn dynasty, recorded historical events in the chronological base. More importantly, the writing style of the *Chunqiu* based on the spirit of *cheng ming* (*rectification of names*) significantly influenced the Vietnamese court historians. Consequently, by authorizing imperial chronicles, the Vietnamese court historians could place the constitutional *cheng ming* roles similar to those of Confucius in his *Chunqiu*.<sup>181</sup> Let's illustrate by the case of the historians of the Nguyễn court mainly with the *Veritable Records of Đại Nam*- the most important annual of the dynasty and the other relevant historical work, the *Collected Institutions of Đại Nam*.

First, in the *Veritable Records of Đại Nam*, the historians of the Nguyễn court, like Confucius in the *Chunqiu*, gave names and definitions to political phenomena. The *Records* defined clearly governmental terms and clarified governmental events. However, different from the *Chunqiu*'s concise style, the *Veritable Records of Đại Nam* interpreted the terms and events in quite a verbose manner. The "constitutional" meaning of the interpretation is that it made clear to the court and the public in general governmental terms and phenomena, which is the base for the operation of the public power in transparent and objective manner.

Second, the historians defined fundamental principles of governmental organization and particular spheres of actions of the government's members. This can be found in the *Veritable Records of Đại Nam* but more evidently in

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181. For discussions on role of Confucius by the *Chunqiu* as a de facto constitutional judge, see Bui, *supra* note 17, at 93-95.

the *Collected Institutions of Đại Nam* which defined in detail the principles of organization and operation, the authorities and the duties of various governmental institutions of the Nguyễn dynasty. By this, the historians objectified the standards of the polity and established a transparent foundation for the practice of the public authority.

Third, through recording historical events, the historians passed critical judgments (“*praise-and-censure*”, Chinese: *pao-pien*; Vietnamese: *bao biếm*) on the action of the ruler and other members of the imperial government. However, different from Confucius’s judgment by the strategy of meticulous terminology, the Nguyễn court historians practiced this in a more explicit and verbose style. In theory, the constitutional meaning of the historians’ praise-and-censure to historical phenomena is that it affected the practice of imperial power by encouraging good deeds and limiting bad deeds by the ruler. Practically, a comparison of the *Completed Annals of Đại Việt* with the *Veritable Records of Đại Nam* suggest that the court historians of the Lê dynasty were more active and willing in censuring the emperor than those of the Nguyễn dynasty. The *Veritable Records of Đại Nam* recorded historical events in either neutral or praising manner.

That is why Vietnamese historical scholars tend to conclude that the Nguyễn dynasty appropriated the National Historian Office and historical means in general to legitimize its rule and elevate the position of the Nguyễn family in Vietnamese history.<sup>182</sup> The monarch indeed could take advantage of the means of history to legitimize and honor his rule. However, he might be well aware of the fact that to be recorded in history was to be subject to the critical judgment of not merely the historians but ultimately entire future generations.<sup>183</sup> This consciousness could constantly remind him to be considerate and responsible in his actions and hence be instrumental in preventing him from bad deeds. It is in this way that the historians could curb the arbitrariness of the imperial power.

Moreover, as the court historians were normally selected from the Confucian scholars who possessed a high level of probity, the ruler were not at ease to force them to distort the historical events according to his personal direction. The *Veritable Records of Đại Nam*, as its name indicates, recorded the true events. Consequently, to be legitimized and honored by history, the ruler had to act in a way that was consistent with the Confucian requirements of an ideal and legitimate king (such as, receiving the Mandate from the Heaven, being virtuous and talented, working for the happiness of the people, following the rule of *li*, employing wise and virtuous men and respecting their advice and criticisms) about which the court historians were

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182. Nguyễn, *supra* note 94, at 39.

183. Hahm, Confucian Constitutionalism, *supra* note 5, at 194.

educated prior to their appointment to the National Historian Office. Therefore, to be praised by history, the ruler was expected to limit his wrongdoings and govern the kingdom in the way that could provide meaningful standards and lessons for later governors. History and the historians could hence become the special means to rectify the use of imperial power.

### C. *Assessment*

In the Marxist assessment of Vietnamese historical scholars, the Nguyễn dynasty was for many years viewed with aversion. Particularly, in a quite formal textbook on Vietnamese history published in 1971, the Nguyễn dynasty was denounced as an “extremely reactionary despotic monarchy.”<sup>184</sup> The antipathy is partially because, different from the Lê and Tây Sơn predecessors, the Nguyễn dynasty was founded not by resistance against external invasion but by internal struggle and more seriously because it failed to protect the national independence from French invasion.<sup>185</sup>

However, recently, a new trend of reappraisal of the Nguyễn dynasty has emerged among Hanoi historians.<sup>186</sup> To illustrate, in a conference on the Nguyễn dynasty convened in October 2008, the widely shared conclusion was that it is time to replace the biased denouncements in the past with more impartial re-assessments of the failures and achievements of the dynasty, which is necessary not only for scholarly understanding but also for public conscience. From that perspective, various contributions of the Nguyễn dynasty have been recognized, such as consolidation of the national unity by completely putting an end to the North-South partition, extension of the territory to the Mekong Delta, and developments of culture, literature, and history.<sup>187</sup>

As far as the government is concerned, it is believed that although the Nguyễn dynasty practiced a despotic monarchy, its national governance was progressive, and its institutional arrangement and process for the operation of the state apparatus were well disposed.<sup>188</sup> From the historical point of view, some rare Vietnamese historical scholars have begun to discuss the attenuation of Nguyễn’s totalitarianism.<sup>189</sup> However, such rare discussions

184. COMMITTEE OF SOCIAL SCIENCES, 1 *Lịch Sử Việt Nam* [HISTORY OF VIETNAM] 369 (1971).

185. *Id.* at 369-86.

186. *Lịch Sử Nhà Nguyễn- Một Cách Tiếp Cận Mới* [HISTORY OF THE NGUYỄN DYNASTY- A NEW PERSPECTIVE] (Phan Ngọc Liên, ed., 2011).

187. Phan Huy Lê, *Chúa Nguyễn và Vương Triều Nguyễn trong Lịch sử Việt Nam từ Thế kỷ 16 đến Thế kỷ 19* [Nguyễn Lords and Nguyễn Dynasty in History of Vietnam from 16<sup>th</sup> Century to 19<sup>th</sup> Century] 11 INFORMATION OF SOCIAL SCIENCES 4-5 (2008).

188. *Id.* at 5.

189. Đỗ Bang, *Triều Nguyễn: Thiết chế Tập quyền và Các Chế tài Điều tiết Cục quyền* [The

focus mainly on the institutions that could control the administrative bodies and fail to discover the norms and the institutions that could potentially restrain the power of the ruler. Therefore, the conventional view of the Nguyễn dynasty as a highly despotic government remains unchanged.

In my point of view, it is unsatisfactory to identify the dynasty as the “extremely despotic monarchy” firstly because the ruler was subject to numerous constitutional norms: the models of ancient kings, the political norms in the classics, the ancestral precedents, and the institutions of the precedent dynasties. One may reject that argument by stating that any polity has a set of constitutive norms as fundamental principles by which it is organized, and the Confucian polity is not an exceptional case. To be sure, constitutionalism is not merely about the norms by which the state is organized but is about the norms the state *ought* to be organized. On that ground, one may question whether the Confucian norms mentioned above are qualified to be called “constitutional.” To a certain extent, we can assert that they are “constitutional,” because they are normative limitations of the royal power. As the embodiments of the tradition, they subjectified the ruler to the universal moral and political truths and the shared values and beliefs of the community generally accepted from generation to generation and hence presenting the social consensus. When the Confucian polity is instilled with these traditional norms, the popular will, rather the ruler’s individual will, controls the polity. As the Confucian traditional norms presented the social *concordia* and limited the imposition or dictation of the governmental discretions, they are the “oughtto be” norms and hence constitutionally meaningful to a certain degree.

Those who deny some constitutional practices of the Nguyễn dynasty may also argue that the dynasty lacks effective institutional mechanisms to enforce the Confucian norms in case the ruler chose to infringe them. It is true that the Nguyễn dynasty as well as other dynasties in imperial history of East Asia did not have effective institutions of constitutional enforcements, like modern constitutional courts. However, as mentioned above, in the Nguyễn government, there were multiple structural institutions designed for the wise and virtuous scholars to participate in the imperial government to deliberate national affairs and to restrain the ruler’s power in accordance with the traditional norms by various means, namely, remonstrance, teaching, and praise-and-censure. Without such complex institutional arrangements, the arbitrary power could be controlled and the constitutional norms could be put into practice to a certain degree. Particularly, the willingness and the audacity of the scholar-officials and even of the

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*Nguyễn Dynasty: Institutions for Concentration of Power and Institutions for Attenuating Totalitarianism*], 1 J. HISTORICAL STUD. 42 (2007); see also Vũ, *supra* note 128, at 99.

commoners to criticize the emperor were useful for enforcing the constitutional norms.

However, I am not idealistic to believe that the institutional enforcement of the Confucian norms was perfectly effective. In fact, in the Nguyễn dynasty, the norms and the institutions failed to control the emperor in many cases. This is because the institutions which had the potentials of restraining the ruler's actions in accordance with the constitutional norms lacked necessary independence. They were merely the institutions of the imperial government whose members were appointed by the ruler. This constricted their effectiveness in restraining the ruler.<sup>190</sup> The followings are among many stories showing the failure of the norms and the institutions in controlling the arbitrary practice of the imperial power.

First is the case of the construction of Tự Đức's Imperial Mausoleum. Tự Đức constructed the Mausoleum when he was alive. In the statement about the Mausoleum, Tự Đức himself revealed the rejection of the "heaven" and the people of that highly costly project: "Since the Mausoleum has been built, lightning struck the *Hòa khiêm* palace, people rebelled, and deceived people invaded the doors of the palace. As the heaven has blamed and the people has resented, how can I do not dare to respect?"<sup>191</sup> Notwithstanding that, the construction of the Mausoleum was finished at the cost of the people's live. These Vietnamese folk verses remain until today: "*Vạn Niên*"<sup>192</sup> là *Vạn Niên* nào! Thành xây xương lính, hào đào máu dân." ("Alas the *Vạn Niên*! Alas the *Vạn Niên*! Its walls are built by the soldier's bones, and its trenches are dug by people's bloods.") Tự Đức's construction of his own mausoleum infringed the norms *kính thiên* (respecting the Heaven) and *ái dân* (loving the people).

Another case is related to fate of a scholar-official serving in the institution of imperial lecture (*Viện Tập hiền*) named Phạm Phú Thứ, who is still popularly known in Vietnam today. He was a doctorate and appointed as a member of the *Viện Tập hiền* in the second year of Tự Đức's reign (1849) to give lectures to the emperor. It is said that, as a junior emperor, Tự Đức indulged in pleasures and neglected national affairs. One year after his appointment (1850), Phạm Phú Thứ submitted a remonstrant statement against the emperor. In response, the emperor dismissed and imprisoned him.

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190. This is similar to the fate of modern constitutional review bodies in the nations where the presidents can control them, for example, the constitutional councils in Mauritania and Senegal. Sherif Ayoub and Anton P. Jongeneel, *Failures and Prospects: Four Eras of Constitutionalism in Mauritania* 20 (Columbia Law School, Public Law & Legal Theory Research Paper Series, 2006); Landry Signé, *Strangling Democracy in Senegal*, N.Y. TIMES, Feb. 24, 2012, <http://www.nytimes.com/2012/02/25/opinion/strangling-democracy-in-senegal.html>.

191. Cited in Trần, *supra* note 31, at 282-83.

192. *Vạn Niên* is the first name of the Mausoleum. The name is later changed to *Khiêm Cung* and finally to *Khiêm Lăng*.



Fortunately, thanks to the advices of the queen mother Từ Dũ, the emperor recalled him to the palace and appointed him to hold new position. Although Phạm Phú Thứ was reappointed, the story indicates that the scholar-officials in some cases failed to practice their remonstrant power.

Let us consider another case pertaining Minh Mệnh. Although he is more positively evaluated by the Vietnamese historical scholars among the early emperors of the Nguyễn dynasty, the following case shows his disregard of upright remonstrances. In 1831, Minh Mệnh took a journey to Ngũ Hành Sơn- a famous tourist site of Quảng Nam province. The emperor had visited this place in 1825 and 1827 but in 1831, while the province was suffering from serious drought which caused lean harvest for four suburban districts, he decided to have a trip to the place again. Many ministers admonished his tourist plan but the emperor ignored their voices. Phan Thanh Giản, a mandarin of Quảng Nam province, was in charge of receiving the emperor, but he also remonstrated against the tour and unfortunately was demoted for that action. The tour eventually did happen.<sup>193</sup>

When the emperor was on the road to return, a poor student stopped the emperor's palanquin and proposed a long impeachment of the emperor's trip. Invoking the models of the ancient kings and the Confucian classics, the student stated:

Whenever your Majesty takes long-day trip, this costs greatly, not to account for the burdensome and the annoyance of the people. Today, your Majesty has again visited Quang Nam, and the great ministers and other mandarins have remonstrated against this. Although I am an alone and mediocre inferior, I candidly submit to your Majesty some words. If your Majesty happens to be vexed and upset because of this, your Majesty forgets the Yu dynasty's mirror of listening to criticism of king's mistakes. In contrast, if your Majesty happens to be considerate and to treat the people as the most important element,<sup>194</sup> this will be the base of the dynasty. In this case, the lord is nothing more than a boat and the people are nothing more than water. It is only said that water sustains the boat; never is it said that the boat sustains water.<sup>195</sup> I dare to demand

193. *Cuộc Tuần du Ngũ Hành Sơn của Vua Minh Mạng năm 1831 và Bản Điều trần của Người Học trò Huyện Duy Xuyên* [Minh Mạng's Journey to Ngũ Hành Sơn in 1831 and the Petition of a Student at Suburban District Duy Xuyên], DANANG PORTAL (Nov. 29, 2012), [http://www.danangcity.gov.vn/portal/page/portal/danang/chinhquyen/gioi\\_thieu/nhung\\_moc\\_son\\_lich\\_su?p\\_pers\\_id=&p\\_folder\\_id=29377555&p\\_main\\_news\\_id=30096069&p\\_year\\_sel=](http://www.danangcity.gov.vn/portal/page/portal/danang/chinhquyen/gioi_thieu/nhung_moc_son_lich_su?p_pers_id=&p_folder_id=29377555&p_main_news_id=30096069&p_year_sel=).

194. This is a reminding of Mencius' famous statement: "the people are the most important element in a nation; the spirits of the land and grain are the next; the sovereign is the lightest." See JAMES LEGGE, 2 THE CHINESE CLASSICS WITH A TRANSLATIONS, CRITICAL AND EXEGETICAL NOTES, PROLEGOMENA, AND COPIOUS INDEXES - THE WORKS OF MENCIOUS 483 (1960).

195. This famous simile can be found in the *Works of Xunzi*. It is on record in the *Works of Xunzi*

your Majesty not to disdain my stupid ideas in this suggestion and aspire you to practice them. In case you disdain and ignore my ideas and incriminate me because of the offense against the sovereign, I am ready to suffer the penalty without any regret.<sup>196</sup>

It is said that the audacious student was immediately arrested and punished with the dead penalty, but some officials suggested the emperor let him live under surveillance by the court. The actual fate of the student is unclear.<sup>197</sup>

The above stories suggest that it is idealistic to state that the Confucian norms and institutions effectively controlled the ruler like those of a mature constitutional government in modern times. At the same time, it is also misleading to believe that the norms and the institutions had no real effects on the ruler and hence there was nothing which can be called “constitutional” in the Nguyễn dynasty. In fact, the political norms and the institutions could restrain the arbitrary power to a certain extent in other cases.

To illustrate, consider how the norms *kính thiên* (*respecting the Heaven*) and *ái dân* (*loving the people*) could meaningfully control the actions of Minh Mệnh. The chapter entitled *kính thiên* in the *Minh Mệnh's Principal Policies* records such abnormal phenomena as droughts, inundations, epidemics, and earthquakes and the emperor's attitude and corresponding policies. It indicates that the emperor often acknowledged that these were because of his imperfect governance and conducts, and this actually led to his further self-cultivation of his personal morality and his amelioration of the public policies, especially the criminal policies.<sup>198</sup> In addition, the *Minh Mệnh's Principal Policies* records numerous policies which Minh Mệnh introduced to practice the Confucian requirements of *minben* governance. For the livelihood of the people, Minh Mệnh reduced taxes, punished criminal slightly, distributed rice to the poor, provided rice, medicines and

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9.4 that: “A tradition says: the lord is the boat; his subject the water. It is the water that sustains the boat, and it is the water that capsizes the boat.” See JOHN KNOBLOCK, 2 XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS 97 (1994). In another book of the *Works of Xunzi*, 31.4, Confucius is reported to respond to Duke Ai by recalling the king to the metaphor with the beginning “I have heard that.” JOHN KNOBLOCK, 3 XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS 262 (1994). The classical locus of the simile belies the people that the saying belongs to Xunzi. In fact, the words “a tradition says” in the 9.4 and Confucius’ words “I have heard that” in the 31.4 indicate that the statement is the traditional expression of the ancient Chinese people’s conventional credence in the significant role of the people vis-à-vis the government.

196. The story is recalled according to a letter by the bishop Taberd of South Vietnam from 1830 to 1940, cited in *supra* note 193.

197. *Id.*

198. HISTORIAN OFFICE, VOLUME 1, *supra* note 69, at 23-50. (Book 1, First Chapter- Respecting the Heaven).

financial aids to the victims of catastrophes, and the likes.<sup>199</sup> With regard to the officialdom, he employed the talented and virtuous and punished corrupt mandarins.<sup>200</sup> Concerning his own works, he was highly diligent in his businesses.<sup>201</sup>

Apart from that, there were cases suggesting that the emperor really respected the remonstrance of the scholar-officials. TỰ ĐỨC can be considered again. Nguyễn Đắc Xuân, the most well-known specialist in the Nguyễn dynasty and past Huế in Vietnam, stated that although the construction and expenditure under the rule of TỰ ĐỨC were highly costly, he was not a despotic ruler.<sup>202</sup> During his reign, many scholar-officials remonstrated against him, and in many cases, the emperor actually showed consideration for the upright words. The following are some examples.

Mandarins Trương Đăng Quế, Nguyễn Tri Phương, Lâm Gia Thiệp, Nguyễn Đăng Giai, and Phan Thanh Giản concurrently submitted a report to TỰ ĐỨC to criticize themselves but implicitly criticized the emperor. They said in the report:

We hold key political positions. The one who is responsible for the employment affair is not selective enough to create a transparent mandarinat and hence the talented and the incompetent cannot be distinguished. The one who is responsible for finance and tax do not often clarify the profits and hence the corrupted has not all been penalized. While the deities demand candour, the one who is responsible for the state's rites is not respectful enough. While no one among the people do not want leisure, the one who is responsible for the military affairs do not know how to love the arduous people. The one who is responsible for criminal affairs is not upright and hence there are many unjust cases . . . We do not know what to do. We request you to interrogate our unfulfillment of the responsibilities.

It is recorded that TỰ ĐỨC examined the report and also self-realized his mistakes.<sup>203</sup>

More direct criticism of the emperor and the court is the case of Trương Quốc Dụng, a doctorate who is famous for his upright personality and his erudition. He passed through many positions in the imperial government,

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199. *Id.* at 231-347. (Books 6 and 7- Loving People).

200. *Id.* at 147-64. (Book 4- Seeking the Talent).

201. *Id.* at 205-31. (Book 5- Being Diligent in Political Affairs).

202. NGUYỄN ĐẮC XUÂN, 2 NGHIÊN CỨU TRIỀU NGUYỄN VÀ HUẾ XƯA [STUDIES OF NGUYỄN DYNASTY AND PAST HUẾ] 221 (2012).

203. NGUYỄN DYNASTY'S NATIONAL HISTORIAN OFFICE, 27 ĐẠI NAM THỪC LỤC CHÍNH BIÊN [VERITABLE RECORDS OF ĐẠI NAM] 113-14 (Institute of Historical Studies trans., 1970).

including serving as the head of the National Historian Office.<sup>204</sup> In 1848, when Tự Đức had just acceded to the throne, Trương Quốc Dụng submitted a letter to the emperor to criticize the affairs of the court, stating that the court's expenditures were lavish, trials of crimes were arbitrary and lacking of respecting the laws, the appointments of mandarins were not selective, administrative procedures were complicated, and taxes were high. He then suggested corresponding remedies. After reading the letter, Tự Đức requested the Council of Courtiers to examine the problems and implement the suggested remedies.<sup>205</sup>

Another case concerning Thân Văn Nhiếp should be recalled. He was a doctorate, who also passed through many positions in the imperial government and is famous for his probity talks.<sup>206</sup> In 1866, he submitted a petition to Tự Đức to criticize his luxurious life, saying that: "Reigning in the precious nine-storey palace, think about the destroyed houses of the Southern people. Viewing the beautiful storey of the mausoleum, think about the graves on field's mounds of the Southern people. Seizing sapphires, think about the empty of productions in the South." The emperor responded that the statements were "plain but pressing" and requested the Council of Courtiers and the Privy Council to consider the possible implementation of the proper suggestions.<sup>207</sup> As the situation was not considerably ameliorated, in 1868, Thân Văn Nhiếp proposed the second petition to Tự Đức, particularly rebuking his construction of the imperial mausoleum. In the conclusion, he stated: "As your Majesty possesses the nation but does not regret it, I do not regret my head. I have made petitions for many times, but the problems have not been handled. Now I offend the taboos again I am ready for death." The emperor replied that: "the things you rebuke are my faults."<sup>208</sup>

The above stories suggest that, despite the obvious limitations, the effectiveness of the Confucian norms and institutions could be achieved to a certain degree. How can we explain this relative effectiveness? In this regard, one should be mindful of the fact that constitutionalism cannot be reduced to the independent institutions of constitutional enforcement, like the constitutional courts. Rather, as Grey has pointed out, constitutional norms can be implemented by general social acceptance. In the case of the Nguyễn dynasty and generally in Confucian polities, the enforcement of the Confucian norms could be underpinned by a special power, namely, the

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204. NGUYỄN ĐẮC XUÂN, 1 NGHIÊN CỨU TRIỀU NGUYỄN VÀ HUẾ XƯA [STUDIES OF NGUYỄN DYNASTY AND PAST HUẾ] 303 (2011).

205. *Id.* at 59-63.

206. NGUYỄN, *supra* note 202, at 218.

207. NGUYỄN DYNASTY'S NATIONAL HISTORIAN OFFICE, 31 ĐẠI NAM THỰC LỤC CHÍNH BIÊN [VERITABLE RECORDS OF ĐẠI NAM] 83-84 (Institute of Historical Studies trans., 1970).

208. *Id.* at 244-46.

power of tradition.

The Confucian norms were the embodiments of reasonable principles authenticated in the tradition, which presented the social consensus and conditioned the activities of the ruling class. The continuation of the traditional norms could stabilize the dynasty while the discountinuation of them might result in social chaos. As the Confucian norms and the institutions were firmly established in the past as socially accepted in general, the ruler was not at ease to repudiate them without risking ruin of his reign. Although there were no independent institutions to protect the scholar-officials from the ruler's chastisement, it was the power of tradition that could regularly compel the ruler to follow the established norms and the advices, teachings, and frank remonstrance of the scholar-officials as a cultural political behavior.

Therefore, we cannot invoke the fact that the Confucian regime lacks independent and effective constitutional enforcement institutions to negate some of its constitutional practices. It is the power of the tradition and the political culture that could guarantee the implementation of the constitutional norms, although this model of guarantee was not always effective. This is more justifiable if we take into account the fact that even in modern mature constitutional governments, constitutional enforcement does not exclusively rely on the independent bodies of judicial review; rather it also depends on tradition and political culture.<sup>209</sup>

With the above material, I suggest that the early Nguyễn dynasty should be identified as, rather than a pure despotism, a government of a complex nexus of both despotic practices and constitutionalist practices.

#### IV. CONCLUSION

The present paper has examined the practice of Confucian constitutionalism in imperial Vietnam with the case of the early Nguyễn dynasty. The investigation has revealed numerous norms as the embodiment of *li* used to rectify the royal authority, namely the models of ancient kings, the political norms in the classics, the ancestral precedents, and the institutions of the precedent dynasties. In addition, the paper has also discovered structuralized forums enabling the scholar-officials to use the norms to rectify the royal power, including the royal examination system, the deliberative institutions (the Council of Courtiers and the Privy Council), the education institution (the imperial lecture), the remonstrative institution (the Censorate), and the historical institution (the National Historian Office). The

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209. For example, the implementation of constitutionalism in the United Kingdom largely depends on the power of tradition rather than the independent judiciary.

paper has also suggested that the early Nguyễn dynasty should be identified as a government of a complex nexus of both despotic practices and constitutionalist practices. I conclude this paper with the following implications.

First, as far as Vietnam is concerned, the orthodox understanding of the imperial government in this nation should be re-orientated. “Oriental despotism” has remained the popular lens for the scholarly understanding of the imperial government in Vietnamese history. The present chapter has revealed various constitutional norms and structuralized institutions, which could restrain the royal authority, although they were not perfectly effective. This discovery is important not only for our better understanding of the government and the law in imperial Vietnam but also for the development of constitutional government in contemporary Vietnam. The availability of the constitutional norms and institutions in the tradition is the cultural foundations for the promotion of modern constitutionalism in the present-day Vietnam. Or, in a less positive scenario, the cultural traditions cannot be imputed as the impediments of the development of modern constitutional government in contemporary Vietnam.

Second, the factual material concerning the Vietnamese experiences can hopefully be used for further study of the practice of Confucian constitutionalism in East Asia and further revision of the “Oriental despotism”-based-understanding of imperial polity in the region.

Third, the findings in this paper may also be useful for a more general reflection on pre-modern constitutionalism. Western constitutional scholars did recognize the existence of pre-modern constitutionalism in the general sense. Constitutionalism has been achieved vividly in the modern age, but its practices and ideas are traceable to pre-modern time.<sup>210</sup> However, with a few exceptions,<sup>211</sup> western constitutional historians tend to ignore the Eastern experiences of pre-modern constitutionalism. The Vietnamese experiences discovered in this study together with the Chinese and Korean experiences elaborated by other scholars elsewhere may provide a correction to that trend. In addition, while western constitutional historians point out the limitations of pre-modern constitutionalism, they fail to honor its merits which may be even more meaningful to reflect on modern constitutionalism.

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210. Graham Walker, *The Idea of Nonliberal Constitutionalism*, in *ETHNICITY AND GROUP RIGHTS: NOMOS XXXIX* 154 (Ian Shapiro & Will Kymlicka eds., 1997); SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* (1999); BEAU BRESLIN, *THE COMMUNITARIAN CONSTITUTION* (2004); CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (2005).

211. See, e.g., Tom Ginsburg, *Constitutionalism – East Asian Antecedents*, 88 *CHI.-KENT L. REV.* 11 (2012).

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## 帝制越南的儒家憲政主義

Bui Ngoc Son

### 摘 要

近來主宰傳統對東亞帝制政府觀點的「東方專制主義」已經被「儒家憲政主義」的學術研究所挑戰。為了展示我們對於儒家憲政主義展現在不同儒家地區的全面探索，本論文將以帝制越南作為個案，並聚焦在阮朝初葉之上。本研究揭示許多體現儒家「禮」精神的憲政規範，亦即先王的典範、儒家經典中的政治規範、祖傳的先例與先朝的制度被用以限縮皇室權力。此外，本論文發現結構化的論壇，包括科舉制度、審議機構、教育機構、諫官制度與史官制度，讓學而優則仕的官員可以運用這些規範來限制皇權。在實踐的面向上，本論文指出這些規範與制度在控制統治者方面，因為缺乏必要的機關獨立性而產生的限制。同時本文亦認為這些規範與制度的相對有效性可被達成，要歸功於傳統的力量。本研究最後指出幾點涵意：首先，傳統憲政規範與體制的可及性是在當代越南推廣現代憲政主義的文化基礎。再者，越南經驗的史實材料有希望用以更進一步研究儒家憲政主義在東亞的實踐，與修正對本區域以「東方專制主義」作為帝制政體基礎的理解。第三，這些發現也對前現代憲政主義作一更普遍的反思有所助益。

**關鍵詞：**儒家、憲政主義、儒家憲政主義、越南