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# **The Role of Vietnamese Government in Legislation – in Comparison with Japan**

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Vietnam



# THE ROLE OF VIETNAMESE GOVERNMENT IN LEGISLATION

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## IN COMPARISON WITH JAPAN

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## Abstract

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Since Doimoi was introduced in 1986, Vietnam has made a great effort in building comprehensive legal frameworks to support socio-economic aspects as well as to move towards a rule of law state. However, low quality of current legal system is one of the main obstacles to prevent Vietnam from achieving development targets. Although legislative power is vested to the National Assembly but Government had played important role in legislation. Delegated legislation is carried out as alternative solution for solving the burden on legislature as well as for responding quickly to the changes of economy and society. However, this practice also cause many problems of legal system such as contradictory, overlap, and inconsistency which have raised challenges to Vietnam in process of implementing legislative reform. The problem is that theories and principles of delegated legislation are still under debated. How to improve the quality of legal system in order to become more transparent, coherent, understandable, and enforceable is remaining as a significant question for Vietnam when an effective channel for reviewing constitutionality and legality of legal normative documents has not yet established. This paper aims at studying the role of Vietnamese government in legislation based on Japanese's experiences in order to identify possible solutions for Vietnam to improve the quality of legal system responding to requirements of rule of law state.

## Introduction

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Since establishment in 1945 and especially since become independent country in 1975, the modern constitutions of Vietnam such as 1980 and 1992 had followed the socialist modern as the former Soviet Union, therefore the separation of state power principle was not adopted. Instead of that, the *democratic centralism* principle was introduced as a fundamental principle for organization and operation of state organs. In addition, a single party policy also refers to the leading role of party in all aspect of society, especially in legislative aspect. Therefore, legal system of Vietnam is also influent by this principle. Although separation of state power has not regconized yet but legislative, executive and judicial powers have been carried out by the specific state agencies without checks and balances principle. In other words, there is unclear distribution of these functions among state organs of Vietnam. Government has played important role in legislation whereas the theories and principles of delegated legislation is still under debated.

Recently, the 2013 Constitution of Vietnam provides that: “The National Assembly is the highest representative organ of the people and the highest organ of State power of the Socialist Republic of Vietnam. The National Assembly exercises constitutional and legislative powers, decides significant national affairs, and exercise supreme control over all activities of the State” (Article 69). This provision indicates that the legislative power is vested to National Assembly and only National Assembly holds power to promulgate Constitution and Law. In addition, Article 96 provides that Government holds power to propose draft laws to the National Assembly and to propose draft ordinances to the Standing Committee of National Assembly. In addition, “the Government, the Prime Minister, Ministers and heads of organs of ministerial rank shall issue legal documents to exercise their duties and authorities, review the implementation of these documents, and handle illegal documents in concordance with the law” (Article 100). These regulations indicate delegated legislation with or without any limitation are essential to examine.

It cannot deny that delegated legislation is solution adopted by many contries in order to handle with the burden on legislature as well as to ensure legal system responds quickly to the changes of socio-economy, especially in open-market economy. Therefore, Government had played a vital role in legislative processes in Government not only proposes many drafted laws but also issues legal documents such as Decrees and

Circular to support implementation of Law. Consequently, regulations issued by government ministries are the main part of the source of law. However, confliction, inconsistency and instability are common issues of legal system in Vietnam. Although Vietnam had made a significant progress in reforming legal system through introducing the Law on Promulgation of Legal Normative Document (Law on Laws)<sup>1</sup> which provides procedures, forms and competence of legislation; however, it could not handle with current problems of legal system. Yet, the quantity of legal regulations in Vietnam has increased significantly as a ‘forest of laws’ whereas the quality has not yet improved relatively. Especially, the shortcoming of legal frameworks to support for socio- economic aspects of the shift from central planned economy to the opened market socialist oriented economy is still unstable which causes many difficulties for business sectors and foreign investment projects to develop their business in Vietnam.

This practice indicates that both executive and legislative organs take part in law-making processes in which executive organs propose a greater part of laws and control the legislative process. Government is considered that has more discretion in legislation due to the lack of specific and concrete delegation of legislative powers. In addition, Vietnam still lacks of an effective channel to review constitutionality and legality of legal normative documents. Consequently, legal system of Vietnam is inconsistent, ineffective and often contradictory.

With commitment to build up a rule of law state, Vietnam amended the 1992 Constitution in 2013. The new Constitution requires government to reviewing and amending all related legal documents in order to ensure that the legal system become more consistent, coherent and comprehensive. To do that, Vietnam is planning to revise the Law on Laws 2008 in 2015 as a key factor for improving the quality of legal system. Hence, the theories delegated legislation and the role of government in legislation are worth to study adequately in order to answer the question how to improve the quality of legal system in Vietnam.

This paper aims at studying the role of government in legislative process in order to identify what are the major problems in the law-making process, and the limitation in performing delegation of legislative powers in current practice of Vietnam. This paper also aims at answering the question that whether legislative power

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<sup>1</sup> The Law on Laws was adopted first time since 1996, revised in 2002 and finally replaced by the Law on Laws 2008.

should be delegated strictly to government in Vietnam. The first section will focus on analyzing the concepts of delegated legislation based on specific socio-political conditions of Vietnam. The second section will examine the current practice of law-making process in Vietnam based on both legislation and practices. In comparative study with Japan in legislative processes, especially the role of government in law-making processes, the third section will propose some recommendation for improving the quality of legal regulations in Vietnam in order to ensure that legal system of Vietnam will become more consistent, effective and comprehensive.

## I. Delegated legislation and the legal system in Vietnam

### **A. Why delegated legislation is needed?**

In the modern state which introduces the separation of power needs to make clear distinction among legislative, executive and judicial power. In other words, principle of separation of powers indicates the division of functions that appropriate to each branch of state organs and the boundary line clarifying of these three functions from the other. As Hiroshi described about spereation of state power as follows:

“Under the separation of powers, the legislative power includes the power, through enactment of laws, to specify the ends and means of public policy, but does not include executive power to administer and enforce those laws or the judicial power to resolve cases arising under them.”<sup>2</sup>

Legislative power must be separated from executive and judicial power in order to ensure that all government’s actions bound by laws. In general, a modern country often divides these powers to three separated state organs which namely Diet/Parliament, Cabinet/Government and Supreme Court. The problem is that how to interpete the concept of legislative power if constitution defines that legislative power is vested to Diet/Parliament. Legislative power refers to general norms as the promulgation of Constitution and Laws.<sup>3</sup> If legislative power is understood that only Diet/Parliament holds law-making power, then legislative works must be carried out by the Partliament itself or its experts. Then, executive organ cannot invole in law-making process because that is against the saparation of power.<sup>4</sup> However, Diet/Parliament cannot itself create a legal system comprehensively; hence, delegated legislation is considered as alternative solution for reducing the burden on legislation of the legislature. In other words, there is no pure separation of powers because executive organs have to involve in legislation in order to meet demands of society management as Carl remarked:

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<sup>2</sup> Hiroshi Itoh, *The Supreme Court and Benign Elite Democracy in Japan* (Ashgate Publishing, Ltd., 2010), pp138.

<sup>3</sup> Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd., 2009), 255.

<sup>4</sup> Shuichi Sugai and Itsuo Sonobe, *Administrative Law in Japan* (Kyosei, 1999), 64.

“Although it is recognized that a “pure” separation of power cannot exist in parliamentary democracy Japanese scholars maintain that a “practical doctrine of separation of powers exist”. In fact, however, most legislation passed by Japanese Diet is legislation that has its genesis in a Cabinet bill”.<sup>5</sup>

In fact, the legislative organ often faces with difficulties due to the lack of capacity, professional knowledge in order to make laws; therefore it must delegate legislative power to the executive or judiciary as an alternative solution.<sup>6</sup> In principle, a country often divides these three functions as follows: the legislative power is vested to the Diet or Parliament; the Government or Public Administrative organs hold the executive power; and the Supreme Court and the lower courts carried out the judicial power. However, these organs do not only carry out these functions separately because they also contribute important role in legislation. In current practice, delegated legislation is adopted by many countries and has changed the traditional role of legislative bodies. The fact indicates that the real role of law-making process depends on political tradition and form of government.<sup>7</sup> For example, in some country, executive organs play important role in legislation by proposing drafted law and judicial organs are responsible for interpretation of laws.

In general, there are two types of delegated legislation: normal and exceptional as follows:<sup>8</sup>

The former is marked by two characteristics: first, its limits are clearly enforceable by the judiciary; and secondly, it does not delegate power to legislate on matters of principle or to impose taxation. The exceptional type of delegated legislative powers is:

- a) To legislate on matters of principles, and even to impose taxation;
- b) To amend Acts of Parliament; either the Act by which the powers are delegated or other Acts;
- c) Conferring so wide a discretion on a minister, that it is almost impossible to know what limit parliament did intend to impose; and
- d) Abandoning limits of delegated powers not formally, yet actually by forbidding control by the courts of law.

As Hiroshi Oda explains the reason of delegated legislation because legislature is not able to regulate the matters which relate to technical expertise or need to be adapted quickly to the changes of society.<sup>9</sup> Yet, delegated legislation is different from country to country depending on specific socio-political conditions.

Constitution of a country defines directly or indirectly delegated legislation, and with or without any limitation.

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<sup>5</sup> Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis* (Kluwer Law International, 2003), 36.

<sup>6</sup> Itoh, *The Supreme Court and Benign Elite Democracy in Japan*, pp 125,126.

<sup>7</sup> I.Bogdanovskaia, “The Legislative Bodies in The Law-Making Process” n.d., [www.nato.int/acad/fellow/97-99/bogdanovskaia.pdf](http://www.nato.int/acad/fellow/97-99/bogdanovskaia.pdf).

<sup>8</sup> Rumki Basu, *Public Administration: Concepts And Theories* (Sterling Publishers Pvt. Ltd, 2004), 345, 346.

<sup>9</sup> Hiroshi Oda, *Japanese Law*, 3 edition (Oxford England ; New York: Oxford University Press, USA, 2011), 47.

Constitution of many countries defines that Parliament can delegate the legislative power to the Government through providing that Government holds power to submit a bill. Although Constitution does not provide clearly for delegation of legislative power to the Cabinet but delegation also refers to power of issuing cabinet orders, ministerial ordinances, and other administrative rules.<sup>10</sup>

The Constitution of Japan also provides principle of separation of powers and each belongs to the different organs called Diet, Cabinet and Supreme Court and other courts.<sup>11</sup> However, there is also no pure of separation of state power. In Japan, as other parliamentary democracies, ministries and administrative organs of Japan play a vital role in legislation.<sup>12</sup> Therefore, legal system of Japan does not include only Constitution and Law. In addition to legal document adopted by Diet such as Code and statutes, legal system of Japan also includes rules issued by Cabinet and Ministries, rules of House of Representative or House of Councillors, and rules of Supreme Court.<sup>13</sup> These rules are also the sources of law in which cabinet's orders are issued orders (seirei) to provide detailed regulations or to handle with issues delegated by law in order to implement a Law (statute), and Ministry 's ordinances (furei or shorei) are regulated to detailed implement the Cabinet Order or Law under its jurisdiction.

Although Constitution does not define directly delegation of legislative power but legislative power is often delegated to orders of cabinet, ordinances of ministries and other administrative rules.<sup>14</sup> Article 73, Constitution provides that: "*The Cabinet, in addition to other general administrative functions, shall perform the following functions: Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law.*" In addition, the Cabinet Law also defines that: "*No provisions imposing obligations or restricting rights can be made in a Cabinet Order unless authorized by law*" (Article 11). Therefore, Cabinet's order may not include provisions which assign duties or restrict rights of individual/organization if the law does not delegate the

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<sup>10</sup> Ibid.

<sup>11</sup> Goodman, *The Rule of Law in Japan*, 36.

<sup>12</sup> "Role of Ministries and Agencies in the Legislative Process - Executive - Government - Japan - Asia," accessed April 28, 2014, [http://www.countriesquest.com/asia/japan/government/executive/role\\_of\\_ministries\\_and\\_agencies\\_in\\_the\\_legislative\\_process.htm](http://www.countriesquest.com/asia/japan/government/executive/role_of_ministries_and_agencies_in_the_legislative_process.htm).

<sup>13</sup> Dean, *Japanese Legal System* (Cavendish Publishing, 2002), 130.

<sup>14</sup> Oda, *Japanese Law*, 47.

power. In addition, the National Government Organization Law on also provides that: “*For the purpose of implementing any law or Cabinet Order or under special authorization by law or Cabinet Order, each Minister may issue ordinances of his respective office (ordinances of the Prime Minister's Office or ministerial ordinances) in respect of administrative affairs under his charge*” (Article 12, section 1). In general, Cabinet and Ministries hold power to promulgate orders and ordinances for implementing the law.

Significantly, delegation of legislative power in Japan is mentioned indirectly in Constitution as well as the Laws. Delegation of legislative power is not unlimited. Cabinet’s order cannot provide regulations related to penalties if the law does not allow government to do. Hence, constitutional review is adopted as essential mechanism when delegated legislation is adopted. In other words, if a country introduces delegated legislation, it is essential to review the constitutionality and legality of legal documents issued by the other state organs.

Although Vietnam introduces democratic centralism principle instead of separation of state power principle, but it is essential to divide state functions into three main areas such as legislative, executive and judicial functions. Constitution of Vietnam also defines that: National Assembly holds the constitutional and legislative power (Article 69). It is often interpreted that only National Assembly can promulgate the Constitution and Laws. Therefore, it is essential to examine the concept of delegated legislation in specific conditions of Vietnam. Related to this concept, Dr. Luong Minh Tuan mentions that: if legislative power is understood that only National Assembly holds power to promulgate and revise the Law, it will be quite narrow concept and very hard to explain the fact that other competent state agencies also hold power to issue legal normative documents (regulations).<sup>15</sup> Delegated legislation is also defined indirectly in Constitution 2013 of Vietnam such as Article 96 provides that Government holds power to propose draft laws (section 4); Article 100: “*The Government, the Prime Minister, ministers and heads of organs of ministerial rank shall issue legal documents to exercise their duties and authorities, review the implementation of these documents, and handle illegal documents in concordance with the law.*” These regulations indicate that Vietnam also applies delegation of legislative power.

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<sup>15</sup> TS. Luong Minh Tuan, “Cần Có Quy Định về Ủy Quyền Lập Pháp Trong Hiến Pháp,” *Trung Tâm Thông Tin, Thư Viện và Nghiên Cứu Khoa Học, Văn Phòng Quốc Hội*, n.d., [http://www.na.gov.vn/Sach\\_QH/Ban%20ve%20lap%20hien/Chuong2/12.htm](http://www.na.gov.vn/Sach_QH/Ban%20ve%20lap%20hien/Chuong2/12.htm).

However, the concept of delegation of legislative power under socio-political condition of Vietnam which had followed democratic centralism principle is different from the other country. In principle, National Assembly holds power to promulgate Constitutions, Laws and Ordinances. However, Laws and Ordinance of National Assembly only provide very general regulations. Therefore, Government is delegated power to interpret laws/ordinances. Law on Laws 2008 defines that: Government holds power to make Decree, Prime Minister has power to issue Administrative Decision, Organ of Ministerial level issue the Circular (Article 2, Law on Laws 2008). Therefore, Government and Ministries have carried out executive functions in principle but also holds power to issue legal documents. The problem is that how to determine power to issue legal documents of Government and Ministries is the implementation of executive power or legislative power when concept of delegated legislation has not yet mentioned clearly in context of Vietnam. Consequently, it is hard to make clear-cut between the laws and legal documents issued by executive organ if the hierarchy of legal system is not established.

In general, concept of delegated legislation is not determined clearly in Vietnam. Another concept as such “power to issue legal norms” (*quyen ban hanh van ban quy pham phap luat*) is often mentioned as the power of executive organs in implementing executive functions. However, “power to issue legal norms” may be considered as the delegated legislation if government/ministries issue legal norms for interpreting laws or dealing with the issues which are not yet regulated by laws. For example, Government in Vietnam holds power to issue Decree which provides specific administrative sanctions applied for administrative violation meanwhile regulations related to rights and obligations of citizens should be regulated by statute laws as principle of separation of state power. This practice indicates that Vietnamese government not only carry out executive function but also exercises delegated legislation in particularly. However, the problem is that there is a lack of line boundary between legislative and executive power in Vietnam. From legislative reform aspect, Vietnam needs to clarify whether Government and Ministries can implement the delegated legislative power unlimitedly.

To some extent, executive organs in many countries often involve in law-making process by drafting bills and submit to the Diet and Diet holds power to pass these bills. On the other hand, executive organs also issue legal norms in order to implement executive functions. The problem is that it is difficult to answer the question:

can executive organs has power to issue the legal norms which play a role as a law because there is no law provides about these issues, are there any limitation in implement this power in the current legal frameworks of Vietnam is also essential to examine.

Vietnam scholars often mention that the power to issue the legal norms of executive power is the power of making legal normative document (*quyen lap quy*) – as power of executive organ which is different from the power of making laws (*quyen lap phap*).<sup>16</sup> On the other hand, when government submit the draft –laws is considered that government takes part in law-making process. This case may be interpreted as delegated legislation (*uy quyen lap phap*) in Vietnam. In brief, government can take part in legislation by two ways: 1) draft the laws and submit to Diet; and 2) promulgate legal norms under jurisdiction as prescribed by laws. The first way refers to the delegation of legislative power in which government takes part in law-drafting as a demand from the executive needs or legislative organs face with difficulty in drafting the laws due to the lack of capacity, legislative techniques. The second way refers to power of executive organs in promulgating legal norms independently. This issue is still under debated that is the implementation of executive power or delegation of legislative power.

The problem is that it is very hard to define the case of implementing power to issue legal norms of executive organs is the implementation of delegated legislative power or executive power in current legislation practice of Vietnam. Delegated legislation in Vietnam has not yet defined clearly or studied adequately. There is no limitation in delegated legislation so Government and Ministries have more discretion in issuing Decrees and Circulars. For example Article 14 provides that: *Decrees issued by Government not only provide detail guidelines on the implementation of law and ordinance but also identify other important issues which are not mature enough to be developed into laws or ordinances to meet governance and socio-economic management requirements* (Law on Laws 2008). This regulation indicates that Government has power to issue legal normative documents without laws or ordinances. These decrees are often considered as **decree-laws** and play a vital role in source of laws in Vietnam. This regulation also indicates that there is no clear-cut determination

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<sup>16</sup> Tran Minh Huong (ed), *Textbook on Themes of Vietnamese Administrative Law* (Giao trinh Luat Hanh chinh Vietnam) 2013, chapter 6.

of powers to issue legal normative documents as government may have more discretion in legislation. Consequently, legal system of Vietnam could not meet the requirement of rule of law principle.

The problem is that how to control the executive organs in legislative processes because it is very difficult to determine the boundary line of legislative and executive power when introducing delegation of legislative power. Because legal norms issued by executive organs are also defined as a source of laws therefore the question remains as executive organs also exercise legislative power? There is unclear distribution between legislative and executive powers; as a result, government has played a vital role in legislation as well. As Montesquieu (*The Spirit of the Laws*) mentioned: “*When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.*” In other words, the rule of law principle will be violated if legislative and executive powers are not divided clearly. Rule of law requires government action is bound by laws. Therefore, when delegating legislative power to the executive organs, it will need a mechanism for ensuring that the legal norms issued by government comply with laws. In addition, the constitution also needs to set up line boundary of issuing legal norms by executive organs in order to ensure the supremacy of Constitution and Laws. It is essential to note that delegation of legislative power is not unlimited but must be specific and concrete for ensuring rule of law principle.

### **B. The legal system in Vietnam**

Rule of law state refers to the state management based on laws; therefore source of law is a key element of legal system of every country. In general, sources of laws may include such as: Constitution, Laws, Rules and Regulations enacted by the Cabinet, ministries, and agencies belonging to the executive branch; Rules enacted by the Supreme Court, concerning judicial procedures; International treaties; and Ordinances enacted by local governments. However, some countries also define judicial precedents as one part of source of laws.<sup>17</sup>

Every country has to start from building a comprehensive, coherent, transparent and enforceable legal system as the fundamental requirements of rule of law state. Therefore, law is a key factor for ensuring that all state organ’s activities bound by laws. However, law refers to various forms of legislation in written form because

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<sup>17</sup> I.Bogdanovskaia, “The Legislative Bodies in The Law-Making Process,” p?.

all three branches of state powers have participated in legislation.<sup>18</sup> For example, laws not only refer to Constitution, Law/Act but also include regulations issued by executive organs or judicial organs. Therefore, written laws include many types of legislation which are essential to establish hierarchal order for implementation. “Written laws form a hierarchy in accordance with their effect. The Constitution is the “Supreme Law of the nation”, next come statute laws enacted by the Diet, then cabinet orders, followed by ministerial ordinances”.<sup>19</sup> In principle, delegation of legislation requires all legal norms must comply with the laws of parliament and under jurisdiction as prescribed by laws, and the changes of laws of parliament will lead to the changes of related legal norms issued by Government or Judicial Organs.

In general, sources of law in Vietnam include all legal normative documents. Then, Law on Laws defines the concept of legal normative documents as follows:

And the concept of legal normative document is defined as follows:

*“Legal documents are documents issued or jointly issued by state agencies in accordance with the authority, formats, sequence of steps and procedures prescribed in this Law or the Law on the Promulgation of Legal Documents of People’s Councils and People’s Committees, which includes common rules of conducts, which has compulsory effectiveness and the implementation of which is guaranteed by the Government to regulate social relations” (Article 1).*

However, Vietnam also defines the hierarchical order of sources of law as follows: (Article 2, Law on Laws 2008)

1. Constitution, laws and resolutions of the National Assembly.
2. Ordinances and resolutions of the Standing Committee of the National Assembly.
3. Orders and decisions of the State President.
4. Decrees of the Government.
5. Decisions of the Prime Minister.
6. Resolutions of the Justices’ Council of the Supreme People’s Court and circulars of the Chief Justice of the Supreme People’s Court.
7. Circulars of the President of the Supreme People’s Procuracy.
8. Circulars of Ministers or Heads of Ministry-equivalent Agencies.
9. Decisions of the State Auditor General.
10. Joint resolutions of the Standing Committee of the National Assembly or the Government and the central offices of socio-political organizations.

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<sup>18</sup> Bui Thi Bich Lien, “Legal Interpretation and the Vietnamese Version of the Rule of Law,” *National Taiwan University Law Review* 6 (2009): 5, [http://www.law.ntu.edu.tw/ntulawreview/articles/6-1/11-Article-Bui%20Thi%20Bich%20Lien\\_p321-337.pdf](http://www.law.ntu.edu.tw/ntulawreview/articles/6-1/11-Article-Bui%20Thi%20Bich%20Lien_p321-337.pdf).

<sup>19</sup> Oda, *Japanese Law*, 35.

11. Joint circular of the Chief of Justice of the Supreme People's Court and the President of the Supreme People's Procuracy; those of Ministers or Heads of Ministry-equivalent Agencies and the Chief Justice of the Supreme People's Court, the President of the Supreme People's Procuracy; those of Ministers or Heads of Ministry-equivalent Agencies.
12. Legal documents of People's Councils and People's Committees.

According to this order, Constitution has the highest legal validity, and Law/Ordinance of National Assembly is the major part of the sources of law. *“Laws of the National Assembly shall address fundamental issues in the following fields: economics, society, national defence and security, finance, money, budget, tax, ethnicity, religion, culture, education, health, science and technology, environment, external relations, organization and functioning of the state apparatus, civil service, public officials and civil servants, rights and obligations of citizens”* (Article 11, section 3). However, a Law adopted by National Assembly is not able to implement without the guidelines on implementation issued by other competent state agencies. Consequently, legal system of Vietnam is quite complicated because it includes 12 types of statutory documents issued by different competent agencies. These types of documents are defined as the sources of law if the content of these documents include legal norms. The Law on Laws defines that:

*“Documents which are issued or jointly issued by state agencies but not in accordance with the authority, formats, sequence of steps and procedures prescribed in this Law or the Law on the Promulgation of Legal Documents of People's Councils and People's Committees are not legal documents”* (Article 1, section 2, Law on Laws 2008)

In reality, Decrees and Circulars are the most important part of legal system and have both positive and negative impact on social development. In general, government of Vietnam plays important role in legislative processes through the main areas as follows:

- Drafting the laws and ordinances;
- Providing guidelines on implementations of laws and ordinances;
- Provide specific actions to implement policies;
- Specify tasks, authority and organizational structures of Ministries and Ministerial level Agencies,
- Providing legal norms for applying the new issues which are not yet regulated by laws or ordinances (decree-laws). (Article 14, Law on Laws 2008).

In principle, legal normative documents issued by state agencies must be consistent with the Constitution, Laws, Ordinances and the other legal documents issued by higher state agencies. For example, legal normative documents issued by Ministry must comply with Constitution, Laws, Ordinances and Government's Decrees. This requirement refers to constitutionality and legality aspect of legal normative documents. However, the number of unconstitutional or illegal normative documents issued by executive organs remains very high. For example, around 50,000 legal normative documents issued by both central and local authorities were defined as unconstitutional and illegal by Ministry of Justice recently.<sup>20</sup> For example, Circular No 02 dated 13 January 2013 was defined as unconstitutional document by Legal Committee of National Assembly due to restrict the number of vehicles registration by individuals, this provision conflicts with property right of citizen guaranteed by Constitution.<sup>21</sup>

As Bui Thi Bich Lien illustrates about legal system in Vietnam when all three branches have involved in legislation as follows:

Although this system provides considerable flexibility for the state to use legislation to respond quickly to economic and social changes, it presents the inherent problem of a jungle of regulations, which is both inconsistent and fragmented. The National Assembly (NA) and its Standing Committee (SCNA), as the legislature, is authorized to promulgate Constitution, Laws and Ordinances. These documents are regarded as having the highest legal validity. Yet, they are often abstract (*luat khung* or 'framework' law) and thus require specific guidance for application. The Government and its various ministries then must issue inferior documents including Decrees and Circulars to support the implementation of such laws.<sup>22</sup>

In fact, legal system of Vietnam includes a lot of regulations issued by Government, Ministries, and other competent state agencies. However, there is no standard for distinction between legal norms issued by National Assembly with legal norms issued by executive organs in the case of Vietnam. From practical point of view, the competent organs or persons often follow the legal normative documents issued by executive organs rather than the laws issued by National Assembly because they consider that legal normative documents of government shall provide guidelines on implementation and they have to obey the guidelines. This practice

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<sup>20</sup> "50,000 Văn Bản Sai Quy Định Bị 'Tuýt Còi,'" accessed April 28, 2014, [http://hue.toaan.gov.vn/portal/page/portal/tandtc/ttsktand/307887?p\\_page\\_id=1752606&pers\\_id=1751929&folder\\_id=&item\\_id=35182064&p\\_details=1](http://hue.toaan.gov.vn/portal/page/portal/tandtc/ttsktand/307887?p_page_id=1752606&pers_id=1751929&folder_id=&item_id=35182064&p_details=1).

<sup>21</sup> "Văn Bản Luật Văn 'vô Tu' Trái Luật - VnExpress," accessed April 30, 2014, <http://vnexpress.net/tin-tuc/thoi-su/van-ban-luat-van-vo-tu-trai-luat-2034431.html>.

<sup>22</sup> Bui Thi Bich Lien, "Legal Interpretation and the Vietnamese Version of the Rule of Law," 326.

indicates that legal system of Vietnam does not ensure the supremacy of laws and violates the rule of law principle.

It cannot deny that delegated legislation is essential solution for ensuring that legal system responds to the changes of society promptly however there is no provision for delegation of legislative power as well as for determining line boundary between legislative and executive powers. In reality, Decrees and Circulars are the most important sources of law but the theories and principles of delegated legislation have not yet clarified clearly by Consitution and Laws; therefore, executive organs may have more discretion in implementation of delegated legislation. This fact indicates that Vietnam has not determined clearly the boundary of delegation of legislative power; consequently, executive organs often issue legal normative documents without any limitation. In addition, Vietnam lacks of independent mechanism for reviewing the constitutionality and legality of legal normative documents issued by the executive organs. Consequently, this practice may violate the rights and legitimate interest of citizens.

In brief, Vietnam still lacks of adequate theory on legislative power and delegation of legislative power; therefore, that is not clear-cut determination of legislative and executive power in the case of Vietnam. The need to answer the question such as executive organs in Vietnam are delegated legislative power still remains as a controversial issue in both legal theory as well as practical aspect of Vietnam. Consequently, legal system of Vietnam reveals many problems such as contradictory, inconsistency, overlap and instability.

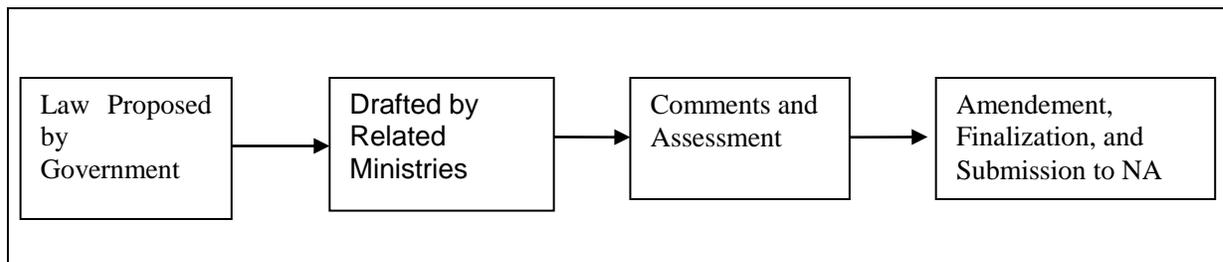
## II- How Vietnamese government takes part in legislation

In general, Vietnamese government takes part in legislation through main activities as follows:1) drafting the laws; and 2) promulgating the legal normative documents (Decree-laws) which are not only for guiding on implementation but also for identifying other important issues which are not mature enough to be developed into laws or ordinances to meet governance and socio-economic management requirements. The fact indicates that executive organs have involved significantly in legislation and the quality of legal system also depends partially on executive organs; therefore building capacity of government in legislation is essential condition for improving the quality of legal system in Vietnam. This section will examine the role of government in legislation through two major activities in order to identify the current issues of legal system in Vietnam.

## A. Drafting laws

Article 96 of Constitution 2013 defines that Government has power to propose drafted law to National Assembly. This regulation refers to delegation of legislative power in Vietnam. It cannot deny that Vietnamese Government had played a vital role in law-making process through submission its proposed laws to National Assembly. This practice is similar to other country such as Japan. However, the most important issue is the quality of drafted law submitted by government. It is essential to examine how government involves in law-making process by drafting the laws.

Law on Laws 2008 provides procedures for making –law which includes four major steps such as: proposal for laws and ordinance development program; drafting; verification, review and comment; and approval. Government often takes part in the first and second step of law –making process as follows:



### *The first step is development of legislation program.*

Development of legislation program is defined concretely by Law on Laws 2008 and Decree No 24/ NĐ-CP dated 05 March 2009 of Government detailing and providing measures for implementation of Law on Laws 2008. For example, Article 22, section 1 of Law on Laws regulates that:

“Law and ordinance development programmes shall be formulated on the basis of adhering to the Party’s directions and policies, socio-economic development and national defence and security strategies as well as governance requirements in each period and ensuring fundamental rights and obligations of citizens.”

This article indicates that law development programs are made basing on the direction of Party or requirements government. However, it is essential to note that the law and ordinance development program must follow the procedures as prescribed by laws in order to ensure that programs are feasible for implementation in reality.

Law on Laws defines that government shall proposes law and ordinance development programs related to its issues, functions and authorities. However, these proposals are often made basing on the proposals of

organization or individuals of line ministries when implementing field management. Therefore, Ministry of Justice is responsible for supporting government in drafting the law and ordinance development programs. The Committee for Legal Affairs of National Assembly will be responsible for receiving and reviewing law and ordinance development programs. *“The verification shall focus on the need to promulgate the proposed laws/ordinances, their scopes and objects of regulation, their basic policies, consistence, feasibility and order of priority as well as conditions for ensuring their development and implementation”* (Article 25, Law on Laws 2008). Hence, reviewing the law and ordinance development programs is an important process in order to ensure that laws and ordinances promulgated by National Assemble respond to the needs of society.

From 2009-2013, Government has submitted 06 laws and ordinance development programs for the period of 2010- 2014 and also laws and ordinances development programs for National Assembly section XIII. It indicates that government had played very important role from the first step of law-making process through submission of laws and ordinances development programs. However, some issues related to the laws and ordinance development program are mentioned as follows:<sup>23</sup>

- The programs for development of laws and ordinance are unstable because the number of laws or ordinances submitted by programs is changed due to the cancellation or adjustment of the proposed organs. Since 2009, National Assembly and Standing Committee of National Assembly have changed the programs related to 50 proposals of Government. During period 2010-2013, the changes of programs tends to be increased, especially the adjustment in the year 2013 was more than two times of the year 2010.
- Proposal of law or ordinance only meets requirements of procedures for submission but not yet drafted in detail, and regulation impact assessment is not carried out properly.
- Some proposals do not meet requirements for submission and will be rejected by Standing Committee of National Assembly, for example Law on Library, Law on Employment...

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<sup>23</sup> “Quy Trình Lập và Thực Hiện Chương Trình Xây Dựng Luật, Pháp Lệnh - Một Số Bất Cập Cần Hoàn Thiện - Ban Nội Chính Trung Ương,” accessed April 16, 2014, <http://noichinh.vn/nghien-cuu-trao-doi/201401/quy-trinh-lap-va-thuc-hien-chuong-trinh-xay-dung-luat-phap-lenh-mot-so-bat-cap-can-hoan-thien-293544/>.

- Proposed organ do not submit its draft to government for recommendation on time; therefore, Government cannot present any idea during process of verification by Standing Committee of National Assembly.

In general, this period still reveals many problems because the National Assembly has not yet played active role in constructing laws and ordinances development programs. Laws and Ordinance development programs are often planned for long term period; hence some proposals become unnecessary because they do not meet social demands. Although the Law on Laws 2008 defines that member of National Assembly also has power to submit the draft law but he/she cannot draft law proposal due to lack of capacity. In addition, this law does not define any organ which is responsible for assisting the member of National Assembly to draft the proposal. Consequently, government has played very important role in law-making development program. For example, the number of proposals submitted by Government has been accepted by National Assembly and Standing Committee accounts for 83%.

- *The second step- Drafting of law*

In general, Standing Committee of National Assemble shall establish Drafting Boards and appont the leading drafting organs. However, Government shall assign Ministries or Ministerial level organs to be a lead drafting organ if the proposals of laws or ordinances submitted by Government (Article 30). Therefore, almost laws have been drafted by Government because these laws are made basing on proposals of government. Drafting Boards often include members who are representatives of the senior management of the lead drafting agency/organization and other concerned agencies/organizations and experts/scientists. In practice, the members of drafting board are often the senior public officials of line management Ministries related to scope and content of draft laws.

Drafting Board has to implement the following tasks:

- 1) Reviewing and approving the outlines of the draft laws/ordinances and resolutions;
- 2) Deliberating on related basic policies and substantive issues of the proposed laws/ordinances and draft resolutions;
- 3) Deliberating on the draft documents; introductory notes supporting the submission of the draft documents, detailed narratives of the proposed laws/ordinances and draft resolutions as well as on the incorporation of comments from agencies/organizations and individuals;

4) Ensuring the relevance of the draft documents to the Party's directions and policies as well as their constitutionality, legality, consistence with the legal system and feasibility (Article 32)

In addition, the Law on Laws 2008 also defines the tasks of lead drafting agencies as follows: Reviewing law enforcement/implementation and assessing existing legal documents related to the proposed law/ordinance; 2) Implementing regulation impact assessment and drafting report on impact assesment; 3) Conducting studies about informations, documents and international treaties related to proposed law/ordinance; 4) Organizing the collection of comments related to drafted laws; 5) Preparing draft documents ... (Article 33).

Drafting laws/ordinance is the most important work in law-making process. The quality of law depends on how the regulations are drafted. In order to ensure that all regulations of drafted laws/ordinances are comprehensive, coherent and consistent with legal system, the drafting board has to review and assess all related legal documents and carry out regulation impact assessment properly. In addition, Article 33 and 61 of Law on Laws 2008 define about regulation impact assessment (RIA) in drafting period, however, RIA has not yet carried out effectively and andequately. Consequently, RIA report cannot enable drafting board to select the best solutions and policies for law-making.<sup>24</sup> However, regulation impact assesment reports made by drafting boards are often very low quality.

Significantly, members of drafting board are often senior public officials of ministries concerned to content of proposed law/ordinance who often try to draft provisions for protect the interests/benefits of their line Ministries or of group; therefore, these regulations do not meet requirement of society.<sup>25</sup> For example, Law on Social Insuarance aims at increase the age of retirement in order to avoid the damage of "social fund" without consideration of legitimate rights and interests of workers; or law does not allow the small size enterprises to apply value at tax deduction in order to reduce the workload of tax authorities.

In other words, regulations are often influenced by lead drafting agency so the drafted law may not comply with legal system in general. In addition, these persons also lack of drafting skills, legal backgrounds for

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<sup>24</sup> Danh gia tac dong cua che dinh RIA trong Luat ban hanh VBQPPL nam 2008, Bo Tu Phap, Vien Khoa Hoc Phap ly, 2012.

<sup>25</sup> "Đưa Cuộc Sống Vào Luật - Báo Công Thương Điện Tử," accessed April 17, 2014, <http://bacongthuong.com.vn/doi-thoai/47639/dua-cuoc-song-vao-luat.htm#.U093SKLhz3E>.

formulating legal norms properly, consequently the quality of drafted law remains very low and unfeasible in daily life.

Moreover, quality of drafted laws/ordinance is low because of the other reasons such as the lack of effective mechanism for public participation in law-making process as well as the law does not define clearly responsible of the lead drafting agencies/organizations for consolidating, studying and incorporating the collected comments of individuals or social organizations. Therefore, the drafted law may not respond to the willings of people and the needs of society and protect interests of a specific group in society.

Ministry of Justice is responsible for assessing the proposed laws/ordinances before submission to the Government. However, Ministry of Justice also faces with difficulty in assessing the constitutionality and legality of the drafted laws/ordinance due to the lacks of capacity in reviewing drafted legal regulations. Bureau of Legal Normative Document Post-Review under Ministry of Justice is responsible for reviewing constitutionality and legality of all legal documents issued by other Ministries and Local government at provincial level.<sup>26</sup> However, Ministry of Justice only has power to recommend to other state agencies if their legal documents are considered as unconstitutional or illegal documents. This mechanism is not strong enough to protect constitution as well as ensure the consistency of legal system.

The drafted law will be submitted to Government for deliberating and deciding the submission to the National Assembly after assessing and finalizing by Ministry of Justice and Drafting Board. National Assembly will only responsible to discuss and has power to adopt or reject the drafted law. However, National Assembly members are not able to give comments or analyze the legal norms properly because they often lack of capacity and legal knowledge. Especially, the percentage of specialized member of National Assembly is quite low, that accounts for 30% (National Assembly section XIII only has 150 specialized member/500 members).

In addition, one of significant issue that makes the law becomes ineffective and inefficient because the legal norms formulated by drafting board are often in broad scope and very general, even the important issues which challenge drafting board will be shifted to decrees of Government. Consequently, law adopted by National Assembly cannot implement due to the lack of guidelines on implementation made by Government.

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<sup>26</sup>Ministry of Justice in Vietnam website: <http://www.moj.gov.vn/en/Pages/Organizationalstructure.aspx>

In brief, government and ministries have played a dominant role in law-making processes because the National Assembly lack of capacity in law-making and depend deeply on executive organs in drafting law aspect. This practice indicates the weakness of legislation in Vietnam and also does not ensure the rule of law principle.

### **B. Issuing Decree-Laws**

Constitution 2013, Article 100 defines that: *“The Government, the Prime Minister, ministers and heads of organs of ministerial rank shall issue legal documents to exercise their duties and authorities, review the implementation of these documents, and handle illegal documents in concordance with the law.”* This article empowers Government and Minister to issue legal normative document but only “to exercise their duties and authorities.” So this regulation can be interpreted that as the delegation of legislative power or only the implementation of executive power? In order to answer this question, it is essential to examine the content of legal normative documents issued by Government and Ministries. Article 14, Law on Laws 2008 defines that government issues the Decree in the following cases:

- 1) To provide detailed guidelines on the implementation of laws and ordinance;
- 2) To provide specific actions to implement policies related to the fields such as: economic, society, national defense, security...
- 3) To specify the tasks, authority and organization of Ministries...
- 4) To identify other important issues are not mature enough to be developed into laws or ordinances to meet governance and socio-economic management requirements. The issuance of decrees shall be subject to agreement by the Standing Committee of the National Assembly.

According to this article, Government exercise delegation of legislative power in the two cases: 1) providing the guidelines on implementation of laws/ordinances; and 2) identifying issues which are not yet regulated by laws/ordinances. It is worth to note that there is no limitation in delegation of legislative power in Vietnam as the law empowers government to issue Decree without any limitation. In principle, Vietnam also establishes the principle of hierarchical of legal system such as Decree issued by Government must comply with Constitution, Laws, Ordinances and Regulations adopted by National Assembly and Standing Committee of National Assembly.

Guidelines issued by government and ministries are essential conditions for implementing laws/ordinance. In other words, Law/Ordinance cannot come to effect if there is lack of guidelines on implementation. For example, In order to implement the Law on State Compensation adopted by National Assembly in 2009, Government issued Decree No 16/2010 and Ministry of Justice, Ministry of Finance, and Government Inspectorate issued join-circular No 19/2010 for guidelines on implementation. However, the new circular No 04/2014/TTLT-BTP-TANDTC-VKSNDTC on guidelines on implementation of this law just issued in 2014 (after 3 years since this law came to effect). Moreover, some Law/Ordinance requires a huge number of legal normative documents for guidelines such as Ordinance on Civil Judgement Enforcement in 2004 needs more than 40 documents; and Land Law 2004 requires related state organs to issue around 126 legal documents for guidelines on implementation, the number of legal normative documents related to environment is around 300 documents.<sup>27</sup>

This practice shows that the implementation of law/ordinance depends deeply on the guidelines of executive organs without effective mechanism for protection of constitution. Therefore, legal system of Vietnam is not hierarchical and the Decree and Circular are often applied as main sources of law. In practice, application of law by authorities only base on the guidelines without essential consideration of provisions defined by Law/Ordinance. However, Vietnam still lacks of concreted and detailed delegated legislation; therefore, government/ ministry has more discretion in interpretation of law.

In general, Law/Ordinance does not provide detailed legal norms; therefore it always needs guidelines on implementation issued by Government and Ministries. The matter is that government has more discretion to interpret the content of legal norms in the ways that enable executive sectors to implement those legal norms easier. For example, Law/Ordinance only provides very general terms and the detailed regulations related to standards, measures, procedures... will be provided by Decree and Circular of Government and Ministry, such as: Law on handling with administrative violations 2012 cannot provide the detailed administrative violations as well as administrative sanctions applied for each administrative violation. Consequently, Government has

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<sup>27</sup> “Hoàn Thiện Hệ Thống Pháp Luật Đáp Ứng Yêu Cầu Xây Dựng Nhà Nước Pháp Quyền XHCN,” accessed April 18, 2014, <http://luatsuhanoi.vn/index.php?page=productView&viewParent=301&id=875>.

issued around 56 Decrees on handling with administrative violations in each field of state management.<sup>28</sup> Hence, government has power to determine what are violations and the measure of sanctions (warning, fine, or withdraw of licence or postponement of operation; confiscation of properties related to violations...). The needs to answer the questions such as whether government should have power to define the penalties applied for administrative violations of individual and organization and the delegation of legislative power should be limited in this aspect? Recently, many Vietnamese scholars have debated about the limitation of delegated legislation and what kind of regulations should be delegated. For example, the provisions which impose the obligations or restrict the rights of citizen can be issued by government or not?

Regarding to delegated legislation, another matter is that, Government also holds power to issue Decree in order to deal with problems *without existence of Law/Ordinance* (Article 14, section 4 Law on Laws 2008). This kind of decree is often mentioned as Decree-Law because it plays function as a Law. The reason why Government can has power to issue Decree-Law because National Assembly and Standing Committee are not able to formulate Law/Ordinance whereas the new problems occurred in society are significant dealt with by laws. This practice also indicates the fact of delegation of legislative power has been carried out without any limitation; consequently, legal system of Vietnam has many shortcomings that prevent Vietnam from building up a rule of law state.

### III. Current problems of legal system in Vietnam- Solutions for improving the quality of legal system

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#### A. Problem Identification

Delegated legislation has many advantages such as it enables legal system responds quickly to the changes in society; it allows government to issue rules and regulations for dealing with specific situations which are not yet mentioned by Law; it reduces the burden on legislature and enable government to deal with emergencies promptly.<sup>29</sup> However, delegated legislation also causes many problems of legal system, especially in a country

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<sup>28</sup> Decree No 171/2013 on sanctions/penalties of road administrative violations and rail transport violations; or Decree No 121/2013 on sanctions of administrative violations in constructions activities, real estate business...

<sup>29</sup> Basu, *Public Administration*, 348.

that lacks of effective channel for reviewing constitutionality and legality of legal document issued by executive organs.

Since Doimoi was introduced in 1986 up to July 2013, Vietnam has issued around 471 Laws/Ordinances (290 Legal Codes, Laws/Acts and 181 Ordinances), 2783 Decrees and 7080 Circulars and Joined-Circulars in order to respond to the needs of open market economy.<sup>30</sup> In general, legal system of Vietnam still has many issues such as cumbersome, complex, contradictory, overlapping because legal normative documents are issued by various competent agencies without an adequate mechanism for reviewing constitutionality and legality.<sup>31</sup>

The current problems of legal system of Vietnam are mentioned as follows:<sup>32</sup>

- Legal system of Vietnam consists of so many legal documents but is still incomprehensive because legal normative documents are too focused on some aspects whereas the other aspect still lacks of adequate legal normative documents for application. For example, there are so many legal normative documents issued for guidelines on implementation in the field of investment, or land management. Legal normative documents are issued in order to respond to the needs of open market economy; therefore they are formulated in consistent with the changes of socio-economic conditions, in order to ensure that laws can cover all aspects of society. This practice indicates the misunderstanding of rule of law principle. Rule of law is interpreted as the supremacy of law which requires to promulgating a lot of legal normative documents for application. Consequently, Vietnam has made a significant effort in “producing” the legal normative documents. Each line management agency also wants to issue legal normative documents for its field management even it is not necessary to have legal normative documents for application. Consequently, some legal normative documents are not applicable due to the lack of feasibility and effectiveness. On contrary, some aspects which need more detailed and comprehensive legal frameworks for implementation have not yet provided adequately. For example,

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<sup>30</sup> “Một Số Giải Pháp Tăng Cường Tính Khả Thi Của Văn Bản Quy Phạm Pháp Luật,” accessed April 21, 2014, <http://moj.gov.vn/ct/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=6009>.

<sup>31</sup> “Doi moi quy trinh lap phap va lap quy trong mot van ban phap luat” accessed April 20, 2014 <http://baophapluat.vn/hoat-dong-bo-truong/doi-moi-quy-trinh-lap-phap-va-lap-quy-trong-mot-van-ban-luat-178736.html>

<sup>32</sup> “Nâng Cao Chất Lượng Văn Bản Quy Phạm Pháp Luật,” accessed April 21, 2014, [http://caicachanhchinh.gov.vn/Plus.aspx/vi/News/71/0/1010046/0/4876/NANG\\_CAO\\_CHAT\\_LUONG\\_VAN\\_BA\\_N\\_QUY\\_PHAM\\_PHAP\\_LUAT](http://caicachanhchinh.gov.vn/Plus.aspx/vi/News/71/0/1010046/0/4876/NANG_CAO_CHAT_LUONG_VAN_BA_N_QUY_PHAM_PHAP_LUAT).

there is a lack of specific regulations on implementation and improvement of transparency, accountability of state organs and public officials. For example, until now Vietnam does not have Law on Administrative Procedures which considered as a key Law for promoting transparency of public administration.

- Legal normative documents are not consistent, coherent and comprehensive because of the lack of effective mechanism for reviewing constitutionality and legality of legal normative documents. For example, Lawyer Quach Tu Man mentions that it is easy to find out the confliction between interpretation of law by Government and Ministry and Law, such as: related to Law on Personal Income Tax 2007, Decree No 65/2013 and Circular No 111/2013 of Ministry of Finance provide guidelines on implementation of Law on Personal Income Tax, which define additional condition for tax exemption from transferring land-used right and selling a house if that person has ownership at least 183 days whereas the Law on Personal IncomeTax does not define that condition.<sup>33</sup> Law on Laws 2008 defines that Ministry of Justice is responsible for reviewing the drafted laws/ordinances and drafted decrees, circulars before submitting to Government as well as in process of implementation legal normative documents. However, Ministry of Justice lacks of capacity for reviewing a huge number of legal normative documents issued every year by both central and local authorities at provincial level. In addition, Ministry of Justice had dealt with difficulty due to the burden of workload because it has played an important role in drafting process as a key lead drafting agency. However, Ministry of Justice is not empowered to deal with illegal documents issued by other state agencies. It is only responsible to recommend the competent agencies to deal with illegal normative documents.
- Legal system of Vietnam lacks of stability because almost legal normative documents are formulated basing on the urgent needs of society without consideration for long-term development strategies as well as the sustainable development. Therefore, legal normative documents have been amended or revised frequently. For example, Law on Administrative Complain and Denunciation was

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<sup>33</sup> “Văn Bản Quy Phạm Pháp Luật Dưới Luật: Những Khiếm Khuyết Thường Gặp | HCMC Bar,” accessed April 30, 2014, <http://www.hcmcbar.org/NewsDetail.aspx?CatPK=4&NewsPK=374>.

promulgated in 1998, revised in 2004, 2005, and separated in two different laws in 2011. Unstable legal system has raised challenges to not only state authorities but also to individuals, organizations, especially business sectors in process of implementation. For instance, regulations related to land-used –right registration and land managements have changed quit often; hence individual have faced with difficulties in exercising the property rights.

- The feasibility of legal system of Vietnam remains very low because the drafting boards often pay attention to review the constitutionality and legality of legal normative documents rather than consider the feasibility of drafted legal documents. Especially, regulation impact assessments (RIAs) have not yet carried out properly during process of proposing, drafting and implementing. Legal normative documents are promulgated basing on the proposals of competent agencies without consideration carefully the needs of society as well as public opinion. Mechanism for public participation was introduced and implemented but it could not achieve effective results. However, responsibility for collecting, assessing the comments is not defined clearly by laws; hence drafting boards are not responsible for explaining why they do not accept the comments from public. In addition, there is a lack of effective participation of experts, scientists who play very important role in impact assessment and proposing better solutions for drafting legal normative documents. In addition, Law on Laws 2008 does not define any standards or creterias for evaluating the feasibility of legal normative documents. The standards for feasibility assessments just regulated by Decision No 1048/QĐ-BTP Ministry of Justice on reviewing legal normative documents such as: the consistence of legal normative documents with economic development; affection of legal normative document to society (bot positive and negative affect); mechanism for emplementation related to determining clearly responsibility, procedures; correspondence to administrative reform standards;...However, the assesement of feasibily of drafted laws/ordinances/ and other legal normative documents has not yet implemented effectively. The problem is that the legal normative documents will be adopted whether is feasible in reality or not. Consequently, drafting and promulgating agencies do not bear any liability if the legal normative documents are unfeasible.

- Legislative technique is also one of the factors that affect the quality of legal system. Laws/Ordinances only provide very general legal norms and cannot be implemented without guidelines on implementation issued by Government and Ministries. Drafting boards includes senior public officials from relevant ministries and they have tried to interpret the laws/ordinances in the ways that easier for implementation. The practice has revealed that Laws/Ordinance cannot be implemented because of the lack of guidelines. In addition, the guidelines on implementation may not consistent, coherent because many competent agencies are responsible for issuing the guidelines. For example, there are 27 overlapped issues; 57 unclear provisions; and 29 unreasonable issues related to documents on detailing the functions, duties of line ministries.<sup>34</sup> Significantly, the legal normative documents are often drafted by the same form in which the section for general provisions is quite long and re-regulated by the Decrees and Circulars as unnecessary section. In addition, low legislative technique also causes problems of interpretation and application because the legal norms can be interpreted by various meanings; as a result, the confusion in interpretation and application has happened.
- Mechanism for reviewing the constitutionality and legality of legal normative documents has not yet implemented effectively because the lack of effective and independent organ which is empowered to deal with legal normative documents. In principle, illegal normative document is only abolished by the adopted organs or by the higher state organs. For example, if the circular of a Ministry is defined as unconstitutional or illegal, Ministry of Justice only holds power to recommend to that Ministry for abolishment or report to Government for abolishment.

Report of Legal Committee of National Assembly section XI evaluates about legal system: “Some Laws/Ordinances just provide very general provisions which causes difficulties for state organs. In general, legal system still consists of many issues such as: shortages in number of laws; low quality, and protect for a group’s interests...” It is worth to note that government has involved in legislation through two main aspects: drafting law/ordinance, issuing decrees, circulars, and reviewing the constitutionality and legality

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<sup>34</sup> Vũ Văn Thái. Xử lý chồng chéo chức năng nhiệm vụ đáp ứng yêu cầu cơ cấu tổ chức Chính phủ khoá XII. TC Tổ chức Nhà nước. số 7/2007.

of legal normative documents. The quality of legal system depends deeply on the capacity of government in legislation. Vietnam, in particular, still lacks of effective mechanism for improving the quality of legal system.

It cannot deny that though separation of state powers is not introduced in Vietnam but division of state functions has been carried out as an essential condition for implementing state management. However, the delegation of legislative power to executive sector without any limitation, low capacity of government in legislation, and lack of effective mechanism for reviewing legal normative documents are the three main reasons that causes legal system become inconsistent, incomprehensive and contradictory. Therefore, it is essential to identify the solutions for improving the quality of legal system in Vietnam in order to meet requirement of rule of law principle.

## **B. Legislation by Japanese government and Constitutional Review**

Like Vietnam, executive organs often play important role in legislation by involving in law-making process and promulgating orders and ordinances. There are two kinds of bills such as bills submitted by Diet and bills submitted by Cabinet. Among 100 bills enacted per year, most of them were submitted by Cabinet.<sup>35</sup> Cabinet holds power to issue orders to implement its function or implement laws. It is essential to answer two questions concerning delegation of legislative power in Japan such as: 1) How Japan implements delegated legislation? 2) And, how Japan ensures the constitutionality and legality of rules and regulations issued by executive organs? Answering these two questions will be a good reference for Vietnam in process of legislative reforms.

### ***a) Limited delegated legislation in Japan***

Concerning to delegated legislation in Japan, Hiroshi Oda mentioned about delegation of legislation in Japan as follows:

“Matters left to delegated legislation are fairly broad in Japan. For example, in the field of pollution controls, the emission standards are set by an order of the Prime Minister’s Office. The Foreign Exchange and Foreign Trade Law provides that a person who intends to export goods may be required to obtain a licence from the Minister of International Trade and Industry as provided by cabinet order.”<sup>36</sup>

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<sup>35</sup> “About the Cabinet Legislation Bureau / Cabinet Legislation Bureau,” accessed April 28, 2014, <http://www.clb.go.jp/english/about.html>.

<sup>36</sup> Oda, *Japanese Law*, 48.

This fact is similar to Vietnam as government also takes part in providing detailed guidelines on implementation such as providing “emission standards”. In principle, Law cannot provide too detailed the standards, conditions related to line management because these standards, conditions are very specific and specialized issues. Therefore, delegation of legislative power is essential condition for ensuring the implementation of Law. However, delegated legislation in Japan is more clearly than the case of Vietnam because it also defines some limited in Cabinet’s Order and Ministries’s Ordinance. For example, Constitution, Article 73 defines Cabinet Order as follows: “*However, it cannot include penal provisions in such cabinet orders unless authorized by such law.*” In addition, the Cabinet Law also defines that: “*No provisions imposing obligations or restricting rights can be made in a Cabinet Order unless authorized by law*” (Article 11). These regulations indicate that Cabinet cannot issue Order without any limitation. Unlike Japan, Vietnam does not regulate any limitation on delegated legislation, Government can issue decree quite freely as mentioned in above section. Decrees that include imposing obligations or restricting rights of citizen are not considered as unconstitutional or illegal cases in Vietnam because Law on Laws allows government to have more discretion in legislation. For example, Decree No. 170/2007 ND-CP on amending and supplementing a number of articles of the Government’s Decree No. 05/1999/ND-CP of February 3, 1999, on people’s identity cards was considered as unconstitutional and illegal Decree because of imposing obligations for citizen to write their parent’s name in identity card. This regulation is defined as violation of the privacy rights under Civil Code by Ministry of Justice. Therefore, Government issued Decree No. 106/2013 to abolish this regulation.<sup>37</sup>

Controversial issue related to delegation of legislative power is the boundary of delegation because executive organs may have more discretion for drafting rules. Delegation of legislative power is required to be more specific and detailed in order to ensure rule of law principle. It is worth to note that rules or regulations issued by executive organs must comply with the Constitution and Law. However, both Constitution and Laws in Vietnam have not yet regulated clearly delegated legislation, as a result, many regulations issued by executive organs are inconsistent with the Constitution and Laws.

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<sup>37</sup> “Chính Thức Bỏ Ghi Tên Cha Mẹ Trên Chứng Minh Nhân Dân | Tinmoi.vn,” accessed May 9, 2014, <http://www.tinmoi.vn/chinh-thuc-bo-ghi-ten-cha-me-tren-chung-minh-nhan-dan-011284341.html>.

Significantly, constitutionality is one of the most controversial issues in Japan because the questions remain such as what kinds of provisions are regulated by cabinet's order instead of Law. For example, Law on Government Employees, Article 102 prohibits public officials from being participated in political activities; however political activities are defined by the rules of Government Personnel Authority. Therefore, this rule may be considered as unconstitutional regulations because it relates to fundamental rights of public officials.<sup>38</sup> It is worth to note that Supreme Court of Japan is empowered to examine the constitutionality of cabinet's order.<sup>39</sup> To some extent, Japan has carried out delegation of legislative power in Japan is more specific than Vietnam because the Constitution defines the boundary of cabinet's order as well as empowers Supreme Court to implement the function of Constitutional Court. However, Cabinet's Order and Ministry's Ordinance were also defined as unconstitutional in some cases. For example, the "Stronglife Case" was a famous case in Japan when registration of imported product was refused by Minister of Health and Welfare according to Cabinet's Order. Related to this case, Supreme Court considered that: "There should be a strict interpretation and application of provisions relating to regulations by administrative authorities, to ensure the same are made within the designate area of the aim/purpose of the Act."<sup>40</sup> The fact is that executive organs may interpret and apply the provisions of Law defferent from the purpose of Law. In other words, the provisions of Law are too general; therefore, they may cause defferent interpretation and application of the administrative authorities. It is worth to note that Vietnamese government had played a vital role in interperetion of law without strict judicial review like Japan. Consequently, administrative authorities often follow the regulations which are interpreted by Decree or Circular rather than the regulations of Law.

Concerning delegation of legislative power, Cabinet also takes part in law-making process. Cabinet also holds power to submit the bills (Article 72, Constitution). Therefore, Japanese Cabinet has played important role in law-making process through drafting bills. In order to achieve a policy goal resulted from implemetaion of

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<sup>38</sup> Oda, *Japanese Law*, 48.

<sup>39</sup> "Overview of the Judicial System in Japan," accessed April 22, 2014, [http://www.courts.go.jp/english/judicial\\_sys/overview\\_of/overview/index.html#02](http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html#02).

<sup>40</sup> Shuichi Sugai and Itsuo Sonobe, *Administrative Law in Japan*, 104.

administrative duties, ministry will propose to enact a new law or to amend or abolish an existing law. Then, a bill will be drafted by competent ministry and other related ministries will give comments for the first draft.<sup>41</sup>

***b) Constitutional and Judicial review***

In fact, Japanese government also plays important role in legislation. However, delegation of legislative power requires to reviewing the constitutionality and legality of order issued by cabinet in order to ensure rule of law principle. In order to review constitutionality of legal documents issued by Cabinet or Ministries, Japan's Cabinet itself established the Cabinet Legislative Bureau (*Naikaku Hōsei Kyoku*) and the Supreme Court holds power of constitutional review based on the separation of power principle.

*Cabinet Legislative Bureau:*

Cabinet Legislation Bureau was established as an independent organ for examining and reviewing drafted bills, ordinances. "Cabinet Legislation Bureau has two formal tasks: 1) to provide opinions to the Prime Minister and the Cabinet on legal issues; and 2) to examine drafts of all bills, regulations, Cabinet orders, and treaties for consistency with the constitution and legal precedents."<sup>42</sup> Cabinet Legislation Bureau assists Cabinet on legislative works through examining the drafts of all bills, regulations before submission to the Cabinet. The Cabinet Legislation Bureau will examine legally and technically the drafted bills and orders as follows:<sup>43</sup>

- The relationship between the proposed bill on one hand and the Constitution and other existing laws on the other, as well as the legal appropriateness of the contents of the bill;
- Whether or not the intentions of the proposed bill are accurately expressed in the text;
- Whether or not the structure of the bill (e.g. the order of articles.) is appropriate;
- Whether the usage of letters or words is correct.

Cabinet Legislation Bureau focuses on reviewing technical of legislation and the clarity of drafts before submission to the Cabinet.<sup>44</sup> This process is considered as pre-judicial review of constitutionality and legality of drafted laws, orders in order to ensure that laws, orders and regulations are consistent, coherent and comply with constitution. After examining the drafted bills, Cabinet will make decision to submit the bills to the Diet (to House of Representatives or to the House of Councilors) for promulgation. The key role of Cabinet

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<sup>41</sup> "Until the Law Can Be Done / Cabinet Legislation Bureau," accessed April 22, 2014, <http://www.clb.go.jp/english/process.html>.

<sup>42</sup> Richard J. Samuels, "Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?" (Japan Policy Research Institute, 2004), <http://www.jpri.org/publications/workingpapers/wp99.html>.

<sup>43</sup> "Until the Law Can Be Done / Cabinet Legislation Bureau."

<sup>44</sup> John Owen Haley, *The Spirit of Japanese Law* (University of Georgia Press, 2006), 35.

Legislation Bureau is to ensure the “unified government interpretation”. Cabinet Legislative Bureau, in fact, has played effective role in pre-enactment review because the member of CLB are themselves judges and they carefully and expertly reviewing the documents before enactment, therefore, Supreme Court is hardly to find unconstitutionality in the final documents.<sup>45</sup> In addition, CLB is refers as the ‘in-house lawyers’ of Prime Minister and the members of CLB are also different from the members of any administrative agencies in Japan. Members of CLB are senior officials who are legal experts with 15 or 20 years of experiences or senior officials of Ministries such as Ministries of Justice, Ministry of Finance.<sup>46</sup> Therefore, CLB has carried out constitutional review effectively. It is a reason to explain why the number of unconstitutional cases in Japan is quite low.

Supreme Court:

Article 81, Constitution defines that: “*The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act*”, and, Article 98: “*no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.*” It is essential to introduce judicial review of constitutionality and legality of legal normative documents (rules) issued by executive organ for ensuring legal system to be consistent, coherent. Japanese Supreme Court reviews both the constitutionality of legislation and legality of orders and regulations whereas Supreme Court of Vietnam is not empowered to implement judicial review related to legal normative documents issued by Government and Ministries. Mechanism for protection constitution can be introduced in Japan because it adopts separation of state power. However, it is very hard for the case of Vietnam where the *democratic centralism principle* is adopted. The constitutional protection mechanism, in fact, was discussed in Vietnam since 2001 when revising the 1992 Constitution. And, Communist Party (Tenth Congress) mentioned that: “establish a system of adjudicating the constitutionality of the actions of legislature, executive and the judiciary in Vietnam”. And once again the draft of the 2013 Constitution introduced the Constitutional

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<sup>45</sup> David S. Law, “Why Has Judicial Review Failed in Japan,” Decision Making on the Japanese Supreme Court, 2011, 1454, <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1061&context=lawreview>.

<sup>46</sup> Richard J. Samuels, “Politics, Security Policy, and Japan’s Cabinet Legislation Bureau: Who Elected These Guys, Anyway?”.

Council. However, the Constitutional Council was not adopted by new Constitution in 2013.<sup>47</sup> Hence, Constitution of Vietnam Article 74 provides that: “*Standing Committee of National Assembly has powers and duties to supervise the implementation of the Constitution, the law, the resolutions of the National Assembly, decree-laws, the resolutions of the Standing Committee; to supervise the activities of the Government, the Supreme People's Court, the Supreme People's Procuracy, State Audit, and other organs created by the National Assembly.*” This provision only mentions the power to supervise the implementation which is different from the power of judicial review. Hence, Vietnam still lacks of effective channels for reviewing constitutionality and legality of Decrees and Circular issued by central government.

### **C. Recommendation for improving the quality of legal system in Vietnam**

The fact is that Vietnamese government has played an important role in legislative process by drafting laws and issuing legal normative documents. Government’s Decree and Ministry’s Circular are major part of sources of law. However, executive organs have more discretion in rule-making due to delegation of legislative power has not yet provided specifically and concretely. Vietnam still lacks of an effective channel for reviewing constitutionality and legality of legal normative documents; therefore, the quality of legal system of Vietnam still remains very low. In order to improve the quality of legal system to become more efficient, coherent, consistent and comprehensive, Vietnam needs to focus on the following solutions:

- Revising Law on Laws 2008, especially regulations related to ensure effectiveness of public participation and the quality of regulation impact assessment. Drafting board shall be not only responsible for collecting comments from individuals, organizations, especially scientists, experts in order to improve the quality of drafting laws but also for explaining the reasons why they do not accept comments from public. In addition, report of regulation impact assessment shall be carried out effectively before, during and after promulgating legal normative documents by independent agencies rather than drafting board because it often lacks of capacity or over workload for implementing assessment. Consequently, report on regulation impact assessment will indicate alternative options for drafting board to select the best one. In addition, Law on Laws needs to define clearly the boundary

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<sup>47</sup> Albert Chen, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014), 209–211.

of delegation of legislative power in order to ensure that legal normative documents issued by executive organs comply with Constitution and Laws. Law on Laws shall include a strict regulation to ensure that law's interpretation and application of administrative authorities as the same as the aim/purpose of the regulations adopted by Law. It is essential to establish a hierarchical of legal system in implementation process strictly.

- Building capacity for Ministry of Justice as a lead drafting agency is essential condition for improving quality of drafted laws, decrees and circulars. In addition, Ministry of Justice has played important role in reviewing constitutionality and legality of legal normative documents issued by other ministries and provincial local authorities; therefore, Ministry of Justice needs to have qualified staffs who take part in legislative process effectively. Hence, training drafting skills is also an urgent need for ensuring the drafted laws, ordinances, or decrees to become more clearly and coherently.
- Significantly, Vietnam may consider to establishing a state organ such as Cabinet Legislative Bureau like Japan which is responsible for reviewing constitutionality and legality of all documents before enactment. This organ will include senior public officials who have experiences in legal aspects such as legal professionals (lawyers, judges, senior legal officials...). This organ will have capacity and will play a role in reducing the number of “bad-law” in Vietnam. Establishment of this organ also enable Vietnam to deal with current situation as such Ministry of Justice is lack of capacity to review all legal documents and does not hold power to abolish illegal documents.<sup>48</sup> Cabinet Legislative Bureau will be more effective solution for ensuring the constitutionality and legality of legal documents because it reviews both pre-enacted and post –enacted documents. Significantly, legal status of Cabinet Legislative Bureau is different from the legal status of Ministry of Justice; therefore, it is a possible solution for Vietnam to improve the quality of legal system. On the other hand, building capacity for Legal Commission of the National Assembly is an essential channel for ensuring that all drafted laws are reviewed carefully before submitting to National Assembly for promulgation.

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<sup>48</sup> Ministry of Justice only can recommend other state organs to revise or abolish the illegal documents.

- Empowering Supreme Court is another alternative solution for enhancing constitutional protection mechanism in stead of establishing a Constitutional Court/Council. In other words, Supreme Court needs to hold power to review the constitutionality and legality of legal normative documents issued by executive organs as a significant independent channel in implementing judicial review. In addition, when Supreme Court has judicial review of legal normative documents, it will allows citizen to bring the legal normative documents to the court when these documents are considered as unconstitutional and illegal document and violate to his/her rights and legitimate interests.

In brief, the quality of legal system depends on the role of government in legislation. Promoting the quality of draft laws, decrees will ensure that legal system become more consistent, coherent. Therefore, reforming law-making process, promoting public participation in law making process, introducing effective judicial review are the main factors for improving the quality of legal system in Vietnam./.

## Conclusion

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Although National Assembly in Vietnam has legislative power however Government had played a vital role in legislation. The problem is that delegated legislation in Vietnam has not yet regulated strictly; consequently, executive organs have more discretion not only in interpretation of provisions adopted by Law but also in formulation legal norms (**Decree-Laws**). In addition, Vietnam still lacks of effective mechanism for reviewing constitutionality and legality of legal normative documents issued by administrative authorities. Hence, legal system of Vietnam reveals many shortcomings such as overlapping, contradictory, and infeasibility. Consequently, administrative authorities can abuse state power easily during process of law application, and violate the rights and legitimate interests of citizens. In order to ensure legal system will become more consistent, coherent and comprehensive, Vietnam needs to empower Supreme Court to carry out judicial review related to legal normative documents issued by Government and Ministries. In addition, building capacity of Ministry of Justice as a lead drafting agency in law-drafting process and pre-reviewing constitutionality and legality of drafted Decrees and Circulars is essential condition for ensuring the quality of drafted legal normative documents. Vietnam may consider to establishing a Cabinet/Government Legislation Bureau as Japan for improving the quality of legal system. Law on Laws should be revised with the aim at promoting effectiveness of public participation in law-making process as well as the quality of regulation impact assessment reports.

Rule of law requires that all actions of the state organs, groups, and individuals must abide by the constitution, laws and regulations, and to exercise their powers within limits of the law. Therefore, building a rule of law state requires that legal system must be consistent, coherent and comprehensive as a primary condition for ensuring that all government actions bound by laws. Rights and legitimate interests of citizen can be protected effectively if there is an effective judicial review mechanism is established for reviewing constitutionality and legality of legal normative documents. Hence, adequate mechanism for ensuring effective role of government in legislation, which is significant requirement of rule of law state should be strictly considered in Vietnam today./.

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