



**Discussion Paper No.22**

**The Constitution of Vietnam through  
the Lenses of Cognitive Constitutionalism**

Edited by Ismatov Aziz and Obata Kaoru

May, 2023

Nagoya University  
Center for Asian Legal Exchange



Center for Asian Legal Exchange (CALE)

Nagoya University, Japan

**The Constitution of Vietnam through the Lenses of Cognitive Constitutionalism**

Edited by Ismatov Aziz and Obata Kaoru



## PREFACE

In November 2021, the Center for Asian Legal Exchange (CALE) Nagoya University and the Hanoi Law University conducted a joint workshop on the 2013 Constitution of the Socialist Republic of Vietnam (hereinafter the 2013 Constitution of Vietnam) between academics and practitioners interested in Asian constitutionalism. This event was hosted under the frame of the JSPS Core-to-Core Program: Asia-Africa Science Platforms ‘Advancing Research in Asian Constitutionalism – Establishing a Transnational Research Network to Promote Human Rights and Legal System’. This volume is a compilation of workshop reports authored by local Vietnamese scholars who either participated directly in the *travaux preparatoire* of the 2013 Constitution or currently conduct research on and teach constitutional law in Vietnam. The workshop organizers initially planned to examine the drafting process (*travaux preparatoire*), nature, and the role of the 2013 Constitution that was elaborated and adopted within complex political and nationwide debates. However, in the workshop discussion, involved scholars went beyond just history. They touched upon the critical issues that emerged not only during the elaboration process, but also currently emerging challenges of the 2013 Constitution and Vietnamese constitutionalism.

Upon finalizing the workshop, the organizers felt a necessity to work further on balancing the discussion and publishing this Discussion Paper mainly to the comparative constitutional law audience with the importance of explaining the 2013 Constitution on its own terms and specifics and in the way it speaks to the local context. As an example, some papers in this volume argue that the text of the 2013 Constitution has transformed the Constitution from the fundamental law of the state to the fundamental law of the country (or entire society). In this regard, one may argue that the previous constitution was merely a law that established the state structure, whereas the 2013 Constitution has become the fundamental law of the entire society and, thus, a supreme law expected to protect the population (or the society). In line with such a logic of changing traditional approaches towards the socialist concept of constitutionalism, one of the key questions we had in our mind was how constitutionalism was defined or evaluated in Vietnam. Constitutionalism was negatively evaluated under the traditional (Soviet) socialist legal theory as a concept that constrained people’s power. Considering this significant thesis, we tried to shed more light on how the 2013 Constitution tried to diverge or converge with such an approach. Apart from this example, we tried to discover and discuss other essential areas that would enable readers to understand the core principles and their origins, structure, and substance of the 2013 Constitution. The organizers did not think it proper to simply accept a critique from the top-down international perspective and suggested that there was own unique logic that is not necessarily based on liberal ideals. Therefore, we mainly invited outstanding local Vietnamese constitutionalists to discover and discuss essential internal logic. We

also invited Kevin Tan of Singapore National University, who provided valuable feedback as a discussant of one of the workshop sessions. His suggestions led to significant improvements in workshop reports.

In this volume, the authors intend to offer exploratory descriptions and analyses from the perspectives of socialist and hybrid constitution-making. Therefore, reports inter alia discuss how the Constitution was drafted and what moments were considered as key challenges. Another focus is how the questions on the essence of the rule of law were debated and reflected in the text, and how the positivist concept of citizens' rights and obligations gravitated towards human rights. Authors also try to shed light on people, popular sovereignty, emergency powers, and rights, including science, technology, and the environment.

Within this volume, though often indirectly, there are also certain excerpts pointing to the internal and external factors surrounding making and adopting the 2013 Constitution. Some sections point to or at least leave to the consideration of readers certain key historical moments, including anti-colonial struggle, unification, socialist and ideological settings based on Marxism-Leninist doctrine, local customary and traditional practices which recently re-gain their popularity, cultural and religious patterns, ethnic diversity, and economic condition. The main idea here is to trace the link with socialist constitutionalism eventually transforming into a hybrid one. Simultaneously, although not the main focus in this volume, some authors try to discuss external factors in the form of a comparative perspective with foreign constitutions or concepts, including conceptual conflicts, such as natural rights doctrine vs. positivist stance.

This volume also offers a discussion on the current challenges occurring in the context of the 2013 Constitution. Certainly, given a limited scope, editors cannot reflect all issues of the volume here. Many brilliant scholars who participated in the workshop and contributed their pieces to this edited volume made specific claims and arguments regarding Vietnamese constitutionalism, which we highly recommend considering in detail for those interested in comparative constitutional and Asian law and politics.

ISMATOV Aziz

OBATA Kaoru

## CONTENTS

|   |     |
|---|-----|
| <b>PREFACE</b> .....  | i   |
| Ismatov Aziz and Obata Kaoru  |     |
| <b>CONTENTS</b> .....   | iii |
| <b>1. The Principle of Recognizing, Respecting, Protecting, and Guaranteeing Human Rights under the 2013 Constitution and its Implementation on the Civil Rights</b> .....  | 1   |
| Doan Trung Kien and Dau Cong Hiep   |     |
| <b>2. The Economic, Social, Cultural, Educational, Science, Technology and Environmental Regulations in the 2013 Constitution</b> .....                                     | 15  |
| Nguyen Quang Tuyen  |     |
| <b>3. Popular Sovereignty in the 2013 Vietnam Constitution</b> .....  | 29  |
| Nguyen Minh Doan  |     |
| <b>4. Constitution, Constitutionalism, and the Rule of Law in Vietnam</b> .....   | 41  |
| Nguyen Dang Dung and Vu Thanh Cu  |     |
| <b>5. The Dismissal of a Constitutional Council in Vietnam: A Failure or a Necessary Tactical Withdrawal?</b> .....   | 53  |
| Le Nguyen Duy Hau and Mai Thi Mai   |     |
| <b>6. The Procedure for Drafting the Constitution and the Challenges Posed in Drafting the Constitution</b> .....   | 69  |
| Nguyen Thi Quynh Trang  |     |
| <b>7. Freedom of Business: A New Step towards Human Rights in the 2013 Constitution of Vietnam</b> .....  | 85  |
| Tran Thu Yen  |     |
| <b>8. The Executive Power of the Government under the 2013 Constitution of Vietnam and the Power of the Court to Supervise the Performance of the Executive Power</b> ..... | 97  |
| Tran Thi Hien   |     |
| <b>9. The Media's Role in Making the 2013 Constitution of Vietnam</b> .....   | 107 |
| Phan Thi Luyen  |     |
| <b>10. The Role of the Constitution in Controlling the State Power in Vietnam</b> .....   | 115 |
| Cao Thi Ngoc Yen  |     |
| <b>11. Ensuring Human Rights to Life in Vietnamese Constitution and Laws</b> .....  | 131 |
| Dang Thi Ha and Thi Dieu Ha   |     |





# 1. The Principle of Recognizing, Respecting, Protecting, and Guaranteeing Human Rights under the 2013 Constitution and its Implementation on the Civil Rights

Doan Trung Kien\* and Dau Cong Hiep\*\*

*Abstract:* According to the 2013 Constitution, the state recognizes, respects, protects, and guarantees human rights, which is considered as a preeminent principle in comparison with the former constitutions. This principle concretizes the State's responsibilities for human rights and paves the way for the people to enjoy their rights based on the State's obligations. Firstly, this paper analyzes the principle from a theoretical perspective including its content and role that demonstrates the development of the 2013 Constitution to reach the constitutionalism. Secondly, this paper evaluates the principle's implementation on the civil rights with the goal of illuminating its achievements and shortcomings in the context of Vietnam.

*Keywords:* principle, human rights, civil rights

## I. Introduction

Human rights and citizenship are concepts that are closely related to the obligations of the state. In a society, the individual and the state are deeply intertwined two subjects. Especially on the basis of constitutionalism, the notion that the state is established to protect basic freedoms of the people, the state's obligation becomes even more important. It is the *raison d'être* of the state and the ultimate goal for all state activities. However, the state's obligations towards human rights are recognized and concretized differently in every country's constitution as well as in international human rights legal documents. Vietnam's 2013 Constitution, for the first time, sets forth a series of obligations: recognizing, respecting, protecting, guaranteeing, which is a step forward for clarifying more and more clearly what the state needs to do to better preserve and promote human rights. This spirit has become evident in the current constitution and is expected to become a reality. In the past 5 years, the implementation of the constitution regarding human rights has been mainly carried out through the promulgation of legal documents, the most important of which is the law of the National Assembly. The evaluation of the implementation of this principle, therefore, will have to rely on not only the content but also the progress of state agencies, of which the most vital is the National Assembly promulgating legal documents within its jurisdiction. Therefore, in this article, we present some key

---

\* Rector, Hanoi Law University

\*\* Lecturer, Administrative and Constitutional Law Department, Hanoi Law University

directions in assessing and implementing them on one of the fundamental areas of human rights, namely, basic civil rights.

## **II. Contents and meaning of the principle that the state recognizes, respects, protects, and ensures human rights and citizenship according to the 2013 Constitution**

The 2013 Constitution is considered as a milestone with new breakthrough points, one of which is the content of human rights<sup>1</sup>. This is not only reflected in terms of formality; the issue of human rights and citizenship is also placed in the second chapter with many new rules and new terms. Regarding the content, important principles on human rights, new aspects of rights under international law are also incorporated into the provisions of the constitution. In general, the constitutional provisions on human rights are in harmony with the overall spirit of the constitution. In particular, the idea of the rule of law clearly expressed in the 2013 Constitution can be considered as the core and orientation for all contents, including human rights. In particular, it can be said that "*the rule of law has the content including the equal relationship between citizenship and obligations of the state by law*"<sup>2</sup>.

In the 2013 Constitution, along with the idea of considering human rights in a comprehensive way as mentioned above, the issue of human rights protection has been regulated, reflected in the following contents.

Firstly, with a comprehensive approach to human rights, in addition to recognizing, respecting, and ensuring human rights, the 2013 Constitution recognizes and stipulates the protection of human rights as a commitment as well as the principle of organization and operation of the state apparatus. This is clearly reflected in the provisions of Article 3, Clause 1, Article 14 of the 2013 Constitution and analyzed above. As to solidify that even more, in other articles of the 2013 Constitution, the phrase "protection of human rights and citizenship" appeared quite a lot.

Secondly, the 2013 Constitution has begun to focus on the issue of constitutional protection. A separate independent article has been dedicated to the validity and protection of the Constitution. Several actors have been identified with the duty to protect the Constitution. The 2013 Constitution also requires a constitutional protection mechanism to be provided for in the law<sup>3</sup>. This content has been analyzed in detail as mentioned above. Along with upholding the issue of protecting the Constitution, the protection of human rights is also upheld, because human rights are an important content of the Constitution, which is even considered as the most obvious normative content of the 2013 Constitution.

Thirdly, for the first time in Vietnam's constitutional history, the Constitution clearly stipulates the task of protecting human rights for state agencies. First of all, although stipulated in different articles the tasks of the People's Court and the People's Procuracy both have the same task of

"protecting human rights, citizenship"<sup>4</sup>. Besides these two agencies, the Government is also for the first time provided with the task of protecting human rights and citizenship<sup>5</sup>. Thus, in addition to the role of the National Assembly, through making laws that allow restrictions on human rights, all the key agencies in the Vietnamese state apparatus including those exercising legislative, executive, judicial power, and the People's Procuracy all have the duty to protect human rights. The responsibility to protect human rights has been widely stipulated in the 2013 Constitution. Such regulation may not be focused enough to determine which agency hold main accountability in protecting human rights, but it nevertheless has shown a great development in general awareness about the role and importance of human rights as well as the protection of human rights under the socialist rule of law state of Vietnam.

As for the principle that the state recognizes, respects, protects, and guarantees human rights, its content of can be viewed from the following angles:

- *The obligation to recognize.* This obligation reflects the view that human rights are natural rights, originating from the inherent nature of human beings and independent of other social factors. Therefore, human rights are not granted by the state, but on the contrary, the state must accept the objective existence of these rights. Thus, the obligation to recognize under the 2013 Constitution is that the state must objectively recognize human rights. It is in this Constitution that new contents related to human rights, such as the right to live in a clean environment, have been recognized. In order to fulfill this obligation effectively, it is necessary to refer to international legal standards.

- *The obligation to respect.* A state is established through the empowerment of the people to create an apparatus capable of maintaining order and ensuring freedom for society. Therefore, in the context of human rights, the state needs to respect, that is, not to infringe and treat arbitrarily. This is vital due to the fact that a state is a public authority. If a state does not respect or neglects human rights, there will be substantial negative consequences. This has also been reflected in a salient principle on human rights of the 2013 Constitution, that is the principle of limiting human rights in Article 14, Clause 1. Accordingly, all restrictions on human rights of the state can only be placed in case of necessity and must be based on the provisions of law.

- *The obligation to protect.* The state is established to protect human rights. This is an active duty that the state must comply with and perform. Any violation of human rights in society must be prevented and punished. Thereby, the human rights of each individual will be protected. Protection of human rights can be implemented through a variety of mechanisms, including legislative, judicial, executive, and other types of independent constitutional agencies. In the 2013 Constitution, state agencies, particularly the judiciary, have been emphasized more on their role in protecting human rights.

- *The obligation to guarantee.* A guarantee is understood as the preparation of necessary conditions for the good performance of an activity. Here, human rights guarantee is understood as an obligation of the state to provide the necessary conditions in the realm of economy, social infrastructure, other institutions, so that people can exercise their rights in the most effective way. The obligation to guarantee is considered the most proactive obligation because the state must continuously meet the needs of the people in the exercise of human rights. Meanwhile, their needs are always changing according to economic and historical circumstances. Therefore, the state must always take steps to keep up with those changes.

As can be seen, the provisions and spirit of the principle of the workers' state, which respects, protects and ensures human rights under the 2013 Constitution are quite similar to the standards of the international human rights law. Specifically, according to the general perception, the obligations of states in ensuring human rights manifest themselves in the following three forms<sup>6</sup>:

Firstly, the obligation to respect requires states to refrain from interfering, either directly or indirectly, with the enjoyment of human rights by rights holders. This is considered a negative obligation because it does not require states to actively introduce initiatives and measures or programs to assist citizens in enjoying their rights. This obligation is particularly relevant to civil and political rights (passive rights).

Secondly, the obligation to protect requires states to prevent violations of human rights by third parties. This is considered a positive obligation because in order to prevent violations of human rights by third parties, the state must proactively take measures and build mechanisms to prevent and deal with human rights violations. This obligation concerns all civil, political, economic, social, and cultural rights, but is closer to civil and political rights.

Thirdly, the obligation to fulfill requires states to take measures to support citizens to fully enjoy human rights. This is also considered a proactive obligation because it requires states to have specific plans and programs to ensure that all citizens can enjoy their human rights to the fullest extent possible. This obligation is closely related to economic, social, and cultural rights (passive rights).

In short, it is very important to prescribe the principles that the state recognizes, respects, protects and guarantees human rights and citizenship. That not only deepens the obligations and roles of the state, which is the foundation for individuals in requesting the state to perform its responsibilities, but also updates the principles of current human rights law.

### **III. Approach to studying the application of principles of recognition, respect, protection, and guarantee of human rights to basic civil rights**

#### **1. Research subjects**

To answer the above research question, the main subjects of the study are the provisions on basic civil rights in the 2013 Constitution and relevant current legal documents. Academically, human rights can be classified by fields, including civil and political rights<sup>7</sup>. However, in order to determine specifically the basic civil rights provisions in the 2013 Constitution, a clearer separation is needed. The division of rights into civil rights and political rights groups is also relative. For example, for the right to freedom of speech or freedom of expression, if the message being expressed is related to politics (political opinion), it can also be considered a political right. Similarly, the right to freedom of assembly but for civil purposes can be considered a civil right.

However, in terms of nature, the way of dividing rights into groups of political rights and civil rights as above, in our opinion, is reasonable. The reason it can be affirmed is that civil rights can be understood as individual rights. "Civil" in English comes from the Latin word "civilis"<sup>8</sup>, which means personal, individual, or citizen. That is, civil rights will be associated with the subject being an independent individual. In contrast, political rights are associated with the rights of groups, crowds, or several people. Because the word "politics" comes from the Greek word "πολιτικός", which means "πόλι" ("poli" - many, many people) and "τόκος" ("tokos" means interest)<sup>9</sup>. Thus, political rights will include the rights of many people. Therefore, in terms of linguistic nature, the division of rights according to the above point of view is reasonable as the civil rights only include those rights directly related to an individual, while the political rights include rights that are exercised by a group of people. Indeed, the rights of gathering, association or participation in politics all reflect the activities of a large group of people while the rights to physical freedom and freedom of thought are attached to independent individuals.

Therefore, we believe that the provisions on civil rights in the 2013 Constitution can be mentioned including articles 19 to 26. Their specific content will be considered in the following section. Next, in terms of relevant legal documents, it is necessary to clearly define the scope of sources of law used in the research. The proliferation legal documents created a so-called 'law forest' phenomenon. Therefore, within the scope of research and implementation, there should be specific limits to avoid having to deal with too large a volume of documents while ensuring that the review and evaluation will still provide a relatively comprehensive and complete picture on the subject matter involved. In our opinion, it is reasonable to limit the scope of the text to government decrees. Indeed, the government decree is the first document under the law, being the concretization and detailing of the law, as well as the product of the legislative authorization process from the parliament and the result of the exercise of the government's regulatory power<sup>10</sup>. Therefore, the government decree fully and clearly reflects the large orientation of the executive apparatus in regulating one or a group of rights. For the simple reason that the document issuing at the circular level is only intended to concretize and clarify the procedure for the decree, the source of law for the systematization of human

rights law stopping at the decree level is reasonable. To sum up, the research subjects of this article are the provisions of articles 19 to 24 of the 2013 Constitution and related documents in the form of laws and decrees.

## 2. Methodology

With legal documents as its only research, the study uses the following methods. The first is a statistical method for gathering and reviewing relevant documents and regulations. Next is the comparative method, in which the focus is on the International Covenant on Civil and Political Rights (ICCPR) to see the similarities and differences between the concept and legal regulations in Vietnam and that of the world. Finally, the method of analysis and synthesis are used to clarify the effectiveness, completeness, and timeliness of the institutionalization of basic civil rights provisions of the 2013 Constitution and to make necessary recommendations to improve them.

## 3. Intrinsic logic of the research

The research methods are deployed on an internal logic circuit. First, in order to start the research, it is necessary to gather documents belonging to the research subjects and review them. After that, the research subjects were processed by comparison and analysis methods to see their effectiveness and completeness. Finally, those issues are summarized into more general contents from which to give directions and recommendations to improve the law. However, back to the topic of research, we see that the group of civil rights contains many different aspects. Therefore, it is difficult to proceed with each of the steps with all specific rights. Therefore, to ensure the structure, the article will conduct research with some of them. Specifically, the logic of the research will be implemented sequentially for each right, from the right to life, the right to inviolability, etc.

## 4. Research tools

One common feature that emerges from this internal logic is that research for different rights will be conducted in the same way. That is, each still goes through the steps of statistics, comparison, analysis, and synthesis. Therefore, to avoid repetition, the research tool that is generally applicable to each right will be presented first. Specifically, it is a tool to evaluate the implementation of the provisions of the 2013 Constitution on basic civil rights. Having said that, building a complete legal framework to ensure and promote human rights is considered a “*proactive obligation*”<sup>11</sup> of the state. Therefore, evaluating the implementation of the provisions of the 2013 Constitution is also evaluating that initiative. The assessment tools include the following:

- (1) Completeness and balance

When looking at the unity of the law from the holistic perspective, any lack of regulation will result in inconsistency. From this perspective, the requirement to ensure the completeness and balance of legal regulations is very important. When assessing the completeness, it is necessary to compare with international standards in general as well as available legal documents in particular. Especially, in the field of human rights, the willingness of states to promote and guarantee human rights is partly reflected in whether the legal framework on human rights is fully developed in that state or not.

(2) Timeliness

Meeting the needs of society in each period, each context is one of the essentials of the law. Given the fact that the current social, economic, and political situations are undergoing many changes with an accelerating speed, the needs for building a legal system and the need to enjoy the right are also growing at a great speed. In particular, in the near future (until 2030, with a vision to 2030), one of the major trends in human rights issues is “[t]he trend of continuing to build and perfect institutions to ensure human rights in the direction of democracy and the socialist rule of law with the active participation of social organizations, in order to meet the higher requirements of ensuring international human rights standards when the country has transformed into the developing countries group with middle income level”<sup>12</sup>. It is clear that this trend requires the state to promptly issue legal documents concretizing the provisions of the constitution and that is considered an important criterion to evaluate the capacity of the state.

(3) Ease of access

With an accessible legal system, its users can reduce costs and burdens, thereby bringing economic efficiency. From a rights perspective, a concern is raised with regards to the access to justice, which has been and is recognized as a human right<sup>13</sup>. Thus, if we consider the law as a step through which people get closer to justice, the access to the law is must also be a right and building an accessible legal system is an obligation of the state. Especially in the field of human rights, the accessibility of legal regulations is not only in substantive law but also in formal law.

#### **IV. Regarding rights related to health, life, honor, and dignity**

The rights related to health, life, honor, and dignity are stipulated under the provisions of articles 19, 20 of the 2013 Constitution and articles 6, 7, 8 of the ICCPR respectively. The 2013 Constitution added a new right, that is the right to life, with Article 19 of the Constitution stipulating that “Everyone has the right to life. Human life is protected by law. No one shall be unlawfully deprived of his or her life”. It can be said that the provision on the right to life in the 2013 Constitution is a fairly progressive new regulation that affirms the humanistic value of the Constitution in general as well as directly shows that Vietnam consistently adheres to the international conventions it has signed.. However, despite recognizing the "right to life" of people, what needs further discussing is

the fact that Vietnam still applies the death penalty. It is necessary to clarify the relationship between the death penalty and the right to life. International law does not require member states to abolish the death penalty, but states are obligated to limit its use, and limiting its use is also considered a form of protecting the right to life. Like many other countries in the world, stemming from objective requirements on crime prevention, Vietnamese law still maintains the death penalty but is gradually narrowing the scope of its application. Specifically, articles with the death penalty frame in the Penal Code has seen a constant decrease from 44 in 1985 to 29 (accounting for 11%) in 1999 to 22 (accounting for 8%) and to 15 (accounting for 5%) in 2015.

Next is about the inviolability of body, health, honor, and dignity. The 2015 Penal Code has dedicated a separate chapter, Chapter XIV (from Articles 123 to Article 156), that regulates crimes infringing on the right to life, health, dignity, and honor protection and stipulates criminal liability for those who commit these crimes. Along with that, in 2014, Vietnam ratified the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. However, Vietnam does not directly apply the provisions of the Convention, but is gradually internalizing it. The 2015 Penal Code has amended the crime of unlawful arrest, detention or imprisonment, the crime of using corporal punishment, and the crime of coercion in order to ensure the requirements of the Convention Against Torture. Particularly by (1) adding the circumstances that frame the penal aggravation as “torture, cruel, inhuman or degrading treatment or punishment or degrading the victim’s dignity” to the crime of unlawful arrest, detention or imprisonment (point b, clause 2 of article 157, penalties ranging from five years to 12 years of imprisonment); (2) adding the objective act of “using corporal punishment or cruel treatment, humiliating the dignity of others in any way” to the crime of using corporal punishment (Article 373); (3) adding aggravating circumstances to the crime of forced confession (Article 374). In addition, Article 8 of the 2015 Law on Detention and Custody has also confirmed prohibited acts including torture, coercion, and corporal punishment, and cruel, inhuman, and degrading treatment and punishment. This Law, together with the Law on Civil Judgment Execution, are core the laws in ensuring the litigants' right not to be tortured in criminal proceedings. However, up until now, the Law on Criminal Judgment Execution 2010 has not been amended and supplemented. This can be considered as a minus point for the timeliness of the law in this area. There are views<sup>14</sup> that point out some inadequacies in the current Criminal Judgment Execution Law, especially in comparison with relevant international law standards such as: (1) the principles of enforcement criminal judgment has not mentioned the issue of “health” of the sentenced person while the United Nations Department of Standard Rules for the Treatment of Prisoners of 1955 clearly noted this; (2) the Criminal Judgment Execution Law lack regulations on detention devices such as cribs, shackles, foot shackles, and handcuffs. The consequence of this may be the abuse of the law leading to infringement of the rights of the sentenced person. (3) Issues of gender, sexuality and



reproduction have not been clearly considered in the law. In particular, neither the Law on Criminal Judgment Execution nor Decree 117/2011 and Joint Circular 04/2010 have mentioned these sensitive issues. It is clear that the absence of a more advanced law that both reflect the spirit of the 2013 Constitution and accepts the views of the Convention Against Torture is a weakness in both the completeness and timeliness of the law.

From the perspective of protecting honor and dignity, Vietnam's criminal law is quite complete with the Criminal Code alone, which has devoted articles 155 and 156 to punish acts of humiliation and slander. However, to a lesser extent, according to the provisions of Point a, Clause 1, Article 5 of Decree No. 167/2013/ND-CP dated November 12, 2013, people with rough, provocative gestures and words, teasing or insulting the honor and dignity of others shall be subject to a warning or a fine of between VND 100,000 and 300,000. The administrative handling of this violation falls under the competence of the chairperson of the People's Committee of the commune or ward where the violator resides. In our opinion, this regulation is somewhat outdated with low fines and low enforcement effect. In other words, the mechanism of administrative law to protect human rights in this case is very difficult to access.

In addition to public law, private law, typically the 2015 Civil Code, also has provisions related to the rights to life, health, honor, and dignity, specifically in articles 33 and 34. However, the way in which private law guarantees human rights is considerably different from that of public law. If public law is deterrent, private law is paving the way. The right to live according to the concept of civil law covers many aspects, including the issue of tissue and body organ donation, the right to live in accordance with one's gender, right to die, etc.<sup>15</sup> These are the parts that the law is not only lacking, but is also slow and difficult to approach. Firstly, the Law on donation, collection and transplantation of human tissues and organs, and the donation and collection of human body, promulgated in 2006 has revealed many shortcomings<sup>16</sup>; the Law on gender change and the decree replacing Decree 88/2008 remain to become available although the Civil Status Law 2014 has allowed to amend identity papers when transgender; and the Law on euthanasia has not been developed yet. These are the weak manifestations of the implementation of the right to life according to the civil law.

## **V. Right to personal freedom**

It can be said that this group of rights includes many branch rights in the 2013 Constitution, including: Freedom of movement and residence (Article 23), the right to freedom of belief and religion (Article 24), the right to freedom of speech, freedom of the press and access to information (Article 25), and the right to have a place to live (Clause 1, Article 22). They correspond to a number of rights in article 4, article 7, article 18, article 19 of the ICCPR.

## 1. Freedom of movement and residence

Along with the recognition in Article 22 and 23 of the Constitution, in order to realize these rights, legal documents have been implemented and created a legal corridor for their implementation, specifically:

### (1) Residence Law 2006, amended and supplemented in 2013

Accordingly, in order to ensure the freedom of movement and freedom of residence of citizens in the territory of the Socialist Republic of Vietnam, and to create a legal corridor for citizens to exercise their fundamental rights recognized in the Constitution, the National Assembly has promulgated regulations on the order and procedures for registration and residence management; rights and responsibilities of citizens, households, agencies and organizations regarding residence registration and management<sup>17</sup>. The Law also stipulates the principle of exercising citizens' right of residence in Article 3 that "*Citizens have the right to freely reside in accordance with the provisions of this Law and other relevant provisions of law. Citizens who fully meet the conditions for registration of permanent or temporary residence may request competent state agencies to register their permanent or temporary residence.*

*Citizens' right to freedom of residence is restricted only under decisions of competent state agencies and according to the order and procedures prescribed by law*".

After the 2013 Constitution was issued, in order to be consistent with the new contents on human rights and citizens' basic rights recognized in the new Constitution, the 2006 Residence Law was amended and supplemented with a number of new articles to ensure the conformity of the progressive contents recognized in the new Constitution. Along with the addition of the residence law, the Government has issued guiding documents including Decree 31/2014/ND-CP detailing and implementing measures to the Law on Residence and Circular 35/2014/TT-BCA guiding the Law on Residence and Decree 31/2014/ND-CP.

In addition to the recognition of the right to freedom of residence, currently in the legal system of Vietnam, there are documents regulating the freedom of movement of Vietnamese citizens, ensuring the right to "go abroad and from abroad to return home" of Vietnamese citizens, that is Decree No. 136/2007/ND-CP on exit and entry of Vietnamese citizens, issued on June 17, 2007. The content of the document regulating the paperwork creates a legal basis for the entry and exit activities of Vietnamese citizens. This Decree is amended and supplemented by Decree No. 94/2015/ND – CP. In this regard, we see a salient point that, up to this point, Decree 136/2007 (amended and supplemented by Decree No. 94/2015/ND-CP) of the Government is the most effective document concretizing the right to freedom of movement of Vietnamese citizens to go abroad and return Vietnam from abroad which is recognized in Article 23 of the 2013 Constitution. Under the decree, there are a number of provisions, such as Articles 21 and 22, with content on limiting the freedom of movement. However,

according to the provisions of Clause 2, Article 14 of the 2013 Constitution, human rights are limited only by "law". Therefore, in our opinion, the National Assembly should promulgate a document to regulate the principles first and then the decree. Otherwise, the regulations in this area are seemingly not yet complete.

## 2. Freedom of belief and religion

To ensure the freedom of belief, Vietnamese citizens' right to follow or not to follow a religion is recognized in the Constitution. The 14th National Assembly has developed regulations from the Ordinance on Belief and Religion to the Law on Belief and Religion 2016 to ensure the principles recognized in the 2013 Constitution, which are human rights and citizenship in Vietnam are recognized, respected, protected and guaranteed. This law recognized the rights to freedom of belief and religion of everyone, as well as the responsibilities of state agencies and social organizations in ensuring the right to freedom of belief and religion for everyone.<sup>18</sup> Along with that come the regulations on belief activities and religious activities, religious organizations, rights and obligations of agencies, organizations and individuals related to belief and religious activities.

Based on this law, the Government has issued Decree 162/2017/ND-CP to provide detailed regulations. Besides, the Ministry of Home Affairs is currently in the process of drafting a Decree on administrative sanctions in the field of religious beliefs. In general, in this area, Vietnamese law has made some progress, such as the Penal Code which stipulates crimes related to infringing upon the right to freedom of belief and religion, The Criminal Procedure Code that has provisions to expand the right to practice beliefs and religions of inmates. However, both the Constitution and the law define a wide range of cases where rights are restricted, leading to arbitrary interpretation and restricting freedom of belief and religion in practice. Decree 162/2017/ND-CP also does not specifically explain the cases where rights are restricted under the provisions of the Law, especially Clause 4 Article 5, leading to difficulties in application. This is a gap that the law must fill in order to ensure its completeness.

## 3. Freedom of the press, freedom of speech

### (1) Law on Press 2016

Institutionalizing regulations to ensure freedom of speech and press freedom are recognized in the 2013 Constitution. The XIII National Assembly discussed and passed the 2016 Press Law, which regulates the right to freedom of press, citizens' right to freedom of expression in the press; press organization and activities; rights and obligations of agencies, organizations and individuals participating in and related to press activities; and the State management of the press., Accordingly, the Press Law stipulates citizens' right to freedom of expression in the press as follows:

- *“Expressing opinions on the situation of the country and the world.*
- *Participate in the formulation and implementation of directions, guidelines and policies of the Party and laws of the State.*
- *Giving comments, criticism, recommendations, complaints, and denunciations in the press for Party organizations, state agencies, socio-political organizations, socio-political-professional organizations, social organizations, socio-professional organizations and other organizations and individuals.”*<sup>19</sup>

Along with that, to ensure clarification of a number of provisions in the press law, the Government has issued a number of specific decrees including:

- Decree No. 08/2017/ND-CP issued on February 8, 2017, stipulating the electronic deposit of audio, visual and electronic newspapers independent of press agencies;
- Decree No. 09/2017/ND-CP detailing the statements and provision of speech and provision of information to the press by state administrative agencies.

As can be seen, the content of Decree No. 09/2017/ND-CP issued by the Government contributes not only to ensuring the content of exercising the right to freedom of the press and freedom of speech, but also to the realization of the right to access information recognized in the 2013 Constitution.

Regarding the right to freedom of expression, there is a rather topical legal issue related to the Law on Cybersecurity, which has just been promulgated and has not yet taken effect. Although born quite late, this Law has touched on a rather thorny issue, that is the freedom of expression on the internet environment. Temporarily setting aside the completeness and timeliness of the network security regulation, however, as studying the content of this law, we find that there are many problems that make it difficult for people to access. The concept of cyberspace in clauses 3 and 4 of Article 2 is quite vague, while Article 16 is also not easily explicable. For example, point c, clause 1 provides for acts of insulting the nation, the national flag, the national emblem, the national anthem, great men, leaders, famous people, and national heroes. The problem lies in defining who are on the list of great people, leaders, etc., because this provision does not restrict whether the scope of the above object to belong to Vietnam or not. In a similar vein, Clause 2 has provisions on the act of "distorting", "defaming" the people's administration, which are highly subjective and difficult to define clearly.

## **VI. Privacy**

The right to privacy, with its connotations include the inviolability of private life, personal and family secrecy, secrecy of correspondence, telephone, telegraph, and other forms of communication other private information (Article 21); and the inviolability of accommodation (Clause 2, 3, Article 22). For this field of rights, it has a fairly wide coverage and is concretized by many legal

documents. The first is the 2015 Penal Code, with the crimes in Articles 158 and 159. Next is the Civil Code 2014 with Article 38. In addition, some specialized legal documents also have relating provisions such as:

- Law on press and publishing law prohibits posting, broadcasting, or publishing content containing information revealing private secrets;
- The Children's Law provides for the protection of children's privacy;
- The law on access to information allows individuals to refuse to provide information that is confidential.

While there is already a fairly broad body of privacy regulation, we find that there are still gaps in the law.

Firstly, the Criminal Procedure Law in Chapter XVI has provisions allowing investigative agencies to secretly record audio and video, and listen to secret telephone calls, and to collect confidential electronic data. However, there is still no complete regulation on this specific procedure, only vague concepts as mentioned above. It may create certain difficulties for people and lawyers to understand and approach them correctly to detect violations of privacy.

In addition, the Cybersecurity Law requires businesses providing online services to authenticate user information and provide it to the police, but at the same time to prevent sharing and even delete information or to stop providing services when required. These regulations also partially affect the privacy of individuals online, especially by infringing on their anonymity.

## **VII. Conclusion**

The principle that the state recognizes, respects, protects, and guarantees human rights is highly important because it inculcates the responsibility of the state towards individuals. The recognition of this principle in the Constitution is the first step for a better way of the state to behave towards people. Each area of basic civil rights has different levels of enforcement, some of which are quite fully regulated and some even left open. Returning to the research question, the issue of improving the effectiveness of the implementation of the 2013 Constitution's provisions on basic civil rights, in our opinion, needs to be done with the following basic orientations:

- continuing to research to supplement necessary regulations and to avoid creating legal "loopholes". In particular, attention should be paid to the rights to life, freedom of belief and religion, and freedom to travel abroad;
- applying a rights-based approach to developing and perfecting the law because many of our regulations still place heavy emphasis on the managerial and supervisory needs of the state;
- continuing to concretize legal documents to facilitate complete, clear and accessible legal system.



## **2. The Economic, Social, Cultural, Educational, Science, Technology and Environmental Regulations in the 2013 Constitution**

**Nguyen Quang Tuyen\***

***Abstract:** This article provides an in-depth analysis of the factors affecting the compilation of the economic, social, cultural, educational, science, technology and environmental chapter and assesses the representation of the internal and external factors in the content of such regulations in the 2013 Constitution.*

***Keywords:** 2013 Constitution, Vietnam, assess, internal factors, external factors, impact, affect; economic, social, cultural, educational, science, technology and environmental, etc.*

### **Question**

In the constitutional history of Vietnam, the 2013 Constitution is the fifth constitution since the founding of the Democratic Republic of Vietnam (now known as the Socialist Republic of Vietnam).<sup>1</sup> Each constitution is associated with a development period in the country. The 2013 Constitution is associated with the period of comprehensive promotion of national reform and international integration. The 2013 Constitution, which includes 11 chapters and 120 articles, was approved by the XIII National Assembly during its 6<sup>th</sup> session on November 28<sup>th</sup>, 2013 (hereinafter the 2013 Constitution). The economic, social, cultural, educational, science, technology and environmental issues are promulgated in Chapter III (from Article 50 to Article 63). The regulations on economic, social, cultural, educational, science, technology and environmental issues are the combination of the analysis and assessment of practical demands in the comprehensive national reform period. They also adapt to the requirements of international integration and selectively learn from the legislative experience of other nations.

### **I. The position of the economic, social, cultural, educational, science, technology, and environmental chapter in the 2013 Constitution**

The economic, social, cultural, educational, science, technology, and environmental chapter is an important chapter in the constitution of any country. This chapter declares the economic model that a country is pursuing, building, and developing; the treatment policy towards different economic sectors;

---

\* Associate Professor, Vice President of University Council, Dean of Economic Law Department, Hanoi Law University

<sup>1</sup> Since the establishment of the Democratic Republic of Vietnam on September 2<sup>nd</sup>, 1945 (now the Socialist Republic of Vietnam), the Vietnamese National Assembly has approved five constitutions in 1946, 1959, 1980, 1992 and 2013.

and the social, cultural, educational, science and technology as well as environmental policy. Based on this declaration in the Constitution, the state shall pass specialized legislation promulgating those matters. The fact that the economic chapter was often placed right after the political regime chapter in the 1946, 1959, 1980 and 1992 Constitutions has confirmed its important position. In the 2013 Constitution, the economic, social, cultural, educational, science, technology, and environmental chapter is Chapter III, after Chapter I. Political regime and Chapter II. Human rights, citizen' basic rights and duties. This does not mean that the economic chapter is not as important as before. Chapter III is a combination of 'Chapter II. Economic regime' and 'Chapter III. Culture, education, science, technology' from the 1992 Constitution, which means that Chapter III of the 2013 Constitution promulgates the above five issues in addition to social and environmental issues. Thus, this chapter shows the close relationship between economic development, ensuring social justice, environmental protection, and cultural, educational, and science development. According to the Summary Report of people' opinion on the Draft amendment to the 1992 Constitution by the Vietnamese Fatherland Front published on March 30<sup>th</sup>, 2013, Chapter III received 603,539 opinions, which is the most out of any chapter in the 2013 Constitution. Having a separate economic, social, cultural, educational, science, technology, and environmental chapter seems to be a characteristic of Vietnam. This chapter demonstrates the direction the country is moving towards, ensuring a close association between multi-sector economy with sustainable development, linking economic development with cultural development, promoting social justice and environmental protection. *"With the view that economic development must be closely and harmoniously associated with cultural, educational, science and technology development as well as social progress and justice, environmental protection is institutionalized in the same chapter, the contents of this chapter shall be comprehensive and stable in terms of objectives, directions and basic polices as the highest legal foundation for fast and sustainable development across all socio-economic, cultural, educational, science, technology and environmental sectors."*<sup>2</sup> The 2013 Constitution was passed during the 30 year reform period with recognized economic, cultural and social achievements as well as global challenges such as environmental pollution, climate change, and the impact of the 4.0 Industrial Revolution. One of the theoretical bases for the formulation of Chapter III is the ideas and direction of the Vietnamese Communist Party. This was reflected in the resolutions of the Party assembly and especially the Resolution on transforming the country toward socialism (supplemented and developed in 2011), building a rich, strong, democratic, fair, and civilized Socialist Republic of Vietnam. Therefore, one of the objectives of the 2013 Constitution

---

<sup>2</sup> Nguyen Sinh Hung (2014), the revised Constitution is to ensure a solid political and legal framework so that the entire Party, people and army can unanimously move forward in the new era - Constitution of the Socialist Republic of Vietnam - The political and legal foundation for the comprehensive renovation of the country in the new period compiled by the Legislative Research Journal under the Legislative Research Institute under the National Assembly Standing Committee, Labor and Social Publishing House, Hanoi, p. 19 -20.



expressed in Chapter III is ensuring economic reform and completing the socialist-oriented market economy regime.<sup>3</sup>

## **II. The drafting process of the 2013 Constitution and the economic, social, cultural, educational, science, technology, and environmental chapter and the impact of economic, cultural, social and international integration factors.**

1. The drafting process of the economic, social, cultural, educational, science, technology, and environmental chapter and the requirements<sup>4</sup>

The 1992 Constitution was promulgated in the early years of the country's effort to institutionalize the Reform policy, diversifying and multilateralizing international relations initiated by the Communist Party of Vietnam at the The Sixth National Party Assembly (1986) and the National Transition to Socialism Credo in 1991. The 1992 Constitution played an important role in the political, economic, cultural and social development of the country. However, in the 21<sup>st</sup> century, Vietnam faces challenges that the 1992 Constitution could not have foreseen.<sup>5</sup> The actual operation of the government also revealed several shortcomings such as cumbersome organization, overlapping functions, unclear authority and responsibility, and low levels of effectiveness and efficiency. The unsynchronized legal system did not create enough necessary legal framework to serve the reform. The enforcement was not strict, which led to complicated corruption, wastefulness, bureaucratic issues, etc.<sup>6</sup> Facing that situation, the consolidation of the entire system and the construction of a socialist rule of law state was an urgent requirement to continue promoting the reform.<sup>7</sup> On the other hand, to meet the requirements of the country's development in the new situation, the 11th National Assembly of the Party (from 12 to 19 January 2011) approved the Credo for building the country in the transition to socialism (added and developed in 2011), which identified the objectives and developing directions for the new period, aiming towards the eight characteristics of the socialist regime in Vietnam (compared to two characteristics in the 1991 Credo). These characteristics include: i) Rich people, strong country, democracy, justice and civilization; ii) Owned by the people; iii) Having a highly developed economy based on modern productive forces and public ownership of the main means of production; iv) Having an advanced culture imbued with national

---

<sup>3</sup> Bui Xuan Hai (2014), Regulations on economy, society, culture, education, science, technology, and environment in the 2013 Constitution - Scientific commentary on the Constitution of the Socialist Republic of Vietnam by the Institute of Public Policy and Law under the Vietnam Union of Science and Technology Associations, Labor and Social Publishing House, Hanoi.

<sup>4</sup> The content of this section is referenced from the Human rights, basic rights and duties of citizens in the Constitution of Vietnam book by the Standing Office for Human Rights & Ho Chi Minh National Academy of Politics (coordinated), Hanoi, 2015.

<sup>5</sup> See Committee for Drafting Amendments to the 1992 Constitution, Final Report on the Implementation of the 1992 Constitution, dated 1 October 2012, p.1

<sup>6</sup> Final Report on the Implementation of the 1992 Constitution, pg. 1

<sup>7</sup> Final Report on the Implementation of the 1992 Constitution, pg. 1

identity; v) People have a prosperous, free and happy life and have conditions for comprehensive development; vi) Ethnic groups in the Vietnamese Community are equal, unite, respect and help each other develop; vii) There is a socialist rule of law state of the people, by the people, for the people led by the Communist Party; viii) Having friendly and cooperative relations with people of countries around the world.<sup>8</sup> Thus, despite the fact that the 1992 Constitution was amended in 2001, it was no longer suitable. The demand for a new constitution to institutionalize the directions and objectives of the 2011 Credo for building the country in the transition to socialism and other resolutions of the 11th National Assembly of the Party arose. To “...ensure synchronous reform in both economic and political terms, build a socialist Vietnam of the people, by the people and for the people, perfecting the socialist-oriented market economic, better ensure human rights, basic rights and duties of citizens; building and defending the country; actively and proactively international integration.”<sup>9</sup> To achieve the above-mentioned objectives, the amendment of the 1992 Constitution in general and the amendment of the economic, social, cultural, educational, science, technology, and environmental chapter (hereinafter the socio-economic chapter) in particular must meet the following basic requirements:<sup>10</sup>

*First*, continue to affirm and clarify the basic contents of the regime's nature as stipulated in the 1992 Constitution, including promoting socialist democracy, the people's right to own, and ensuring the leadership of the Communist Party, developing a socialist-oriented market economy, building and perfecting the Vietnamese socialist state of the people, by the people, for the people.

*Second*, institutionalize the major views and guidelines stated in the Credo for National Construction in the Transition Period to the Socialist Republic in 1991 and other documents of the 11th National Party Congress.

*Third*, perfecting constitutional techniques, ensuring that the Constitution is really a fundamental, stable and long-term law in the country's legal system.

On the basis of these objectives and requirements, the 1992 Constitution was amended and supplemented (including the socio-economic chapter) based on the following key views:

- Based on the summary of the implementation of the 1992 Constitution and related laws; based on the orientations and contents of the Credo for national construction in the transition to socialism in 1991 and other documents of the 11th National Party Congress; inheriting the provisions of the 1992

---

<sup>8</sup> See Le Huu Nghia, Characteristics showing the superiority of socialism that our people are building, discussed at the morning meeting on January 14<sup>th</sup>, 2011 at the XI Congress of the Communist Party of Vietnam. See the full text of the Platform at <http://www.taydungdang.org.vn/Home/PrinStory.aspx?distribution>

<sup>9</sup> See Report No. 194/TTr - UBDSĐHP dated 19 October 2012 on the 1992 Constitution Draft Amendment by the 1992 Constitution Draft Amendment Committee, p.1.

<sup>10</sup> See Report No. 194/TTr - UBDSĐHP dated 19 October 2012 on the 1992 Constitution Draft Amendment by the 1992 Constitution Draft Amendment Committee, p.2.

Constitution and other relevant previous Constitutions; amending and supplementing issues that are really necessary, issues that are clear, proven to be true in practice, have sufficient grounds, receive high consensus and are suitable for the new situation.

- Continuing to affirm the nature and overall model of the political system and state apparatus as defined in the Credo for building the country during the transition to socialism in 2011 and the 1992 Constitution, specifically: the State of Vietnam is the socialist state of the people, by the people, for the people; all state power belongs to the people; State power is unified, with assignment, coordination and control among state agencies in the exercise of legislative, executive and judicial powers.

- Affirming that the Communist Party of Vietnam is the vanguard of the working class, at the same time the vanguard of the working people and of the Vietnamese nation, a faithful representative of the interests of the working class and the people and the whole nation according to Marxism-Leninism, Ho Chi Minh's ideology, and is the leading force of the state and society.

- Developing a socialist-oriented market economy; economically and politically synchronously reforming for the purpose of building a socialist Vietnam with rich people, strong, democratic, fair and civilized country.

- Respect human rights and citizens' rights; implement socialist democracy; strengthen discipline; building a great national unity.

- Amending the Constitution is an important project that must be carried out strictly and scientifically under the leadership of the Party with the participation by the experts, scientists, managers; organize the public consultation of the people and agencies and organizations; focus on information and propaganda work, ensure the right orientation and not let bad individuals and hostile forces take advantage to fight and distort.

The compilation of the 2013 Constitution and the socio-economic chapter began in 2011 with the implementation summary of the 1992 Constitution by the National Assembly as well as the establishment of the Committee on Amendment to the 1992 Constitution. After over a year, the National Assembly decided to gather public opinions on the Draft amendment on January 2<sup>nd</sup>, 2013. The original deadline for public commentary was March 31<sup>st</sup>, 2013, but it was extended until the end of 2013. It was mainly carried out by conferences, seminars, internet comments and household surveys. According to the report by the Committee on Amendment to the 1992 Constitution, as of May 17<sup>th</sup>, 2013, there were 26,091,000 public comments and over 28,000 conferences, seminars.<sup>11</sup> On November 28<sup>th</sup>, 2013, the XIII National Assembly

---

<sup>11</sup> Committee on Amendments to the 1992 Constitution, Report No. 287/BC-UBDTS DHP dated 17 May 2013 on the explanation, absorption and revision of the Draft Amendment to the 1992 Constitution on the basis of the people's opinions.

passed the 2013 Constitution with 97.59% (486/488) approval by the presented representatives. The 2013 Constitution came into effect on January 1<sup>st</sup>, 2014.

2. The factors that impact the compilation of the economic, social, cultural, educational, science, technology, and environmental chapter in the 2013 Constitution

(1) Internal factors

As mentioned above, the drafting of the 2013 Constitution and the socio-economic chapter were affected by several factors. The main internal factors are as follows:

*First*, the Party's viewpoints and guidelines on building an integrated socialist-oriented market economy in harmony with the requirements of society, culture, education, science, technology, and environment to ensure sustainable development are recognized in the Credo for building the country in the transitional period to socialism (amended and supplemented in 2011) and other resolutions of the 11<sup>th</sup> National Party Congress (2011).

*Second*, the compilation of the socio-economic chapter shall be based on the inheritance and development of achievements of the 1946, 1959, 1980 and 1992 Constitution, which have been proven to be correct and practical.

*Third*, the achievements, new challenges and demands on socio-economic development in the formulation of the socialist-oriented market economy as well as international integration.

(2) External factors

Besides the internal factors, the compilation of Chapter III was also affected by a few external factors, including:

*First*, the current impact of the 4<sup>th</sup> Industrial Revolution on the production process of mankind in general and on the Vietnamese economy in particular. The application of artificial intelligence and new technologies like cloud computing, Big Data, and 3D printing in the production sector has significantly improved productivity. The formulation and development of a digital society are taking place at a global level and in Vietnam. This is an important foundation for the formation of a sharing economy and the transition towards a digital economy with the appearance of new businesses such as technology taxis, online sales, meetings, and online teaching. The world is seeing more and more billionaires in technology. The 4<sup>th</sup> Industrial Revolution (or 4.0 Industrial Revolution) has profoundly changed the entire life of humankind. Reality shows that developed countries are countries which focus on science, technology advancement and application. Nowadays, countries mainly compete in science, technology advancement and application. Vietnam is among the countries with a low average income. Therefore, to become a developed country with high average income, investing in science and technology to improve productivity

is inevitable. For that reason, the 2013 Constitution promulgated that: “1. *Developing science and technology is the top national policy and plays a key role in the socio-economic development of the country; 2. The State prioritizes and encourages organizations and individuals to invest in research, development, transfer and effective application of scientific and technological achievements; guarantees the right to scientific and technological research; and protects intellectual property rights; 3. The State facilitates everyone to participate in and enjoy the benefits of scientific and technological activities.*”<sup>12</sup>

*Second*, the growing impact of international integration. International integration is an irreversible and inevitable trend. All countries, whether an economic powerhouse or an underdeveloped country cannot stay out of this process. This process keeps the economy of different nations close together and creates a global value-added chain. Vietnam’s economy is a part of the world economy and is an economy with high growth rate and heavily oriented toward export, thus, the impact of international integration on socio-economic, culture, education is very clear. That being said, based on public commentary on the Draft 2013 Constitution, an independent economy is still supported by society to prevent and respond to the challenges of international integration.

*Third*, the socio-economic chapter was still drafted using elite legislative foundation and selective reference to the legislative and constitutional experience and achievements of other countries. This is especially clear for developed countries like the United States, Germany, United Kingdom, France, and Japan as well as countries that have transformed into market economies like China while still considering the condition, context, history, political regime, and cultural tradition of Vietnam.

### **III. The impacts on the compilation of the economic, social, cultural, educational, science, technology, and environmental chapter in the 2013 Constitution**

#### **1. Positive impacts**

*First*, the formation of the socialist-oriented market economy and the socio-economic achievements of almost 30-years of comprehensive reforms resulted in the successful eradication of hunger and a reduction in poverty; steadily solving the national food security, rice, and agricultural product export problems; and significantly improving people’s living standards. This not only created trust and consensus among the people impacted by the socio-economic development guidelines initiated by the Communist Party of Vietnam, but also facilitated the compilation of Chapter III in the 2013 Constitution.

*Second*, the intensive damage to life and productivity caused by environmental pollution, climate change, and the growing appearance of extreme weather conditions on a global scale and in Vietnam not only made people recognize the important role of environmental protection and the association between

---

<sup>12</sup> Article 62 of the 2013 Constitution

environmental protection and economic development, but also changed the State's perception on environmental issues and sustainable development in national governance. This is one of the reasons why the Drafting committee combined Chapter II and Chapter III of the 1992 Constitution into Chapter III in the 2013 Constitution.

*Third*, the impact of the 4<sup>th</sup> Industrial Revolution on improving the productivity and competitiveness of economies between countries in general and Vietnam in particular made leaders, people, and enterprises realize the role of science, technology, and education in the development of the market economy. It is difficult to successfully develop the economy if there is little to no investment in education, science and technology. The successes of countries in East Asia like Japan, South Korea, Taiwan, Singapore and Hong Kong are based on the development of education, science, and technology as well as the promotion of traditional cultural values, patriotism, and national pride. This is the reference model and valuable experience for the Drafting committee of Chapter III.

*Fourth*, beside the achievements, issues like social injustice, unemployment, wealth inequality, and environmental pollution are some of the shortcomings and disadvantages of market economies in rich countries like the U.S, the U.K, France, and Germany, which was revealed by the Covid-19 pandemic. This shows that focusing only on economic development will not solve social injustice, unemployment, social security, poverty, and environmental pollution, which are the problems that developed countries are dealing with. Therefore, to avoid facing similar problems in building and developing a socialism-oriented market economy, the integration of economic regulations with social, cultural, educational, science, technology and environmental regulations in Chapter III is very persuasive.

## 2. Challenges

*First*, promoting economic growth and environmental protection to guarantee sustainable development.

Although sustainable development is the main approach, it is not possible to harmonize economic growth and environmental protection at any given time. Some areas, especially low-income provinces, only focus on attracting investment for economic growth while neglecting environmental protection. The Formosa project environmental incident in Vung Ang - Ha Tinh changed the leaders' perception to "not exchange the environment for economic growth" at all costs. However, it is still a tremendous challenge for Vietnam to harmonize economic growth with environmental protection in strategic planning and actual implementation.

*Second*, understanding the structure and the determining criteria of socialist-oriented economy.

This is not a popular economic model among countries and since there is no precedent, there is no experience or practice for reference to build and develop a socialist-oriented economy. Therefore, Vietnam must create a legal framework for the economy to operate smoothly while testing and summarizing to build a theoretical system at the same time which is very difficult and challenging. On the other hand, the 2013 Constitution needs to limit the level of State governance so that it does not interfere too much with economic relations and not let production and business to operate under the objective rules of a market economy. At the same time, disregarding State governance and letting the economy operate spontaneously can also negatively affect growth quality.

*Third*, institutionalizing the view that all economic sectors are important components of the national economy. All entities of each economic sectors are equal, cooperative and compete according to the law while the state economy still plays the dominant role. It is not easy to harmonize guaranteeing freedom of business, healthy competition among different economic sectors, and preventing the monopoly trend of the state economy in the regulations of the 2013 Constitution.

*Fourth*, resolving the incompatibility between the public ownership of land and the multi-sector market economy development in the context of international integration.

- Legislators must resolve the conflicts between the development of a multi-sector economy where all economic sectors are equal in terms of land and the fact that this most important mean of production is owned by the people.

- A vast majority of countries that are trade and economic partners with Vietnam have established different forms of land ownership while Vietnam only has a single model of ownership: Land is owned by the people and the State is the owner representative.

These challenges were necessary to deal with during the drafting of the 2013 Constitution to ensure the public ownership of land and to not hinder the process of international integration in general, bilateral, and multilateral trade and economic relations with other countries, regional organizations, and international organizations in particular.

#### **IV. The recognition of impacting factors in the compilation process and the content of the economic, social, cultural, educational, science, technology, and environmental chapter in the 2013 Constitution**

*First*, the 2013 Constitution recognized the sustainable development view of the United Nations by identifying and integrating economic development with environmental protection and social justice in Chapter III alongside the global challenges of environmental pollution, climate change, and poverty. On the other hand, international is an inevitable and irreversible trend and Vietnam is being increasingly

integrated into the global chain. This is reflected in Article 50 of the 2013 Constitution on building an independent and self-reliant economy, promoting internal resources, international cooperation while developing culture, social quality, environmental protection, industrialization, and modernization.

*Second*, the views of the Communist Party of Vietnam expressed in the Credo for national construction in the transitional period to socialism (amended and supplemented in 2011) and in the resolutions of the 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> National Congresses of the Party (especially the Resolution of the 5th Central Committee of the 12<sup>th</sup> term on perfecting the socialist-oriented market economy institution; Resolution No. 10-NQ/TW dated 3 June 2017 of the 12th Executive Central Committee on developing the private economy to become an important driving force of the socialist-oriented market economy) are affirmed by the 2013 Constitution: “*1. Vietnam's economy is a socialist-oriented market economy with many forms of ownership and economic sectors while State economy plays a key role; 2. All economic sectors are important components of the national economy. Entities of all economic sectors are equal, cooperative and compete according to the law; 3. The State encourages and facilitates entrepreneurs, enterprises and other individuals and organizations to invest, produce and do business, and at them same time promotes sustainable development of economic sectors, contributing to build the country. Lawful assets invested, produced by individuals and organizations are protected by law and shall not nationalized.*”<sup>13</sup>

*Third*, even though Vietnam is building a socialist-oriented economy, it is still essential to follow the objective rules of a market economy. Particularly in the process of international integration, Vietnam does consult and selectively recognize the experiences of countries developing market economies. This was reflected in Article 52 of the 2013 Constitution: “*The State builds and completes the economy institution and regulates the economy on the basis of market rules by assigning, decentralizing in state governance and promoting regional economic linkage and guaranteeing the unity of the national economy.*”

*Fourth*, all nations recognize land as an important natural resource in people’s lives. Furthermore, the land market is also an investment channel for development. The experience from developed countries shows that one of the reasons for success is a comprehensive, synchronous, and unified legal framework to protect land ownership rights. To recognize this factor, the 2013 Constitution stated that: “*1. Land is a special and important national resource for development and must be managed by the law; 2. The State shall assign, lease land to organizations and individuals and recognize land use right. Land users can transfer land use right, execute the rights and duties according to the law. Land use right is protected by the law; 3. The State only reacquire land in case of absolute necessary for national defense, security;*

---

<sup>13</sup> Article 51 of the 2013 Constitution



*socio-economic development for national and public interest. The reacquisition must be public, transparent and compensated according to the law; 4. The State only obtain land in case of absolute necessary as prescribed by the law for national defense, security or in case of war, emergency, national disaster.”<sup>14</sup>*

*Fifth*, compared to previous versions, the 2013 Constitution remarkably expressed the sustainable development perspective in building a market economy through Articles 56 to 63 by:

- Delivering the message of harmonizing economic development with social justice, social security policy, and environmental protection and not letting anyone fall behind in the development process.

- Affirming the relation between education and economic growth: Producing a high quality labor force through education and training to promote economic growth, which in return creates material resources to improve education and training quality.

- Confirming and emphasizing the importance of science and technology as a top national priority in socio-economic development, and, at the same time, declaring the State’s policy in prioritizing and encouraging investment in research and development. This effectively transfers and applies scientific and technological achievements and protects the rights to research and intellectual property.

- Identifying the relationship between socio-economic development and the preservation and promotion of Vietnamese traditional and progressive values. Accordingly, culture is the objective and motivation for socio-economic development, guaranteeing the promotion of traditional values will not “dissolve” in the international integration process. In return, socio-economic development will create important and necessary material conditions to build, preserve and promote those values. Moreover, those values help advance education, improving the international image and position of Vietnamese people in all aspects.

- Confirming the environmental protection policy in a socialist-oriented economy, the State shall:  
i) provide environmental protection policies; effectively and sustainably manage and utilize natural resources; preserve nature and biodiversity; actively prevent and adapts to natural disasters, climate change; ii) encourage environmental protection, develop and use new, renewable energy; iii) recognize and institutionalize the principle that “environmental polluters are responsible for restoration and compensation.”

---

<sup>14</sup> Article 54 of the 2013 Constitution

## V. Conclusion

1. Like in any other constitution, the economic, social, cultural, educational, science, technology, and environmental chapter is the basic chapter of the 2013 Constitution. This chapter not only inherits ideas from previous the versions in 1946, 1959, 1980 and 1992, but also advances their goals on the basis of the comprehensive reform over the past 30 years and the guidelines of the Communist Party of Vietnam in building a socialist-oriented market economy of the Credo for national construction in the transition to socialism (amended and supplemented in 2011) and resolutions of the 11th National Party Congress.

2. Recognizing a sustainable development view of the word and the achievements in developing market economy as well as the impact of the 4<sup>th</sup> Industrial Revolution; combining Chapter II on economy and Chapter III on culture, society, science and technology of the 1992 Constitution; and adding education and environmental protection. This is not simply combining two chapters, it also demonstrates the State's goal to integrate and affirm the importance and the exchange between economy, society, culture, education, science, technology and environment in the process of transforming Vietnam into a developed country by 2045.

## References

- Communist Party of Vietnam (2011), Credo for national construction in the transition to socialism (supplemented and developed in 2011); source: <http://www.xadungdang.org.vn/Home/PrinStory.aspx?distribution>.
- 1946 Constitution
- 1959 Constitution
- 1980 Constitution
- 1992 Constitution
- 2013 Constitution
- Le Huu Nghia, the characteristics showing the superiority of socialism that our people are building, discussed at the morning session on January 14<sup>th</sup>, 2011 at the XI Congress of the Communist Party of Vietnam
- Journal of Legislative Studies - Constitutional Research Institute of the Socialist Republic of Vietnam (2014), Constitution of the Socialist Republic of Vietnam - Political and legal foundation for the comprehensive transformation in the new period, Social Labor Publishing House, Hanoi.

- Committee for Drafting Amendments to the 1992 Constitution (2012), Summary report on the implementation of the 1992 Constitution, dated October 1<sup>st</sup>.
- Committee for Drafting Amendments to the 1992 Constitution (2012), Report No. 194/TTr - UBDDTSDHP dated 19 October 2012 on the Draft Amendment to the 1992 Constitution.
- Committee for Drafting Amendments to the 1992 Constitution (2013), Report No. 287/BC-UBDDTSDHP dated 17 May 2013 on the explanation, absorption and revision of the 1992 Draft Amendment to the Constitution on the basis of people's opinions.
- Standing Office for Human Rights & Ho Chi Minh National Academy of Politics (co-operation) (2015), Human rights, fundamental rights and duties of citizens in the Constitution of Vietnam (monograph), Hanoi.
- Institute of Public Policy and Law - Vietnam Union of Science and Technology Associations (2014), Scientific commentary on the 2013 Constitution of the Socialist Republic of Vietnam, Social Labor Publishing House.



### 3. Popular Sovereignty in the 2013 Vietnam Constitution

Nguyen Minh Doan\*

**Abstract:** Popular sovereignty is one of the important issues in the content of the constitutions. The perception and expression of popular sovereignty in Vietnam's constitutions have many dissimilarities. The constitutions of Vietnam of 1959, 1980, and 1992 were rather limited and inadequate in scope with regards to popular sovereignty. Even though the 2013 Vietnam Constitution has presented more comprehensive popular sovereignty than the previous constitutions of Vietnam, further investigation and refinement are still needed. This article gives a number of suggestions to achieve more adequate and full expression of popular sovereignty in the 2013 Vietnam Constitution.

**Keywords:** Popular sovereignty, Vietnam's constitution

#### I. Expression of popular sovereignty in the constitutions prior to the 2013 Constitution

The human civilization has shifted from “subject society” to “civil society”, from “people of the state” to “state of the people”. Power in society, especially state power, no longer belongs only to the King and the royal family, but belongs to the people; the government is the only official representative body of the society that is authorized by the people to exercise public power of the nation. The people, the owner of the country have the right to decide the most important issues of the country. When all power, especially state power, belong to the people, it means that popular sovereignty has been established.

Currently, the constitutions of most countries recognize popular sovereignty, declaring all state power belongs to the people; however, the perception and expression of popular sovereignty in a constitution differ across countries and even within a country temporally.

In Vietnam since the 1946 Constitution, the first Constitution of Vietnam, special importance has been attached to the issue of popular sovereignty. This is reflected in the 1946 Constitution in the following way: “*Vietnam is a democratic republic. All domestic power belongs to the whole Vietnamese people, regardless of their race, female or male, rich or poor, class or religion*” (Article 1). For the first time in history, the Vietnamese people have been entitled to elect and remove their representatives under the following articles: “*All Vietnamese citizens, aged 18 and over, regardless of female or male, have the right to vote ...*” (Article 18), and “*The people have the right to dismiss their elected delegates...*”

---

\* Professor, Hanoi Law University

(Article 20). Furthermore, the Vietnamese people have become entitled to vote on the Constitution and important affairs of the country: “*The people have the right to vote on the Constitution and matters related to the national destiny ...*” (Article 21), and the “*Amendment to the Constitution must be in the following manner: a/ At the request of two-thirds of the total number of deputies... c/ Changes that have been ratified by the Parliament must be approved by the entire people*” (Article 70). Although this is only the first constitution of Vietnam, the views on popular sovereignty and its expression in the 1946 Constitution are fairly complete and coherent.

The idea of popular sovereignty was continually defined in Vietnam in the constitutions of 1959, 1980 and 1992; however, the manner of expression varied. For example, Article 4 of the 1959 Constitution stipulates: “*All power in the Democratic Republic of Vietnam belongs to the people*”. Article 6 of the 1980 Constitution sets out: “*In the Socialist Republic of Vietnam, all power belongs to the people*”. Article 2 of the 1992 Constitution stipulates: “*The State of the Socialist Republic of Vietnam is a law-governed state of the people, by the people, for the people. All state power belongs to the people, whose foundation is the alliance between the working class and the peasantry and the intelligentsia...*”

Such provisions show that, while the constitutions of 1946, 1959 and 1980 all stipulated: “*all power (or authority) belongs to the people*”, the 1992 Constitution took a narrower scope and only stipulated that “*all state power belongs to the people*”. In other words, it refers to state power as belonging to the people, leaving out other sources of powers. However, the constitutions of 1959, 1980, and 1992 all provided only indirect democracy when exercising the people’s state power: “*The people use their power through the National Assembly and People’s Councils at all levels elected by the people and accountable to the people*” (Article 4 of the 1959 Constitution, Article 6 of the 1980 Constitution, Article 6 of the 1992 Constitution), without stipulating the direct democracy for the people to directly exercise state power when certain conditions are met.

The provision of indirect democracy for the people to exercise state power is also limited, that is, at all levels people use state power only through the National Assembly and People’s Councils, of which members are elected by them and held accountable to them. With such provisions, it can be understood that the people do not use state power through other agencies; in other words, other agencies do not act as mediums for exercise of state power by the people and are not responsible to the people. While theories as well as practices recognize that not only National Assembly and People’s Councils but all state agencies from the central to grassroots levels exercise state power in the name of the State and that they must represent the will and aspirations of the people. Accordingly they are to be held accountable and are for the benefits of the people.

The said constitutions also no longer stipulated “*the people’s right to vote for the constitution and matters related to the national destiny*” like the 1946 Constitution, but only stipulated: “*Citizens have the right to involve in managing the affairs of the State and of society*” (Article 56 of the 1980 Constitution), or “*Citizens have the right to involve in managing the State and society, and discussing common national and local issues, making recommendations to state agencies, and voting when the State holds a referendum*” (Article 53 of the 1992 Constitution).

The provisions of the constitutions of 1959, 1980 and 1992 overstated the role of the State over the country (society). For example, Article 146 of the 1980 Constitution and Article 146 of the 1992 Constitution both stipulated: “*The Constitution of the Socialist Republic of Vietnam is the fundamental law of the State, with the highest legal effect. All other legal documents must be in line with the Constitution. Such provisions make it easy to misunderstand that the Constitution is just the basic law of the State, not seeing the full nature and broad content of the Constitution as the “law” of the people nor as the “social contract”, but rather “as a single document that defines the organization of state power, as a legal form that centrally expresses the ideology of the leading class, at each stage of development, the constitution is a document, a legal means of expressing the Party’s ideology in the form of legal norms*”<sup>1</sup>. The provisions that the Constitution is the basic law of the State were not specified in the constitutions of Vietnam of 1946 and 1959, but only started from the constitutions of 1980 and 1992.

Besides, because the Constitution is “just” the basic law of the State, the Constitution has many provisions that overemphasize the role of the State over the country and downplay the role of the country in promulgating and amending the Constitution. For example, it can be seen in the following provisions of the 1992 Constitution such as: “The National Assembly is the only body with constitutional and legislative powers” (Article 83), “The National Assembly has the following duties and powers: To make the constitution and amend the Constitution” (Clause 1, Article 84), “The National Assembly exercises supreme supervision over the observance of the Constitution and laws...” (Clause 2, Article 84), “Only the National Assembly has the right to amend the Constitution” (Article 147). The 1992 Constitution, when stipulating issues related to society and the people, often follows the motif of the State. For instance, “*The State develops education in order to raise people’s intellectual standards, train human resources, foster talents...*” (Article 35) or “*The State builds an independent and self-reliant economy on the basis of promoting internal force...*” (Article 15). Such articles apparently overemphasize the role of the State over the country.

---

<sup>1</sup> Nguyen Dinh Loc, “The birth and development of the constitution in history”, Textbook of Vietnam constitutional law, Hanoi Law University, Education Publishing House, Hanoi 1996, p. 77.

Thus, the constitutions of 1959, 1980, and 1992, on the one hand, still affirm the popular sovereignty, consistently declaring that “all state power belongs to the people”; but on the other hand, they have provisions that limits the full expression of popular sovereignty and even have narrower scope than those of the 1946 Constitution.

## II. Expression of popular sovereignty in the 2013 Constitution

It must be noted that, before the promulgation of the 2013 Constitution in Vietnam, there were numerous research works by scholars expressing their viewpoints on the expression of popular sovereignty in the Constitution. For example, presentations including “On the expression of popular sovereignty in the Constitution” by Professor Nguyen Minh Doan, “Amending the Constitution to better express and ensure the better implementation of people’s power” by Professor. Bui Xuan Duc, “Vietnam Constitution with popular sovereignty” by Professor Tran Thi Cuc, and “Discussing the idea of popular sovereignty with the amendment of the 1992 Constitution” by Dr. Nguyen Thi Ha at the workshop called “Amending and supplementing the 1992 Constitution and organizing the state apparatus” held on November 7, 2012, at the National Academy of Public Administration.<sup>2</sup> The list also includes “The principle of organizing state power belonging to the people as expressed in the 1992 Constitution - Problems raised” by Professor Tran Ngoc Duong, “State power belonging to the people and the exercise of state power” by Professor Nguyen Minh Doan, “People’s power and state power” by Prof. Dr. Pham Hong Thai, “More discussion on the issue of amending the 1992 Constitution from the perspective of popular sovereignty” by Professor Nguyen Cuu Viet<sup>3</sup>. Furthermore, “The Popular Sovereignty Institution and the Amendment of the 1992 Constitution” by Professor Dao Tri Uc, “The principle of “All state power belongs to the people” and how it is expressed in the Constitution” by Professor Nguyen Dang Dung<sup>4</sup> and many more projects<sup>5</sup>. In those projects, the authors provided their insights and demanded that the Constitution to express popular sovereignty in more full and precise manner in the Constitution, overcoming the limitations of the previous constitutions that heavily regulated or restricted popular sovereignty

---

<sup>2</sup> See, Academy of Public Administration, Conference proceedings: *Amendment and supplementation of the 1992 Constitution and organization of the state apparatus*, Labor Publishing House, Hanoi 2013.

<sup>3</sup> See, Office of the National Assembly, Journal of Legislative Studies, *Discussing Amendments and Supplements to the 1992 Constitution*, Labor Publishing House, Hanoi 2012.

<sup>4</sup> See, Vietnam National University, Hanoi and Office of the National Assembly, *Amendment and Supplement to the 1992 Constitution- Theoretical and practical issues*, Hong Duc Publishing House, Hanoi 2012.

<sup>5</sup> See, Office of the National Assembly, *Constitutional Discussion*, Labor Publishing House, Hanoi 2010; Institute of State and Law and Konrad Adenauer Institute, *Some basic theoretical and practical issues on constitutional amendment in Vietnam today*, Social Science Publishing House, Hanoi 2012; etc.



The first is to affirm that “country” and “state” are distinct concepts with different connotations.. Country “*is an area of land in which people of one or more ethnic groups live together under a socio-political system and belong to a certain state*”<sup>6</sup>. Country is a concept to refer to an unit with a territory and population in a certain geographical location. For example, in the Preamble to the 1959 Constitution, it was written: “*Vietnam is a unified country from Lang Son to Ca Mau*” or Vietnam is a strip of land from the cape of Ca Mau to the top of Mong Cai on which people inhabit. Article 1 of the 1992 Constitution stipulates: “*The Socialist Republic of Vietnam is an independent, sovereign, unified and territorial integrity country, including the mainland, islands, seas and airspace*”. Vietnam is also understood as the country and the Vietnamese, the Fatherland of Vietnam. Accordingly, Article 2 of the 1946 Constitution affirms “*The country of Vietnam is an indivisible Central South North block*”, and Article 118 of the 1992 Constitution also stipulates “Administrative units of the Socialist Republic of Vietnam...” etc. In contrast, the State is a political organization of society, capable of making and enforcing laws in order to establish a certain social order within its territory. The state is born from society to manage society (country) when the society develops to a certain stage. The state is “*a special power apparatus, closely organized to exercise national sovereignty, organize, and manage society by law, serve class interests, social interests, and enforce international commitments*”<sup>7</sup>. Article 2 of the 2013 Constitution stipulates declares that “The State of the Socialist Republic of Vietnam is a socialist law-governed state of the people, by the people, for the people...”. In society, the state is one of the many different organizations and is a form of organization of class society. The state acts as an organization established to manage the country; but unlike other organizations such as trade unions, youth unions, etc., the state is the official representative organization for and on behalf of society to maintain the social order, keeping society stable and developmental. Therefore, “country” and “state” are two entities that are always inextricably intertwined. For example, the constitution stipulates: “The President is the head of the State, representing the Socialist Republic of Vietnam in domestic and foreign affairs”. Moreover, it also states that “The People’s Court is the judicial organ of the Socialist Republic of Vietnam”, which means the Court acts in the name of the Socialist Republic of Vietnam, that is country, not in the name of the State. As such, we see that the Constitution stipulates many things of “country” in one aspect, but at the same time of “state” in another aspect and vice versa. The state is established and exists on a territory (land) with certain inhabitants, while “country” includes territory and population belonging to a certain “state”.

---

<sup>6</sup>Institute of Linguistics, Vietnamese Dictionary, Da Nang Publishing House 2003, p.746.

<sup>7</sup>Hanoi Law University, Textbook of State and Law Theory, People’s Public Security Publishing House, Hanoi 2011, p.35.

As the name suggests, the Constitution of the country (Constitution of the Socialist Republic of Vietnam) must be construed as belonging to the people. The constitution of a country should be a special document that focuses on the will and basic interests of the people in the fields of state life and social life. Thus, the popular sovereignty needs to be fully perceived and expressed in the Constitution in its entirety.

The constitution of the country must be construed as a written agreement of the people vis-à-vis the establishment and exercise of public power for the common good of the entire society. The Constitution is largely likened to the “Social Contract” for the people to agree with one another on the organization of social life, an implementation of empowerment (authorization) and limitation of power of the State, as well as of other institutions in society such as the Party and Trade Union, regulations on human rights and legal regulations of citizens and other individuals, regulations of participation of non-state organizations and citizens in the performance of state and social affairs, regulations of political, economic, cultural and social regimes of the country.

It is important to note that the perceptions of popular sovereignty and the expression in the spirit of upholding popular sovereignty by scholars and politicians are increasingly becoming more complete and accurate. Those who draft the constitution have listened to and respected scholars’ opinions when formulating the 2013 Constitution. Therefore, the expression of popular sovereignty in the 2013 Constitution is more accurate than that of the previous Vietnam constitutions. This has been reflected in the Preamble and many provisions of the 2013 Constitution.

Firstly, the Preamble of the previous constitutions only emphasized “the people make every effort and earnestly implement the constitution...”. However, for the first time in the Preamble of the 2013 Constitution, it has been stipulated that the people are the subject of formulation and implementation of Constitution as suggested by “*Institutionalize the Platform for national construction during the transitional period to socialism, inheriting the 1946 Constitution, 1959 Constitution, 1980 Constitution and 1992 Constitution, the Vietnamese people formulate, implement and protect this Constitution for the goal of rich people, strong country, democracy, justice and civilization*”.

Secondly, the 2013 Constitution has affirmed the Vietnamese people’s role as the master of the country: “*The Socialist Republic of Vietnam is owned by the People; all state power belongs to the People, whose foundation is the alliance between the working class and the peasantry and the intelligentsia*” (Article 2). Consequently, “*The State of the Socialist Republic of Vietnam acts as a socialist law-governed state of the People, by the People, for the People*” (Article 2). The Vietnamese State is responsible for “*ensuring and promoting the people’s right to mastery; recognizing,*

*respecting, protecting, and guaranteeing human and citizen rights; realizing the goal of rich people, strong country, democracy, justice, and civilization, where everyone has a prosperous, free and happy life and has conditions for comprehensive development” (Article 3).*

Thirdly, the Constitution has placed an emphasis on direct democracy by which the people exercise state power. Article 6 of the 2013 Constitution stipulates: *“The people exercise state power by direct democracy, by representative democracy through the National Assembly, the People’s Council and other State agencies”*. It can be said for the first time in the Constitution of Vietnam that *“The people exercise state power by direct democracy, even by representative democracy”*. And the exercise of state power by the people through representative democracy has also been expanded in comparison with previous constitutions, not only *“through the National Assembly, the People’s Council, “but also” through other State agencies”*. This is absolutely correct because state power must be exercised by all state agencies, not only by the National Assembly and the People’s Council.

Fourthly, the Constitution has recognized that *“Citizens who are at least eighteen years of age have the right to vote when the State holds a referendum” (Article 29)* as an independent right of citizens. At the same time, the Constitution also specified that *“The referendum on the Constitution is decided by the National Assembly (Clause 4, Article 120).*

Fifthly, the Constitution has removed the provision that *“The Constitution is the basic law of the State”* and stipulated that *“The Constitution is the basic law of the Socialist Republic of Vietnam, with the highest legal effect. All other legal documents must be in line with the Constitution” (Article 119).*

Sixthly, more attention has been paid to the distinction between the country and the State of Vietnam in the Constitution. The Constitution has removed and reduced the overemphasis on the role of the State over the country in the spirit of upholding popular sovereignty. The Constitution stipulates in such a way that there is no subject or subject is the country (the people), not the State. For example, *“The Socialist Republic of Vietnam builds an independent and self-reliant economy, promoting internal strength, integration, international cooperation, closely associated with cultural development, and implements social progress and equity, protects the environment, carries out industrialization and modernization of the country” (Article 50)* or *“Vietnam’s economy is a socialist-oriented market economy with many ownership forms, many economic sectors; where the state economy plays a leading role” (Article 51).* This also shows the spirit of the State managing society, the Party leading society, and the people are really the owner of the country.

### **III. Limitations and shortcomings of the expression of popular sovereignty in the 2013 Constitution and recommendations**

#### **1. Limitations and shortcomings**

It can be affirmed that the awareness and expression of popular sovereignty in the 2013 Constitution has become more accurate and complete, but still contain some inconsistencies and superficial points. This manifests in the following.

The 2013 Constitution still stipulates that the constitutional right belongs to the National Assembly. In particular, as Article 69 specifies, “*The National Assembly exercises the constitutional rights, legislative powers, decides on important national issues, and supremely supervises the State’s activities*”, while Article 70 also specifies that “*The National Assembly has the following duties and powers: Making the Constitution and amending the Constitution; making laws and amending laws*”. The National Assembly is still the supreme supervisory body for the observance of the Constitution (Clause 2, Article 70). The aforementioned provisions show that the highest decision-making in the country on making or amending the Constitution and important issues of the country is still not in the direct power of the people, but through the National Assembly, the highest representative body of the people and the highest organ of state power of the Socialist Republic of Vietnam.

Since the right to make and amend the Constitution has not yet been defined to belong to the people and the constitutional initiative is only regulated for state agencies. Only “*the President, Standing Committee of the National Assembly, the Government or at least one-third of the total number of National Assembly deputies have the right to propose a constitution or amend it. The National Assembly shall decide on making the Constitution and amending the Constitution when at least two-thirds of the total number of National Assembly deputies vote for it*” (Article 120). These above regulations show that the Vietnamese people still do not have the final decision on constitutional making or amendment.

Pursuant to the 2013 Constitution provision, “*The Constitution is adopted when at least two-thirds of the total number of National Assembly deputies vote for it. The referendum on the Constitution shall be decided by the National Assembly*” (Clause 4, Article 120). Thus, the referendum procedure on the Constitution is not necessarily absolute (as defined in Article 21 of the 1946 Constitution) but depends on the decision of the National Assembly when the it deems necessary.

#### **2. Recommendations**

First of all, it is of utmost importance to continue to promulgate detailed legal documents of

the Constitution in order to implement the Constitution in the spirit of The Socialist Republic of Vietnam, that is owned by the People. Special consideration must be given to the following ideas: all state power belongs to the people, The State guarantees and promotes the People's right to mastery, and recognizes, respects, protects and guarantees human and citizen rights. In addition, elements to be taken into account might also include: fulfilling the goal of rich people, achieving strong country, democracy, justice, civilization, universal prosperity, free and happy life, and comprehensive development conditions.

Secondly, to recognize the right of the people to make and amend the Constitution. In other words, the people's right to vote on the drafting and/or amending the constitution and on fundamental matters related to the destiny of the people and the nation.

In the spirit of the Preamble and in the name of the Constitution, the Vietnamese people must be involved in formulating and implementing the Constitution. Therefore, it should not be specified in the Constitution as "The National Assembly exercises constitutional rights", but should be explicitly or implicitly understandable that the constitutional right belongs to the people. This will also create consistency between the Constitution's Preamble and the specific provisions of the Constitution.

Whether or not to amend the country's constitution must also be finally decided by the people. Therefore, the constitutional initiative may be proposed by both state agencies and social organizations, the final decision on whether to make a new constitution or amend the current constitution must be made by the people through a referendum with the exception of cases where due to objective conditions it is not possible to hold a referendum. In such cases, the people may authorize the National Assembly to decide.

It is therefore necessary to add to the 2013 Constitution that the subjects with constitutional initiative rights are "*The President, the National Assembly Standing Committee, the Government or at least one third of the total number of National Assembly deputies, The Vietnam Fatherland Front, the Communist Party of Vietnam or at least one-third of the provinces and centrally governed cities have the right to propose making a constitution or amend it. The making of the Constitution and the amendment of the Constitution shall be decided by the people*".

Thirdly, the National Assembly organizes the drafting of a new constitution or amendment to the existing one and organizes the adoption of a new or revised constitution, but the people must retain the right to vote on the Constitution through a referendum. In other words, the people's right to vote on the constitution should be restored under Article 21 of the 1946 Constitution. Thus, Article 120 of the 2013 Constitution can be amended as follows:

*“The Constitution has been once approved by at least two-thirds of the total number of National Assembly deputies, it must be put forward to hold a referendum”.*

Owing to the Constitution’s special nature and the current conditions in our country, people’s knowledge enhanced, democracy expanded and consolidated, the procedure for the people to vote on a referendum on the Constitution after it has been officially approved by the National Assembly is needed. The decisions regarding the Constitution should be based on the outcome of the referendum, so that nationwide voters can express their will with regards the content of the Constitution or at least important issues being debated as provided for in the Constitution.

Fourth, to give the President the right to represent the country to propose the National Assembly to review the legal documents passed by the National Assembly. At present, Article 88 of the Constitution only stipulates that the President has the following duties and powers: *“[t]o announce the Constitution, laws and ordinances; to propose the National Assembly Standing Committee to reconsider the ordinance within ten days after adoption; if the ordinance is still approved by the National Assembly Standing Committee but the President still disagrees, the President shall submit it to the National Assembly for decision at the nearest meeting”.* Thus, the President has no right to represent the country (the people) to propose to the National Assembly to review the laws and resolutions that the latter has passed.

Fifth, to specify more clearly the method for the people to select (elect) and change (remove) the people’s representatives. For instance, the principle of representation for hometown or place of living and working to help the representative and voters reach better mutual understandings, allow information exchange between them, and to make the representation more legitimate and impactful. Whereas in a case where the people no longer trust a certain delegate (even if that delegate holds a position in the state apparatus), they should have the ability (right) to request the competent state agency to organize vote of nonconfidence. For example, when there are signatures of a certain number of voters, the competent state agency must initiate a vote of nonconfidence for a particular delegate. The rationale is to get rid of the idea that National Assembly deputies or People’s Council deputies who are no longer trusted by the people cannot be diminished by the people through voting without a competent state agency organized vote for dismissal as prescribed in the current mechanism.

## References

- Vietnam National University, Hanoi and Office of the National Assembly, *Amendment and Supplement to the 1992 Constitution- Theoretical and practical issues*, Hong Duc Publishing House, Hanoi 2012.
- Academy of Public Administration, Conference proceedings: *Amendment and supplementation of the 1992 Constitution and organization of the state apparatus*, Labor Publishing House, Hanoi 2013.
- Vietnam Constitution (in 1946, 1959, 1980, 1992 and the Resolution on amending and supplementing a number of articles of the 1992 Constitution), National Political Publishing House, 2002.
- Constitution of the Socialist Republic of Vietnam, Hong Duc Publishing House, 2014.
- Hanoi Law University, *Textbook of Vietnamese constitutional law*, Education Publishing House, Hanoi 1996.
- Hanoi Law University, *Textbook of State and Law Theory*, People's Public Security Publishing House, Hanoi 2011.
- Office of the National Assembly, Journal of Legislative Studies, *Discussing Amendments and Supplements to the 1992 Constitution*, Labor Publishing House, Hanoi 2012.
- Office of the National Assembly, *Discussion on Constitution Making*, Labor Publishing House, Hanoi 2010.
- Institute of State and Law and Konrad Adenauer Institute, *Some basic theoretical and practical issues on constitutional amendment in Vietnam today*, Social Science Publishing House, Hanoi 2012.
- Legislative Research Institute, Journal of Legislative Studies, Constitution of the Socialist Republic of Vietnam - Political and legal foundations for the comprehensive renovation of the country in the new era, Social Labor Publishing House, 2014
- Institute of Public Policy and Institute of State & Law, *Some theoretical and practical issues on direct democracy and grassroots democracy in the world and in Vietnam*, Hanoi National University Publishing House, 2014.
- Institute of Linguistics, *Vietnamese Dictionary*, Da Nang Publishing House 2003.





## 4. Constitution, Constitutionalism, and the Rule of Law in Vietnam

Nguyen Dang Dung\* and Vu Thanh Cu\*\*

**Abstract:** The rule of law and constitutionalism are two fundamental theories and attach in building and developing society. Vietnamese scholars have focused on the rule of law state in recent years, but they did not discuss constitutionalism much. This article will analyze the relationship between the constitution and constitutionalism, the constitution, and the rule of law in Vietnam. The authors argue that there are some prospects in the development path. However, theoretical and practical limitations still exist.

**Keywords:** constitution; constitutionalism; the rule of law.

### I. Introduction

Since the Doi Moi era, the term “the rule of law” has become very familiar and has appeared many times in scientific forums and public forums. A few years later, especially before and during the process of building and amending the 1992 Constitution, a new scientific term appeared - “constitutionalism.” We argue that these are two modern legal theories related to the current development of Vietnamese legal science. However, there is an odd phenomenon that happened here. The rule of law and the constitution appear often in political-legal documents and on all scientific forums.

Meanwhile, constitutionalism is rarely mentioned. This term has never been mentioned in the political-legal documents of Vietnam. In this article, the authors would like to explain these theories. We then point out the relationship between them in the world and especially in Vietnam currently.

### II. Constitutionalism

Jay M. Shafritz’s dictionary of American government and politics states that “Constitutionalism is the evolution of constitutional thought over the ages. While classical constitutional theory often has to return to the ideas of Aristotle, modern constitutional theory derives from 17th-century social contract ideas<sup>1</sup>. Typical manifestations of the constitution are the concept of a limited government whose ultimate authority is always subject to the consent of the governed.”<sup>2</sup>

---

\* Professor, Doctor of Law, School of Law, Vietnam National University

\*\* PhD student, School of Law, Vietnam National University

<sup>1</sup> See WKC Guthrie, ‘The Social Compact’, *The Sophists* (Cambridge University Press 1971) the social contract theory was anticipated by Greek theorists.

<sup>2</sup> Jay M Shafritz, *The HarperCollins Dictionary of American Government and Politics* (1st ed, HarperPerennial 1992).

Constitutionalism is rooted in the liberal political ideas of Western Europe and the United States. It is meant to protect individuals' rights including their rights to life, property, freedom of religion, and speech<sup>3</sup>. To "secure the blessing of liberty,"<sup>4</sup> the framers of the constitution emphasized control over the powers of each branch of government, equality, fair courts, and the separation of the church and state. These are also the requirements of the rule of law. Representatives of this tradition include the poet John Milton, jurists Edward Coke and William Blackstone, statesmen such as Thomas Jefferson and James Madison, and other philosophers such as Thomas Hobbes, John Locke, Adam Smith, Baron de Montesquieu, John Stuart Mill.

The reason for the necessary objectivity of constitutionalism lies in man's power-hungry nature. Any constitutionalist conceptions and corresponding pressures for constitution-making are often rooted in the belief in man's inherently corrupt and imperfect nature<sup>5</sup>. The constitutionalist's primary concern is that, given the opportunity, most people choose to abuse others while trying to retain their power<sup>6</sup>. It is the overcoming of this negative nature that is the basis for promoting the positive side of the state that must be. One outstanding American judge from the early 20<sup>th</sup> century, Stephen Holmes, said that constitutionalism is not limited to authoritarian power, but rather that it is multifunctional. Holmes did not have the consent with the negative constitutionalism that James Madison and Alexander Hamilton advocated for. Instead, he suggested the positive constitutionalism that Jean Bodin and J.S. Mill inspired<sup>7</sup>. Constitutionalism can seize power, exercise power to the ends desired by society, prevent social disorder and individual oppression, establish the rules for the functioning of democracy, build an institutional foundation for informed policy and decision-making, and mobilize public resources to solve public issues<sup>8</sup>. Holmes finally concluded that "constitutional rules make it possible, not impossible."<sup>9</sup>

Modern constitutional government is closely tied to economics. and the 'power of the pocket' due to the idea that those who pay taxes to a functioning government must be represented in that government. The principle of economic provisions and complaint settlements going hand in hand is a crucial element of modern constitutional governments. The development of representative institutions and national solidarity, as opposed to symbolic submission to the king and the courts, effectively limited the king's power in practice.

Elements of constitutionalism – a government with limited power, include (i) government according to the constitution; (ii) separation of powers; (iii) popular sovereignty and democratic

---

<sup>3</sup> See FD Wormuth, *The Origins of Modern Constitutionalism* (Harper & Brothers 1949).

<sup>4</sup> Duncan Watts, *Dictionary of American Government and Politics* (2014) 57.

<sup>5</sup> See Alexander Hamilton, 'The Judiciary Department' *The Federalist Papers: No. 78* (New York, 28 May 1788).

<sup>6</sup> Beau Breslin, *The Communitarian Constitution* (Johns Hopkins University Press 2004) 115.

<sup>7</sup> Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Nachdruck, University of Chicago Press 1997) 8.

<sup>8</sup> *ibid* 6.

<sup>9</sup> *ibid* 163.

government; (iv) constitutional review; (v) an independent judiciary; (vi) controlling the police; (vii) civilian control of the military; (viii) individual rights; (iv) suspension and derogation.<sup>10</sup>

Constitutionalism must have a constitution. The constitution, originally, like other laws, was a law enacted by the king. With the effects of limitations on the king's power later on, its function gradually shifted towards affirming the rights of all people in the democracy era. These rights were initially reserved only for the nobility and increasingly extended to other classes, even to the 'subjects,' who previously had only obligations but no rights<sup>11</sup>. This is the period of feudalism and colonialism. With the emergence of popular sovereignty<sup>12</sup>, a constitution is a social contract.<sup>13</sup> It is a commitment to jointly establish the state with the people, aiming to maintain their happiness, without establishing a state to oppress the people, as they wish. In case the state fails to fulfill that wish, the people can look to the constitution to change the state. This idea was affirmed by Renaissance and Enlightenment thinkers such as Locke and Montesquieu. That is the goal and subject of the constitution which must be stated in the first paragraph of the constitution – the preamble of each constitution.

As a law on popular sovereignty, the constitution affirms that the people are the subjects of state power. In other words, state power stems from the people and aims to serve the interests and interests of the people. According to social contract theory, people's natural rights can only be guaranteed when individuals jointly establish a joint contract in which state power is limited and human rights and freedoms are recognized and protected<sup>14</sup>. With the concept that a constitution is a contract, the formulation and drafting of the constitution must involve the participation of a large number of people in order to ensure popular sovereignty. The people have the right to debate, exchange, express opinions, and evaluate constitutional issues. Most importantly, it ensures that their opinions and views are heard. Although the above conditions very much depend on the actual situation, the participation of the people in the making of the constitution allows for the improvement of the truthfulness of the constitutional assessment, thereby making constitutional provisions following the will and aspirations of the people.

Constitutionalism is not synonymous with the constitution. Suppose that the constitution does not contain the constituent contents of constitutionalism, such as the separation of powers, protection of human rights, and an independent judiciary, primarily that the constitution is not implemented in practice. In that case, we argue that those nations have a constitution but that they do not establish constitutionalism. This is the case of the written constitution. Meanwhile, in Britain, constitutionalism appears through people's

---

<sup>10</sup> Louis Henkin, 'Elements of Consitutionalism' (1998) Special Issue ICJ Review 11, 11–22.

<sup>11</sup> See Ellen Meiksins Wood, 'The State and Popular Sovereignty in French Political Thought: A Genealogy of Rousseau's General Will', *History of Political Thought*, vol IV (1983); E Gibson-Morgan and A Chommeloux, *The Rights and Aspirations of the Magna Carta* (Springer International Publishing AG 2016).

<sup>12</sup> See Wood (n 11).

<sup>13</sup> See Brian Skyrms, *Evolution of the Social Contract* (Second edition, Cambridge University Press 2014).

<sup>14</sup> See David Boucher and Paul Kelly (eds), *The Social Contract from Hobbes to Rawls* (Routledge 1994).

adherence to their unwritten constitution. This practice is deeply ingrained in British behavior and seems to be impossible to change. This is the spirit of constitutionalism rooted in the ancients of the written and unwritten laws adopted in the middle of the last millennium. It has remained unchanged, such as the Habeas Corpus Act of 1640 and the Bill of Rights of 1689.

A constitution based off of constitutionalism differs from a constitution without constitutionalism in two ways: (i) Constitution lied in constitutionalism is a constitution aiming to restrain the state's power, so the content of the constitution must contain provisions on the separation of powers and human rights; (ii) The content of this constitution must be implemented in practice, and the court must try violations of the constitution.

Currently, the idea of popular sovereignty, i.e., democracy, is widely recognized in most countries globally. In different forms (but usually in the Preamble), Constitutions of different countries affirm that the people are the source of state power. The preamble to the US Constitution of 1787 stated:

*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

Although the Preamble is only about 50 words in one sentence, it is the most accurate one. It includes the promulgating subject, the purpose, the requirement, and the scope of the constitution's content, which all the Americans feel the mixed pride and sacredness of a supreme document of the United States of America. This comes from the fact that they all find their rights and interests in this treaty. Up to now, more than 50% of the total written constitutions of countries around the world repeat this chorus.

The Constitution has many functions such as organizing state power, limiting state power, and promoting and protecting human rights. It has a lot of different provisions, divided into chapters and different things. However, the constitution must stipulate provisions on human rights and the separation of powers between the three branches of government: legislative, executive, and judicial. It could be written in the opposite way – decentralization and then human rights. The regulation of this is a challenging issue. First of all, all human rights must be regulated and the duties and rights of agencies in charge of public duties must be defined. Regulations must be written in such a way that they can be implemented in practice. There are two schools of provisions in constitutions: (i) the constitution only stipulates very general outlines of the classical constitutions of developed countries; (ii) the constitution must prescribe the details of modern constitutions.

There is another function of the constitution which has received little attention from researchers. It is the function that forms the legal basis for the legitimacy of the state. In many cases, the legitimacy of

state power in accordance with the Constitution is fundamental and covers the entire constitution and the exercise of state power in accordance with the constitution. Both constitutionalism and the rule of law consider legitimacy as a necessary element. As the supreme law, the constitution must cover the titles that carry state power. Therefore, it must be established legitimately and in a constitutional manner. In the democratic age, these kinds of power must come from the people.

The separation of powers has two different manifestations in Britain and the United States of America. While the former is seen as a 'soft' model, the latter is considered to be a 'hard' one<sup>15</sup>. The ultimate purpose of decentralization theory is the creation of an independent judiciary, no matter what model the nations are applying. The pluralism introduced through political parties is essential in the politics of many developed nations. The parties play a crucial role in checking and counterbalancing the ruling party, curbing excesses and abuses of power by the ruling party, and acting as the responsible opposition party to find out the party's weaknesses in the ruling. With the operation of political parties, the division of powers between the legislature and the executive branches according to the ideology of the theory of decentralization no longer makes sense in practice. Is the decentralization of power only the separation of powers between the ruling party and the opposition party, especially the guarantee of an independent judiciary?

The second object that needs to be stipulated after that of decentralization, in order to create the state's polity, is regulations on human rights. The provision of human rights in the US Constitution is the first written supreme law with the most prolonged effect until now and has a history of great debate. Fifty-five people at the Constitutional Convention were divided into two equally inclined factions between having or not having human rights in the constitution's text. In the end, a great compromise was formed. The constitution contained both decentralization and human rights. Although on the side of not including human rights in the content of the constitution, James Madison managed to draft 20 articles for the amendment of the newly adopted constitution. Congress accepted his first ten articles. This is the way that human rights are legally recognized in the U.S.

The one common thing between states of different political regimes is the protection of human rights. The constitution must stipulate human rights as the goal of the state. Decentralization has the effect of forging expertise and pride of each power branch for each implementing agency and creating a control mechanism to prevent abuse of power by each state agency.

---

<sup>15</sup> See Đặng Dung Nguyễn, 'Học Thuyết Tam Quyền Hay Là "Nhị Quyền" Phân Lập' [2009] Tạp chí Luật học 18.

### III. The rule of law

In Vietnam, the term “the rule of law” is often identified with a translation from German (*rechtsstat*), French (*état de droit*), or Russian (*pravovogosudarstvo*)<sup>16</sup>. Considering the cultural tradition of the term “the rule of law” formed in England starting from the 12<sup>th</sup> century, the rule of law is understood as the spirit of Greek tradition. Referring to the rule of law, we do not simply refer to the law-abiding state but also to other subjects besides the state, and civil society must comply with the law. That society is entirely different qualitatively from their previous society as the subject society and different from the rule by law or rule of person society of Asian-Eastern countries.

The rule of law was first mentioned by Aristotle in his classic work *Politics* where he asked whether the complete law or the best individual would rule better<sup>17</sup>. This question also examines the nature of the law and the character of the government that makes and enforces the law. This is similar to the later French scholar J. Chevallier’s view that “the law is not only a tool for the operation of the state but also a means of limiting the power of the government.”<sup>18</sup> Aristotle also questioned *epieikeia*, (often translated into English as *equity*) one of the original ideas that greatly influenced the formation of the later perception of the rule of law.

The elements of the rule of law include: (i) the rule of law means that no individual, whether a president or a citizen, is above the law. Governments exercise power by law and are themselves subject to the limitations of the law; (ii) the law must express the will of the people, not the will of emperors, dictators, generals, religious dignitaries, or self-appointed political parties; (iii) A robust and independent court system has the strength, power, resources, and reputation to hold government officials, including the top leaders, accountable to regulations and the laws of the country; (iv) the law comes from many sources: written constitutions, codes, and regulations; religious and ethnic teachings; practices, but it must aim to protect the rights and freedoms of citizens.<sup>19</sup>

Although there are specific differences, both the rule of law and constitutionalism have the same goal of being for the people and limiting state power. They have to rely on the same thing—the constitution. The rule of law in the modern era is clearly reflected in the ideological views of constitutionalism. The government is divided into three branches: legislative, executive, and judicial. Each power branch has a corresponding representative body, which are the congress, the government, and the court, to perform its functions and maintain checks and balances. Decentralization is an important content of the constitution. We argue that there is no constitution without the separation of powers. The most

---

<sup>16</sup> See George P Fletcher, *The Basic Concepts of Legal Thought* (Oxford University Press 1996) 11–12 there are actually two ways to approach the rule of law.

<sup>17</sup> Aristotle and Carnes Lord, *Aristotle’s Politics* (Second edition, The University of Chicago Press 2013).

<sup>18</sup> Jacques Chevallier, *L’État de Droit* (5th edn, Montchrestien 2010) 18.

<sup>19</sup> ‘Principles of The Rule of Law’ (United States Department of State 2004).

outstanding achievement of the doctrine of decentralization to promote the rule of law is an independent judiciary.

That is why many American scholars consider constitutionalism to be synonymous with the rule of law. At the beginning of Greg Russell's article on constitutionalism, he wrote that constitutionalism, or the rule of law, means that the power of leaders and government agencies must be limited. Constitutionalism as a political or legal doctrine refers to a government whose primary mission is to serve all people and protect individual rights.<sup>20</sup>

#### **IV. The constitution, the rule of law, and constitutionalism in Vietnam**

##### **1. The constitution of Vietnam does not clearly express the limitations of the state's powers**

As a progressive point of view, modern Western constitutionalism was introduced in Vietnam along with the colonial invasion of the French colonialists through the New Letter (*Tân thư*) wave in the late 19<sup>th</sup> century and early 20<sup>th</sup> century. Vietnamese intellectuals such as Phan Boi Chau, Phan Chu Trinh, Phan Van Truong, Nguyen Ai Quoc, and Phan Anh wished that Vietnam would soon have a constitutional government following Western constitutionalism like Japan.

*Revendication du Peuple Annamite*, sent to Versailles meeting in 1919 by Ho Chi Minh (Nguyen Ai Quoc), contained eight requests on behalf of a group of leading patriotic Vietnamese in France. The second and seventh request were significant from our standpoint.

“Reform the justice system in Indochina by allowing domestic people to enjoy the same legal protection as European people.”

“Replacement of government by orders with government by laws.”<sup>21</sup>

Ho Chi Minh then wrote in a document written in poetic form in Vietnamese (*Việt Nam yêu cầu ca*): “May the Law—this Holy God—be reigning and a constitution be made for Vietnam.”<sup>22</sup>

The 1946 constitution is the People's Democratic Constitution (*Hiến pháp dân chủ nhân dân*). It affirms national independence and people's sovereignty, clearly reflects the idea of building a solid and wise government belonging to the people, affirms the perfect unity bloc of the whole country regardless of race, sex, religion or class, and guaranteeing the people's freedoms. The meaning of this first Constitution still leans towards serving the construction of an independent and sovereign state rather than ensuring the rights of the people. The 1946 Vietnamese Constitution reflected the spirit of Western

---

<sup>20</sup> Greg Russell, ‘Chủ Nghĩa Hợp Hiến’ in Đặng Dung Nguyễn, Hồng Thái Phạm and Công Giao Vũ (eds), *Về pháp quyền và chủ nghĩa hợp hiến* (NXB Lao động - Xã hội 2012) 56.

<sup>21</sup> Viện Nghiên cứu Khoa học Pháp lý, *Tư Tưởng Hồ Chí Minh về Nhà Nước và Pháp Luật* (Chương trình Khoa học Công nghệ cấp Nhà nước KX02, Bộ Tư pháp 1993) 75–76.

<sup>22</sup> *ibid* 181.

constitutionalism. This model of government marked the creation of a new model of limiting state power by combining the basic features of two basic models existing in the world at that time—the presidential model and the parliamentary model. The former allows the head of state is both head of state and head of government, having veto power. Meanwhile, the latter consists of a head of state and a government established by a parliament that may distrust parliament.

After the historic Dien Bien Phu victory with the policy of building socialism in the North and the struggle against the US in the South, the 1959 constitution was born, reflecting the transition from a people's democracy to a socialist democracy. It can be said that this constitution began to institutionalize the road to socialism as the constitution of the early socialist period. Intending to affirm the political institution of the socialist regime, the goal of protecting human rights is not clearly defined in the constitution. Similarly, when the country was unified, the determination to move straight to socialism was expressed in the 1980 constitution. This included the dictatorship of the proletariat, greatly influenced by the constitutional model of the former Soviet Union in terms of content and form, building a political regime under the leadership of the Communist Party is more than a matter of ensuring human rights.

The fundamental feature of socialist constitutional thought is the rejection of the doctrine of decentralization in the organization of the state. Instead, it is the ideology of socialist centralism (*democratic centralism*)<sup>23</sup>. Although the state did not officially recognize the constitutions, the constitutions of 1946, 1959, and 1980 still contained separate legislative, executive, and judicial provisions. The 1992 constitution, the treaty of the Doi Moi period, recognized the rational elements of the doctrine of decentralization when stipulating that state power is unified with the assignment and coordination of state agencies in the exercise of legislative, executive, and judicial powers. The 2013 constitution repeats this provision and takes it a step further, as mentioned above, by controlling state power. However, the perception of centralization still has a great influence on Vietnam's current institutional organization. The National Assembly is the highest organ of state power, having constitutional, legislative, and decision-making powers with critical national issues as well the supreme supervision of state agencies.

The Vietnamese constitutions of 1959, 1980, and 1992 have many features of socialist constitutions, with a wide range of subjects to regulate the political regime and the economic, cultural, and political regimes. There are many programmatic regulations on different aspects of social life promulgated based on the spirit of Marxism-Leninism. These constitutions do not fundamentally reflect the features of

---

<sup>23</sup> See Klaus Von Beyme, 'A Comparative View of Democratic Centralism' (1975) 10 *Government and Opposition* 259.



constitutionalism as a tool to limit the power of the state but rather as a tool to strengthen the power of the working class – the dictatorship of the proletariat with the goal of socialist construction.

The Doi Moi constitution had to correct perceptions that were no longer suitable with the socio-economic conditions of that time. This is an occasion to show a return to the popular perception of humanity about the constitution and constitutionalism. The 1992 constitution is the Doi Moi constitution approved by the 7<sup>th</sup> National Assembly. Regarding the structure of chapters and provisions of the 1992 constitution, there are no changes compared to those of 1980. However, in terms of content, there are some changes. Those are the regulations that show the new awareness of Vietnam during the opening-up period. *First of all*, the constitution of the opening-up period did not clearly define the nature of the dictatorship of the proletariat of the Socialist Republic of Vietnam. That essence is reflected in the provision stating “the state of the people, by the people and for the people.” This is one of the successes in the perception of the nature of the Vietnamese state in the Doi Moi period, which reduced classism and enhanced the sociality of the Vietnamese state. *Secondly*, for the first time in the constitution of Vietnam, it recognizes the rational kernels of the doctrine of separation of powers by clearly assigning and dividing responsibilities between the legislature, the executive, and the judiciary. *The third* is to gradually abandon the regulations showing the old perceptions' centralization, planning, and subsidy mechanisms. *Fourth*, although it is a comprehensive reform, the constitution still has to ensure the stability of the political regime. This is a unique feature of the renovation and opening-up process of the Vietnamese state, which is gradually not mutated compared to most countries in the socialist system.

The 2013 constitution continues to affirm the nature of the socialist state regime determined from the 1992 constitution and adds an important principle that covers the whole constitution, which is to “control” the state's power. For the first time in Vietnam’s constitutional history, institutions exercising legislative, executive, and judicial powers are prescribed for critical national institutions, namely the National Assembly, the Government, and the Court in the spirit of constitutionalism.

## 2. Constitutionalism and the slogan “The entire Party and people must live and work according to the Constitution.”

As a fundamental law with supreme legal effects, its enforcement and violations are also exceptional. *First of all*, the subject of implementing the constitution is unique compared to the subject of implementing ordinary laws. The fundamental difference between the constitution and other laws is that implementing the constitution is an official, not a citizen. These are agencies and organizations that hold state power. The more power a state agency or organization has, the more responsibility it has to enforce the constitution. Next to enforcement is the possibility of violations. It is the National Assembly, the body

that exercises legislative power. That is the Government, the agency that exercises executive power. It is the Party organs that govern through legislative and executive activities. Those are local government agencies.

*The second* is the dangerous level of the violations of the constitution. They cause significant consequences to many people and even to many generations, hindering the country's development and violations of the constitution. This is usually at the policy level.

Finally, these violations are difficult to detect and very difficult to handle. To date, although nearly 200 countries have constitutions, only less than 10% of states have courts dedicated to adjudicating constitutional violations by state agencies and officials. Practice shows that there are two types of violations of the Constitution: (i) An act of unconstitutional act is an act of the subject who performs an act contrary to the constitution's provisions or inconsistent with the constitution. It may be the act of the agency that promulgates the legal document which is inconsistent or contrary to the constitution; acts of an agency, organization or individual that violates the authority (abuse of power) granted by the constitution; or acts of any agency, organization or individual in the name of the state to prevent or limit the exercise of lawful rights and freedoms of individuals following the constitution. (ii) Unconstitutional omission is an act of failure to exercise the powers and obligations prescribed by the constitution. Agencies, organizations, and individuals assigned the authority by the constitution will be considered an unconstitutional omission if they fail to exercise or do not promptly perform those powers and obligations.

*The entire Party and people must live and work according to the Constitution.* This slogan is one of the trendy slogans in Vietnam and many countries in the former socialist system, as a famous motto of action. Nevertheless, from a theoretical and legal perspective, the above slogan is not perfectly correct. This comes from the fact that the constitution as the fundamental law with supreme legal effects was made and passed not for the people to implement. The leading implementers, again, are state agencies through state officials. The higher rank of the state agencies and individuals in the composition of state agencies, the more responsibility they have to comply with/implement the constitution. This is the expression of the spirit of constitutionalism. However, unfortunately, in the spirit of the constitution's provisions, every citizen, every subject in society, is responsible for implementing the constitution. According to the rule of the principle of centralization, the weight of complying with the provisions of the constitution is placed downwards.

Ordinary people are not capable of violating the constitution. Once the constitution is strictly enforced, the people only benefit, not vice versa, because the object of regulation in the narrowest sense of the Constitution is the limitation of state power. This is also understandable since the very presence of a written constitution and its observance imply a limitation of state power. As with other laws, its presence

requires compliance. If there is no compliance, there is no need to prepare, discuss, and pass them. Unlike other common laws, the subjects responsible for implementing the constitution are state officials, not all citizens.“ *In all ages, leaders in a democracy constitutionalists act to the extent that the rule of law prescribes and constrains their power.*”<sup>24</sup> The more authority they have, the more responsibility they have to enforce the constitution. Constitutional law is the law governing the political field. Only those with positions of power and rights can conduct political activities and acts. In enforcement, as in other areas, there are often violations. The possibility of violations lies within the scope of the enforcement responsibility of state officials.

Meanwhile, state officials are also human beings, not angels. Besides those with perfect, selfless virtues, some individuals hold power but act in selfish, obstinate, and greedy ways. “*Power tends to corrupt, and absolute power corrupts absolutely.*”<sup>25</sup>

## V. Conclusion

With the amendments and supplements to the constitution since the Doi Moi constitution was launched in 1986 and the creation of more and more complete constitutions, increased awareness about changes in Vietnam have been noticed regarding the constitution, the rule of law, and constitutionalism. However, despite the provisions of the constitution and the actual implementation of the new constitution, there is still an incomplete awareness of the people's responsibility to approve the constitution, with the constitution's goal being to protect the people and their rights. Although the amendment was passed and the term “People” was finally changed from lowercase to uppercase, as before, this subject was only allowed to comment like other ordinary draft laws. Furthermore, the responsibility for implementing the constitution and the possibility of violating the constitution are still delegated to the people, without seeing the responsibility for implementation and severe violations on the part of state agencies in the spirit and relationship of constitutionalism and the rule of law. In this spirit, it may not be long before Vietnam needs another constitutional amendment after about 10 to 15 years of implementation.

## References

- Aristotle and Lord C, *Aristotle's Politics* (Second edition, The University of Chicago Press 2013)  
Boucher D and Kelly P (eds), *The Social Contract from Hobbes to Rawls* (Routledge 1994)  
Breslin B, *The Communitarian Constitution* (Johns Hopkins University Press 2004)

---

<sup>24</sup> ‘Principles of The Rule of Law’ (n 19).

<sup>25</sup> John Dalberg-Acton, *Historical Essays and Studies* (JN Figgis and Vere Laurence eds, Macmillan 1907).

- Chevallier J, *L'État de Droit* (5th edn, Montchrestien 2010)
- Dalberg-Acton J, *Historical Essays and Studies* (JN Figgis and Vere Laurence eds, Macmillan 1907)
- Fletcher GP, *The Basic Concepts of Legal Thought* (Oxford University Press 1996)
- Gibson-Morgan E and Chommeloux A, *The Rights and Aspirations of the Magna Carta* (Springer International Publishing AG 2016)
- Guthrie WKC, 'The Social Compact', *The Sophists* (Cambridge University Press 1971)
- Hamilton A, 'The Judiciary Department' *The Federalist Papers: No. 78* (New York, 28 May 1788)
- Henkin L, 'Elements of Constitutionalism' (1998) Special Issue ICJ Review 11
- Holmes S, *Passions and Constraint: On the Theory of Liberal Democracy* (Nachdruck, University of Chicago Press 1997)
- Nguyễn ĐD, 'Học Thuyết Tam Quyền Hay Là "Nhị Quyền" Phân Lập' [2009] Tạp chí Luật học 18
- 'Principles of The Rule of Law' (United States Department of State 2004)
- Russell G, 'Chủ Nghĩa Hợp Hiến' in Đăng Dung Nguyễn, Hồng Thái Phạm and Công Giao Vũ (eds), *Về pháp quyền và chủ nghĩa hợp hiến* (NXB Lao động - Xã hội 2012)
- Shafritz JM, *The HarperCollins Dictionary of American Government and Politics* (1st ed, HarperPerennial 1992)
- Skyrms B, *Evolution of the Social Contract* (Second edition, Cambridge University Press 2014)
- Viện Nghiên cứu Khoa học Pháp lý, *Tư Tưởng Hồ Chí Minh về Nhà Nước và Pháp Luật* (Chương trình Khoa học Công nghệ cấp Nhà nước KX02, Bộ Tư pháp 1993)
- Von Beyme K, 'A Comparative View of Democratic Centralism' (1975) 10 *Government and Opposition* 259
- Watts D, *Dictionary of American Government and Politics* (2014)
- Wood EM, 'The State and Popular Sovereignty in French Political Thought: A Genealogy of Rousseau's General Will', *History of Political Thought*, vol IV (1983)
- Wormuth FD, *The Origins of Modern Constitutionalism* (Harper & Brothers 1949)

## 5. The Dismissal of a Constitutional Council in Vietnam: A Failure or a Necessary Tactical Withdrawal?

Le Nguyen Duy Hau\* and Mai Thi Mai\*\*

**Abstract:** Despite relatively strong public support and a promising start, where a specialized constitutional council was included in one of the last drafts<sup>1</sup>, Vietnam’s lawmakers eventually rejected the formation of a specialized constitutional review mechanism in the 2013 Constitution. Reviews of secondary literature, however, revealed that the true reasons of such rejection are varied and nuanced. They range from functionality debate<sup>2</sup> to a more structural claim that a specialized mechanism would be too foreign to the political system<sup>3</sup>. By revisiting the opponents’ claims, this paper wishes to assess whether the rejection of such a proposal was a failure for its proponents or a necessary “tactical withdrawal”. Should the constitutional council have been accepted, would it have done more harm than good because of the lack of independence a constitutional review agency must have? The authors attempt to answer this question by examining the hypothetical legal position of a constitutional council under Vietnam’s current political system and comparing it to constitutional review agencies in other transitional democracies in Asia.

### I. Introduction

It has been nearly a decade since the adoption of the fifth written constitution of Vietnam (hereafter referred to as the ‘**Constitution**’ or the ‘**2013 Constitution**’), marking the country’s dismissal to constitutionalize the creation of a specialist constitutional guardian. Rather, a collective constitutional protection mechanism was chosen where all important political entities, including the legislature, the administration (i.e. the Government) and the judiciary, are tasked with the “duty to protect the constitution”.<sup>4</sup> Procedurally speaking, despite the introduction of this new collective mechanism and a promise that the specific process for this mechanism would be legislated, the Constitution maintains an

---

\* SJD Candidate, the University of Pennsylvania Law School

\*\* Lecturer, Administrative and Constitutional Law Department, Hanoi Law University

<sup>1</sup> See the full text of draft Constitution for public consultation at <http://www.xaydungdang.org.vn/Home/vankientulieu/2013/5875/Du-thao-Hien-phap-nuoc-Cong-hoa-xa-hoi-chu-nghia-Viet.aspx> (last accessed on September 3, 2021)

<sup>2</sup> See in general Ngoc Son Bui, *Why Do Countries Decide Not to Adopt Constitutional Review?: The Case of Vietnam*, in *CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE* 335–364 (Albert H. Y. Chen & Andrew Harding eds., 2018).

<sup>3</sup> *Id.*

<sup>4</sup> In the final text of the 2013 Constitution, the drafters chose the word “protection of the constitution” (bảo vệ hiến pháp) rather than constitutional review (kiểm tra tính hợp hiến). Although two terms may mean differently, the legal discourse in 2013 around the constitutional council appeared to use these two terms interchangeably. See Bui Ngoc Son, *The Discourse of Constitutional Review in Vietnam*, 9 *J. COMP. L.* 191 (2014). Also see Bui, *supra* note 2. In this paper, we will use these two terms interchangeably.

old design as adopted in the former written constitution. Only the legislature (together with its Standing Committee) and, in some circumstances, the Prime Minister are constitutionally delegated with the power to quash unconstitutional legal instruments.<sup>5</sup> Additionally, the power to interpret the constitution remains with the Standing Committee of National Assembly in the new Constitution,<sup>6</sup> reaffirming its parliamentary supremacy in the country. This *status quo* may disappoint proponents of the creation of a specialist constitutional review body, especially when we take into account a fierce debate around this topic during the drafting process of the Constitution. Despite this “failure”, the enthusiasm for a specialist constitutional council has never diminished and has been revived from time to time when there are occasions.<sup>7</sup> Therefore, it would not be surprising if the movement for the creation of a constitutional council gains momentum again in the future and if the adoption of a special mechanism to protect the constitution once again becomes a trending policy debate.

However, the mere creation of a constitutional council is never a “happy ending” for the movement. Empirically, there are scores of examples around the world where the birth of a specialist constitutional review body brought more harms than success for democracy and the rule of law, providing abundant resources for researchers and policy advocates to use to assess whether one proposed model would be destined for failure. In the case of Vietnam, we propose the following test: to predict whether a Vietnamese constitutional council would ever fall into the same fate as its counterparts in other new democracies, it is worth asking a hypothetical question -“ what would happen if the movement was successful in giving birth to a specialist constitutional council in the 2013 Constitution, provided the country’s unique political settings and tradition?” By answering this question, proponents of the constitutional courts may be more informed upon joining the constitutional negotiation table when there come the times.

This paper wishes to answer the above question. First, we will revisit the opponents’ claims set out during the drafting of the Constitution. They will be assessed at their face value, rather than being decoded on the basis of political motivations. The purpose of this exercise is to see whether a plausible and politically effective response could be made to these claims, so a popular consensus could be built around the formation of a specialist constitutional review body. Second, using case studies about the rise and fall of different constitutional review agencies in other transitional Asian democracies (for example, Russia, Mongolia, Taiwan, South Korea) and the framework developed by Professor Tom Ginsburg in his

---

<sup>5</sup> Articles 69.10, 74.4 and 98.4, the 2013 Constitution.

<sup>6</sup> Article 74.2, the 2013 Constitution.

<sup>7</sup> See, for example, Văn Kiên, Nghiên cứu thành lập “Ủy ban bảo hiến” (Study to establish a “Constitutional Review Committee”), TIEN PHONG, (May 26, 2020, 01:21 PM), <https://tienphong.vn/nghien-cuu-thanh-lap-uy-ban-bao-hien-post1243136.tpo>. Some National Assembly’s deputies requested the legislature to study the establishment of the constitutional review committee.

seminal book *Judicial Review in New Democracies – Constitutional Courts in Asian Cases*, we will argue that Vietnam’s political climate and model would drastically hinder the effective operation of the proposed weak constitutional council and, in the long run, distort the prudence of the institution in general. Last, we argue that the dismissal of a constitutional council in 2013 may not be a decisive failure, but rather a necessary tactical withdrawal of the institution’s proponents for a better policy opportunity. In this count, we will then test our argument by assessing how the proposed constitutional council would react to the hypothetical constitutional questions in Vietnam. From this conclusion, we advise proponents to not accept any compromise for any institutional form which deviates from the traditional function of a constitutional oversight body, which is to adjudicate constitutional disputes.

In Section I of this paper, we will revisit and assess the opponents’ key arguments against the formation of a constitutional council in 2013. Section II will be a summary of the theoretical framework that Ginsburg have developed and examines the story of constitutional review bodies in several transitional democracies (Russia, Mongolia, Taiwan, and South Korea) to explain the logic behind a constitutional review agency’s success or failure. We will lastly employ in Section III Ginsburg’s framework to assess whether the proposed weak constitutional council in 2013 Constitution be a sufficient alternative for a meaningful oversight body and argue for the rejection of any “transitional model” in Vietnam.

## **II. The Debate For a Constitutional Council**

### **1. A fierce and tiresome debate**

Professor Bui Ngoc Son attributes the (re)emergence of discourse on constitutional review in contemporary Vietnam to the intellectual discussions among legal scholars at the dawn of the new millennium.<sup>8</sup> According to Bui, early proponents for the institution were motivated by the ideas of rights and rule of law, reflecting Ginsburg’s ideational theory where he explained why countries decide to adopt constitutional review regimes.<sup>9</sup> In response to the growing intellectual discourse, the Communist Party of Vietnam (hereafter referred to as the ‘CPV’) gradually opened the forum for more mainstream discussions of a possible adoption of the constitutional review mechanism in Vietnam. No official policy reason for the CPV’s decision to study constitutional review was made known to the public, even though such policy was a component of the larger CPV’s judicial reform program, which aims to modernize and integrate Vietnam to a global economy. Public discussions were soon adopted into the country’s direction in 2006 when the CPV’s IX<sup>th</sup> Central Committee adopted in its resolution, the *formation of an adjudication regime*

---

<sup>8</sup> See Bui, *supra* note 2 and *supra* note 4.

<sup>9</sup> *Id.* See also Tom Ginsburg and Mila Versteeg, *Why Do Countries Adopt Constitutional Review*, 30 *J. L. ECON. & ORG.* 587 (2014).

for constitutional violations of the legislature, the administration, and the judiciary,<sup>10</sup> as one of its key policies in the monumental Political Report for the X<sup>th</sup> Congress. A policy window opened with the proposal to draft a new Constitution in 2011, where the CPV's Central Committee once again authorized drafters to "continue to make perfect and promote the constitutional protection mechanism; as well as study the constitutional protection model which is suitable to the country's political system and specific conditions."<sup>11</sup>

Despite the positive signal from the CPV, the fact that the CPV authorized the "study" but stopped short of explicitly endorsing the creation of a constitutional council means the topic would be subject to further public discussions. Consequently, a fierce and exciting debate ensued among the drafters and the National Assembly's deputies who had early access to the original draft.<sup>12</sup> In the end, a strong proposed council with the power to interpret the constitution, to adjudicate constitutional disputes, and to abstractly review all the country's laws and international treaties was originally proposed in the earlier drafts, only to be replaced by a weak council whose authority was limited to post-enactment advisory review<sup>13</sup> in the draft Constitution that was made available for public comments.<sup>14</sup> Unsurprisingly, a weak constitutional council was not appealing for all early proponents. Despite this, most supporters decided to hold the line and managed to pull an admirable last push, even agreeing to make a compromise that deemed the weak constitutional council only as a necessary interim solution.<sup>15</sup> At one point in time, an unofficial test vote on the issue at the National Assembly produced a result that saw slight majority of their deputies in favor of the creation of the proposed constitutional council.<sup>16</sup> However, without a firmer majority, the issue was still considered as controversial. As such, according to the country's constitutional tradition, the CPV's Central Committee would have to make a decision on the matter.<sup>17</sup> Little is known now about what was discussed during the political leadership meeting but in the end, no specialist constitutional review body in any form was included in the final draft of the Constitution. The CPV's decision, according to the country's political conventions, is binding. The final vote to formally adopt the Constitution saw overwhelming support from the National Assembly's deputies.<sup>18</sup> Public voices in favor of the constitutional council faded away. The opponents had won the day.

---

<sup>10</sup> See Communist Party of Vietnam, *Instruments of the Tenth National Congress of the Communist Party of Vietnam* (2006).

<sup>11</sup> See Central Committee of the Communist Party of Vietnam, *Concluding Report of the fifth Plenum of the Central Committee* (2012).

<sup>12</sup> See in general Bui, *Supra* note 4 for a comprehensive report of the debate.

<sup>13</sup> *Id.* Also see Bui, *supra* note 2.

<sup>14</sup> *Supra* note 1.

<sup>15</sup> See Lê Nhung, *Hội đồng Hiến pháp - lựa chọn chính trị an toàn?* (Constitutional Council – a safe political choice?), VIETNAMNET (May 3, 2013, 03:48), <https://vietnamnet.vn/vn/thoi-su/hoi-dong-hien-phap-lua-chon-chinh-tri-an-toan-119577.html>. This article interviewed Professor Dao Tri Uc and other prominent National Assembly's deputies, who expressed their disappointment with the constitutional council but still made comments that they believed the constitutional council to be a transitional model.

<sup>16</sup> See Bui, *supra* note 4 at 211.

<sup>17</sup> *Id.* at 212-213.

<sup>18</sup> Out of 488 deputies present at the voting session, only two deputies voted against the passage of the Constitution.



In his comprehensive and retrospective account on the discourse of constitutional review in Vietnam, Professor Bui Ngoc Son suggests the key reason for the rejection of the institution to be the absence of political diffusion in Vietnam, a necessity for the birth and formation of a strong constitutional review body.<sup>19</sup> This theory was first coined by Ginsburg and is also known as “insurance theory.” Ginsburg argues that exiting ruling party will have a bigger incentive to adopt a constitutional review agency with a strong authority so it may have a channel to compete with the new government when it loses power.<sup>20</sup> While explaining the reason behind the rejection of the constitutional council in Vietnam is not among our interests for this paper, we tend to agree with the claim that the CPV did not have any political incentive, apart from the will of some political leaders, to form a specialist constitutional oversight body in 2013.<sup>21</sup> As such, when the consensus among the public was not built around the institution, the CPV decided to keep the *status quo* but still maintained a backdoor for future debate when the Constitution delegates the formation of a constitutional protection regime to the National Assembly.<sup>22</sup> In fact, the idea of forming a constitutional council has once again been revived recently by the National Assembly.<sup>23</sup> However, since Vietnam’s political order of 2013 remains very much identical in 2021, we can predict that the same arguments against the constitutional council would emerge again. In the next sub-section, we will analyze the face value of those arguments to assess whether they can be rebutted appropriately.

## 2. A two-prong attack against the constitutional council

Professor Bui suggests a theory to explain the motivations behind opponents of the constitutional review, namely the resistance of political elites who saw their powers disputed by the adoption of a new institution.<sup>24</sup> Consequently, one may think that the legal arguments forwarded by these opponents should be taken in a skeptical manner. We reject the notion that because the opponents were mostly politically motivated in their debate against the proposed constitutional council, their arguments do not deserve due considerations. On the contrary, we feel that a serious discussion of the opponents’ arguments is worthwhile, for the proponents to strategize their next moves. Review of secondary literature around the debate allows us to categorize the opponents’ legal arguments into two main groups. These groups are

---

<sup>19</sup> See Bui, *supra* note 2.

<sup>20</sup> See Ginsburg and Versteeg, *supra* note 9.

<sup>21</sup> It is notable that the National Assembly’s Chairman Nguyen Sinh Hung was among the proponents. See Bui, *supra* note 4.

<sup>22</sup> Article 119.2, the 2013 Constitution.

<sup>23</sup> *Supra* note 7. See also Lê Bình, Phó Chủ tịch Quốc hội Nguyễn Khắc Định chủ trì Phiên họp góp ý Chuyên đề về hoàn thiện cơ chế bảo vệ Hiến pháp (National Assembly’s Vice Chairman Nguyen Khắc Dinh presides the meeting on the Project to perfect the constitutional protection mechanism), DAI BIEU NHAN DAN (October 15, 2021, 05:48 PM), <https://daibieunhandan.vn/pho-chu-tich-quoc-hoi-nguyen-khac-dinh-du-phien-hop-gop-y-chuyen-de-ve-hoan-thien-co-che-bao-ve-hien-phap-5ene5hw8cb-64671>. Recently, the National Assembly once again pioneered in studying the constitutional protection mechanism, probably to formalize the Article 119.2 of the 2013 Constitution.

<sup>24</sup> See Bui, *supra* note 2.

(1) *ideological argument*, where constitutional review is deemed as contradicting the Marxist legal theory, especially on the supremacy of the legislature,<sup>25</sup> and (2) *functionality argument*, where it is argued that the existing constitutional protection regime was effective and effort should be invested in perfecting such a regime rather than building a new regime with new headcounts.<sup>26</sup> Professor Bui argued that there remains a third argument, which is that the political challenge where the opponents argued that a specialist constitutional review body would signal political instability of the monist country as the council could go against the will of the people.<sup>27</sup> Upon closer look, we think that this political attack was only a variant of the first argument and does not merit independent consideration. Therefore, for the purpose of this paper, we will only consider the two main legal challenges as set forth above.

Our assessment of this two-prong attack is that it was, at worst, highly effective, and at best, a key constraint for the formation of a meaningful constitutional review body in Vietnam. That is to say, while the opponents do not necessarily prevail in this debate academically, their arguments still carry certain political weight that would prevent any consensus on the formation of the constitutional council. As in the case of the 2013 Constitution debate, when a new proposal could not attract sufficient consensus, the decision was made by the CPV's Central Committee who has the tendency to maintain the *status quo* when there is no real political incentive to change otherwise. Therefore, we believe that it is necessary for the proponents of the constitutional council to acknowledge that they did not have a strong enough rebuttal against this two-prong attack and should reconsider their strategy.

As for the *ideological argument*, the opponents pointed out that traditional Marxist legal theory emphasizes the will of the people as supreme and that no other State bodies could contravene such a will (i.e. the legislations) even when the will is normatively unconstitutional.<sup>28</sup> As such, a constitutional review body with the power to strike down unconstitutional legislation is viewed as too foreign to the Vietnamese constitutional order, which is constructed around the idea of parliamentary supremacy.<sup>29</sup> This argument was effective in setting aside the proposal for a strong constitutional council in the initial draft and replacing it with a weaker model of post-enactment advisory manner.

We do not see a good counterargument for this ideological lecture. Historically, socialist countries adopted constitutional courts or councils only in times of political upheavals that eventually led to the

---

<sup>25</sup> See, for example, Nguyễn Sinh Sự, Về bài báo 'về nhưng điều chưa hiểu đúng về hội đồng hiến pháp' của tác giả Bùi Ngọc Sơn (On the Article 'Misunderstandings about the Constitutional Council' by Bui Ngoc Son), AN NINH THU DO (September 27<sup>th</sup>, 2013), recited from Bui, *supra* note 2. See also Bui, *supra* note 4.

<sup>26</sup> See Bui, *supra* note 2 and *supra* note 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

transition to a multiparty system in a short time.<sup>30</sup> Countries which survived the political upheavals would, in one way or another, sideline the constitutional court by not empowering it with any detailed regulations and only revived it when the foundation of Marxist legal tradition was challenged.<sup>31</sup> Contemporary China once experienced the same push for the the judicialization of constitutional rights after the *Qi Yuling* case, which was widely dubbed as “China’s Marbury”, using the namesake of the landmark case which granted the Supreme Court of United States the judicial review power.<sup>32</sup> However, the country’s political leaders quickly suppressed the movement by cancelling the *Qi Yuling* case outright as an authoritative precedent.<sup>33</sup> Little is known behind the politics of this move but one plausible observation is that the country’s leadership believed that the judicialization of the constitution could potentially hinder the absolute power of the legislature and the Communist Party of China over the constitution.<sup>34</sup> It will not be unsurprising if the same argument is used in Vietnam if a proposal for a strong constitutional council once again emerges. Without a reasonable reinterpretation, the Marxist legal tradition surrounding parliamentary supremacy will always serve as a constraint for the adoption of a strong constitutional review body in Vietnam.

Once the ideological riddle could not be solved, we believe that the only rational model that the proponents could hope for, in the case that the preference still lies with the creation of some sort of constitutional oversight, is a weak constitutional council similar to the proposed council in the draft Constitution. Here, even a weak constitutional council would not be an appealing policy choice, and the opponents were able gain more adherents when they employed the functional argument. In the *functional argument*, not only did the opponents insist that the existing legislative mechanism was sufficient in making sure that no serious unconstitutional legal documents went without notice,<sup>35</sup> but it also argued that a weak constitutional council would never be a better choice to the legislative mechanism, while adding unnecessary headcounts.<sup>36</sup> Let us remember that the proposed constitutional council only has a very limited amount of power to advise the legislature on the constitutionality of the existing legal documents. That means the proposed council does not have any role in the lawmaking process, and their power could be easily ignored by other governmental agencies. Provided that weak nature, why is it necessary, from a functional perspective, for a new agency to be created, adding more headcounts and expenses to the State budget?

---

<sup>30</sup> For example, Czechoslovakia established three constitutional courts in its 1968 constitution amidst the Prague Spring. After the Soviet Union forces occupied the country, the constitutional courts became dormant because there was no further law adopted by the legislature to formally empower them.

<sup>31</sup> For example, the creation of the Constitutional Tribunal of Poland in 1982 in response to the request of the winning Solidarity. Seven years after the birth of the Tribunal, Poland became a multiparty democracy.

<sup>32</sup> See Robert J. Morris, *China's Marbury: Qi Yuling v. Chen Xiaoyi - The Once and Future Trial of Both Education & Constitutionalization*, 2 *Tsinghua CHINA L. REV.* 273 (2010).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Bui, *supra* note 2 and 4.

<sup>36</sup> *Id.*

On this count, the proponents of the council once again did not seem to have a good defense for a weak constitutional council. Instead, they seemed to be satisfied that the weak council is a transitional body to a stronger institution in the future.<sup>37</sup> However, the fact that the proponents settled among themselves did not warrant a satisfactory rebuttal to the functional challenge. Some early proponents even sided with the opponents to criticize the weak nature of an advisory constitutional council. After all, who needs a weak council when the Ministry of Justice, the Standing Committee, or every single committee of the National Assembly were able to perform the exact same task? What difference could a weak council make that can justify additional headcounts and budget?

Perhaps the best response to these questions is to amend the proposal, by granting such advisory council with a power to strike the administrative rules and regulations – rather than keeping it advisory, too – while still restraints itself to the advisory for legislative enactments. Once again, though it may give the impression that the council has some teeth, it does not fully address the functional argument as the power to review administrative rules and regulations has been well vested to the Standing Committee, which is also a National Assembly's body. Therefore, there would be no significant change to the landscape of constitutional review in Vietnam should such power be moved from one legislative committee to the constitutional council.

The reassessment of opponents' arguments is a useful exercise for the proponents to rethink their strategy moving forward. After all, absent the need for a political insurance in the form of a strong constitutional review body, the CPV will likely only agree to a foreign concept of a strong constitutional council when a public consensus could be formed. Otherwise, only a weak constitutional council is the best hope for the proponents. Although we understand that the proponents may view a weak council as an agreeable compromise, transitioning to another policy opportunity, we do not think this strategy is wise. A comparative analysis of constitutional courts in other transitional Asian democracies shows that it usually took a lot of time and a political upheaval for a weak council to become a meaningful institution, at the cost of the prudence of the institution to be in doubt in the eyes of the public during its silent era. Therefore, theorizing how a constitutional court succeeds or fails is a very important next step. In the next Section, we will summarize the theoretical framework on how a constitutional review body succeeds or fails.

### **III. The Rise and Fall of Constitutional Courts in some countries – Case Studies for Vietnam?**

It is widely agreed upon that a ruling party will have greater political incentives to establish a constitutional review body when it foresees its leadership being effectively challenged, and it has a demand

---

<sup>37</sup> *Supra note 15.*

to insulate their policies against any undoing once they lose in the next election (i.e. the “insurance theory”).<sup>38</sup> However, some recent examples suggest that even strongmen have motives to allow constitutional courts to be formed.<sup>39</sup> A weak constitutional review body could serve multiple purposes for an authoritarian regime, including that it could satisfy ideational demand by the local academia, that it could still ensure that no challenge could be launched against the regime, and that a weak council could comply with the strongman and rubber stamp or legitimize his most controversial policies. Consequently, weak constitutional review bodies still emerge but will be kept under close watch by the authoritarian regime. Such weak bodies soon would become compliant institutions and therefore not only fail to live up to their expectations as the rule of law guardians, but also distort the public institutional trust. Then, what is required for a successful constitutional review body?

By comparing different constitutional courts in transitional Asian democracies, Professor Ginsburg theorizes that the key first ingredient for a successful constitutional court is political diffusion:<sup>40</sup>

*“Explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the time of constitutional design.”<sup>41</sup>*

Other scholars share the same observations. For example, Professor Hirschl argues that the judicialization of constitutional disputes will be accelerated when the dominant ruling party begins to lose its power.<sup>42</sup> Whether a court is strong or weak depends on the level of dominance one party has over the others during the constitutional drafting process. Whether a court stays strong or weak, however, depends on how strategic the court is in maneuvering the political tensions during its first cases. Several examples of strong and weak courts in following subsections will be used to illustrate this framework.

### ***Strong Courts***

Strong courts are formed where political diffusion occurs. This is not a region-specific phenomenon. Old Western democracies also saw their judicial review system become stronger in the midst of a constitutional dispute that occurred between a losing incumbent and a winning political opponent. *Marbury v. Madison*<sup>43</sup> was appealed to and decided by the Supreme Court of the United States after a close election which saw a slim victory by Thomas Jefferson against then incumbent John Adams. Marbury’s lawsuit was just one of many plots that the losing Federalists used to distract the Democratic-

---

<sup>38</sup> See Ginsburg and Versteeg, *supra* note 20.

<sup>39</sup> Citing Landau in “Abusive Constitutionalism” (See David Landau, *Abusive Constitutionalism*, 47 U.C.D. L. REV. 189 (2013)), Professor Bui gave an example of Hungary, Venezuela, and Egypt, where authoritarian leaders in these countries manipulated the constitutional court to neutralize its function as a forum for challenging rulers’ policies. See Bui, *supra* note 4.

<sup>40</sup> See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003)

<sup>41</sup> *Id.*, at 25.

<sup>42</sup> See RAN HIRSCHL, *TOWARD JURISTOCRACY* (2000) 95.

<sup>43</sup> See *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

Republicans from its governance and insulate their old policies from the victors' attack.<sup>44</sup> On that background, when Chief Justice John Marshall invented the "judicial review" power for the Supreme Court of the United States, neither party felt the need to challenge such a useful forum.

The same rationale was adopted by Charles De Gaulle when he proposed the creation of the *Conseil constitutionnel* in the Fifth Republic's constitution. The formation of the Fifth Republic France marked the shift from a republican parliamentary system to a semi-presidential system and created a check and balance attitude between the presidency and the legislature. Thanks to the political struggles between the presidency and the legislature at the outset of the Fifth Republic, the *Conseil* rapidly became so influential that it was coined as De Gaulle's "cannon aimed at the legislature".<sup>45</sup> The *Conseil*, whose powers include, among others, the review of any legislative enactment before promulgation upon the request of the President can be seen as an offset for the President's lack of strong veto powers.

A similar phenomenon occurred in South Korea at the time the country was being democratized, when the Constitutional Court was adopted with a strong abstract and concrete review power during a political bargaining process between the military and the civilian forces.<sup>46</sup> The political setting in 1988, the year of the birth of the Constitutional Court of Korea, was also shadowed by the aftermath of the democratization movement which occurred just a year prior in addition to the Seoul Olympics. At that time, no political forces enjoyed the dominant position at the negotiation table. On one side, the military party led by the incumbent head of state saw the end was near and needed political insurance so they would not face prosecution after the regime change. On the other side, the democratic camp was divided between two leading democratic activists who refused to join forces. Such political diffusion was the perfect environment for a constitutional compromise that saw the formation of a strong Constitutional Court.

### ***Weak Courts***

On the contrary, transitional countries where one party can dominate the entire bargaining process tend to choose a weak constitutional review body.<sup>47</sup> Two examples stood out here.

First was the case of Mongolia when they formed the Constitutional *Tsets* in 1992. At the time of its formation, Mongolia's ruling party, Mongolia's People Revolutionary Party (MPRP), felt the need to reform the constitution to curb the rising democratization movement within the country as a result of the Fall of the Soviet Union.<sup>48</sup> A constitutional oversight body was widely agreed upon among the

---

<sup>44</sup> Steven Arrigg Koh, *Marbury Moments*, 54 *COLUM. J. Transnat'l L.* 116 (2015).

<sup>45</sup> See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992)* at Chapter III.

<sup>46</sup> See *supra* note 40 at Chapter 7.

<sup>47</sup> See *supra* note 40.

<sup>48</sup> *Id.* at Chapter 6.

constitutional drafters as one of the solutions to ease the popular dissents.<sup>49</sup> However, the MPRP did not see a credible threat from any organized opposition. The Party heavily dominated the constitutional drafting process and decided to establish a weak constitutional court whose power was limited to abstract review. Such reviews would need to be approved by the legislature for effectiveness.<sup>50</sup> The weak nature of Mongolia's constitutional court was also reflected in its name, *Tsets*. In Mongolian, *Tsets* does not mean "court", but rather refers to the referee of the country's traditional wrestling.<sup>51</sup> As a result, the body was supposed to perform the duties of an arbitrator-mediator rather than of a court of justice which would strictly follow the law and could rule against the government.<sup>52</sup> By thoughtfully choosing the name, MPRP's drafters sent a message to the public that while the formation of the constitutional oversight body was a response to public demand, a boundary was set and must not be crossed. Consequently, *Tsets* remained a heavily compliant body and only became more active when the leadership of the MPRP was challenged in the late 20<sup>th</sup> century.<sup>53</sup> However, a clash with the legislative branch in the early 21<sup>st</sup> century once again saw the *Tsets*'s authority limited.<sup>54</sup>

The second example was the case of Taiwan when they created the *Xiànfǎ Fǎtíng* or the Council of Grand Justices in 1947. Taiwan is a curious case, because under the original 1947 Constitution of Taiwan, the Council of Grand Justices enjoyed a relatively strong level of authority of constitutional and legal interpretation while there was no political diffusion in China at the time.<sup>55</sup> When the 1947 Constitution was drafted and passed, the *Kuomintang* (KMT) largely dominated the mainstream political setting of the country. Historically, the idea of a constitutional court as a neutral protector of citizens' rights had been entertained in China for a very long time, especially during the integration of China and Western powers in the early 20<sup>th</sup> century.<sup>56</sup> After World War II, during the National Political Consultation Conference of 1946 – in fact a political negotiation between the Nationalists (the KMT) and the Communists, both political parties saw themselves as fragile for different reasons bilaterally called for a judicial review to be established, curiously in the form of an America-like decentralized system.<sup>57</sup> However, when the negotiation fell through, the KMT, no longer facing any parliamentary opposition, decided to change course. It chose a hybrid model instead, with the Council of Grand Justices placed under the Judicial Yuan who also oversees other ordinary courts.

---

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Lawrence Shao-Liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 *AM. J. COMP. L.* 509 (1991). This article is also cited in Ginsburg, *supra* note 40 at Chapter 5.

<sup>56</sup> See *supra* note 40 at Chapter 5.

<sup>57</sup> *Id.*

Ginsburg offers an explanation for the logic behind the choice to grant the Council relatively strong powers. Upon closer look, the Council's interpretation power would only contribute to a stronger and more effective administrative rule.<sup>58</sup> Consequently, the executive branch could govern better with a coherent legal system. By taking away the power to review the constitutionality of the legislation, the KMT ensured that the Council would never be able to use their constitutional interpretation to derail the party's policies. This calculation was correct. After the KMT retreated to Taiwan and imposed a 38-year-long martial law period on the island, the Council of Grand Justices gradually became a quite institution until its power was expanded along with the democratization of the island.<sup>59</sup> During this era, there was one occasion that the Council of Grand Justices was put a difficult position in which its constitutional interpretation went against Taiwan's legislative branch (the Legislative Yuan).<sup>60</sup> As a result, the Legislative Yuan reacted by imposing a stricter quorum rule that effectively prevented the Council of Grand Justices from issuing constitutional interpretations freely for the following 30 years.<sup>61</sup>

What can we learn from the lessons of these weak courts? We believe the key lesson here is that it is very time-consuming and requires significant political upheavals in order for a weak constitutional review body to become a strong one. A weak court would choose to comply with both the will of the legislature and the executive branch because it is fully aware that it could be disciplined any time by these two powerful branches. After all, a constitutional review body is a strategic actor whose authority depends heavily on other political forces' compliance, without which the constitutional review body will lose its credibility and its prudence. A strong court can also become weak if it does not choose cases strategically, prompting disobedience or retaliation by other branches.<sup>62</sup> Therefore, in order to assess whether a proposed constitutional oversight option could be effective, we must look into the option's ability to meaningfully challenge other powerful branches, provided its starting position. If a constitutional oversight body is so weak that it can only be a compliant, or worse, an instrumental institution, it would be wiser for the constitutional review advocates to categorically oppose such creature. Using the above theoretical framework, in the next Section, we will argue that the dismissal of the proposed constitutional council in the 2013 Constitution was indeed good news for its proponents.

---

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Here, the example of the Constitutional Court of Russia and its constitutional crisis in 1993 is exemplary. Other examples can include the Supreme Court of Japan, when its decision was largely ignored by the country's longtime ruler LDP.*



#### **IV. The Dismissal of the Proposed constitutional council – A successful tactical withdrawal**

As discussed in Section II, Vietnam's proposed constitutional council was a very weak model for a constitutional review body. From a structural perspective, the proposed council would hardly be an independent body as its operation would be conditional to a National Assembly's laws,<sup>63</sup> which is subject to the council's review as well. The council's power is only of an advisory nature, even in cases of the unconstitutionality of the administrative rules and regulations, which the council must refer to the National Assembly for formal invalidation.<sup>64</sup> Additionally, the 2013 Constitution would only stipulate the formation and scope of review of the proposed constitutional council and leave out other important matters such as the procedure of review, standard of review, criteria of the members, and the quorum of review to the National Assembly.<sup>65</sup> Similar to the case of Taiwan, it could become a constraint where the proposed constitutional council would always act in compliance with the National Assembly, even in case of a clear unconstitutionality, out of the fear that the latter would amend its legislation as an act of discipline.

From a political perspective, the reasoning behind the CPV's choice to establish a constitutional oversight body in 2013 was unclear, but definitely not insurance driven. The CPV was (and still is) the only dominant political party of the country and therefore its policies are not in any dangerous challenge. Perhaps the real policy reasoning behind the CPV's policy to study the formation of a specialist constitutional council was only to "perfect" a rule of law state and to ensure a coherent legal rule by avoiding technical overlaps among legal documents. If our observation is correct, the choice of a weak constitutional council will become explainable, but that also means that the proposed constitutional council would not be able to fulfill its constitutional oversight function. Rather, it would play the same role as other bodies, such as the Ministry of Justice, the National Assembly's Committee of Law, and the National Front. Essentially, a proposed constitutional council would become a symbolic or ceremonial body only. In a country without a history of the judicialization of the constitution, such a maiden institution should not deviate from any traditional functions of a constitutional court, otherwise the meaning of constitutional review would be distorted. When the meaning of constitutional review is distorted, public confidence in the institution would be low and the likelihood for the weak constitutional council to transform into a stronger would be largely hindered.

Judging from these potential challenges, some early proponents did not accept the idea of a proposed weak constitutional council as a transitional model. We agree with this position because we do

---

<sup>63</sup> Article 120, the draft 2013 Constitution. See *supra* note 1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

not see a clear pathway for the proposed council to become a stronger one in a foreseeable future. On the contrary, we see a strong possibility, using the historical examples of weak courts in other transitional democracies, that the proposed constitutional council would become a compliant body and hence do more harm than good.

To test this hypothesis further, let's assume how the proposed constitutional council would likely react to a moot constitutional dispute. Globally, a constitutional dispute usually involves at least two political forces disagreeing on the meaning of one article in the written constitution. The disagreement would only become a constitutional dispute if both political forces could not work out a compromise, prompting either party to resort to the forum of the constitutional council for a resolution. In our moot dispute, the National Assembly and the Government failed to reach an agreement on the interpretation of a constitutional clause, and therefore the debate about the constitutionality of the Government's decree. The National Assembly could easily assert their authority by threatening that it would request its Standing Committee to exercise its interpretation power to gain an advantage and cancel the decree outright. In that case, the Government would need to have a forum which would have the same weight as the Standing Committee's and National Assembly's powers in order to counterbalance the National Assembly's edge. The constitutional council with a very weak advisory power would never be a rational choice. Eventually, in such a dispute, there would be no place for the constitutional council to voice their opinions. Political actors would bypass the constitutional council for a more powerful alternative, for example, a political solution.

Let's examine another scenario where the constitutional council exercises their prescribed authority to advise on the constitutionality of a legal document. For the purpose of this argument, let's imagine an unconstitutional decree. Under the procedure as stipulated in the draft Constitution and an assumption that the National Assembly allows the constitutional council to actively initiate the review, the constitutional council will have two legal options. In the first option, the constitutional council may ask the Government to repeal the unconstitutional decree with a threat that the council would call upon the National Assembly to repeal it when the Government refuses to do so voluntarily. In the second option, the constitutional council may bypass the convincing option and motion directly to the National Assembly to repeal the unconstitutional decree. A politically rational choice for the constitutional council is that it will attempt to convince the Government first rather than appeal directly to the National Assembly and risk political backlash from the Government's leaders. If option 1, then, is taken, will it carry any weight more than that of the Ministry of Justice's recommendation to repeal "outdated" or "unconstitutional" decrees? Perhaps not. The Government may argue that the decree is in fact not unconstitutional, and that the constitutional council is mistaken in its application of the constitution. In such a scenario, the

constitutional council will have no other choice but to risk a political backlash and ask the National Assembly to exercise its power to overrule the decree. Here, the moot dispute that we discussed in the previous paragraph will appear. Eventually, we do not see a different outcome for the role of the constitutional council. If the eventuality remains the same, what is the incentive for the constitutional council to initiate the review of the constitutionality of the decree in the first place? As a rational institution, the constitutional council would once again be more likely choose to overlook, or, at best, be hesitant to exercise their review.

In both scenarios, we do not see the proposed constitutional council being effective. Therefore, we argue that a transitional constitutional council will only be meaningful when it has enough political and legal room to be strategic in its choice of disputes to adjudicate, and to gradually and incrementally increase its institutional reputation in preparation for a transformation into a stronger body. The proposed constitutional council, however, does not have any power at all to be a meaningful body let alone to be a transitional constitutional oversight body.

By testing these two hypotheses, we came to the conclusion that the proposed constitutional council was not a weak constitutional oversight body. It was not a constitutional oversight body at all. The formation of the proposed constitutional council, therefore, will not be a compromise, it will be a failure of the whole advocacy movement for a constitutional review body in Vietnam. Through that lens, the dismissal of the proposed constitutional council was in fact a successful tactical withdrawal of the proponents.

The idea of a legal review body to interpret and safeguard the supremacy of the constitution against any violations from other political branches is justifiable, and it is necessary in the process of building a country of the rule of law. This means that only a constitutional review model which can contribute to the protection of constitutional order, civil liberties, and the rule of law should be adopted. An institution which is labelled as constitutional oversight body but fails to live up to the name is more harmful than nothing. At worst, a proposed model which does not have teeth will gradually become instrumental and may legitimize the clearest unconstitutional act. Legal theorists should never be rushed into establishing a constitutional oversight body in name only, especially when the failure of the institution and the distortion of the original idea is foreseeable.

On that note, we believe that the establishment of a meaningful constitutional review body should be a no-compromise option and, until a popular consensus is built around that idea, against all odds, the proponents for the constitutional court in Vietnam should feel satisfied with the tactical withdrawal in 2013. They should continue to advocate for the idea of constitutional review as a pillar for the rule of law, explore alternatives to achieve the underlying policies, and reject any temptation for a compromise.



## 6. The Procedure for Drafting the Constitution and the Challenges Posed in Drafting the Constitution

Nguyen Thi Quynh Trang\*

**Abstract:** The procedure for drafting the Constitution plays a particularly important role in constitutional activities. A constitution that is built on strict, logical procedures will produce a real Constitution. On the other hand, our State is a state that is ruled by law “*of the people, by the people, and for the people*”. Therefore, the people are authorized subjects, and they delegate their rights by their constitutional authorities. In conclusion, it can be said that the procedure for drafting the Constitution is the starting point to ensure that all state power belongs to the people.

The democracy of a constitution depends largely on how the Constitution is processed. To have a constitution that fits the goal of building a rule of law in a socialist state, opening up, and integrating with the world, it is necessary to renew the procedure for drafting our country’s Constitution, because there are still many inadequacies in this procedure. Within the scope of this research, the author analyzes the procedure for drafting the Constitution and presents the challenges posed in this procedure here and now.

### I. The definition of “Constitution”

The term "Constitution" appeared very early in human history. It was used in ancient books around the 26th and 27th centuries. In the Shijing (*Classic of Poetry*) (8th century B.C), it means a model, an archetype for kings and lords, and also in the 5th century B.C, it means ordinance.<sup>1</sup>

However, in some Western feudal countries, there were some legal documents that has the same nature as a constitutional, such as Charters, but the term “Constitution” has not been used. According to author K.C Wheare, "Constitution" is often used with at least two meanings: ***First, as the entire government system of a country, the collection of rules that establishes and regulates or operates the government. Second, as a document containing the legal rules for operating the government in a country***<sup>2</sup>. The term “Constitution”, which means “*the basic law of a country*”, appeared along with the victory of the bourgeois revolution, which overthrew the feudal class. After the victory of the bourgeois revolution, the bourgeoisie in all countries promulgated the Constitution, upholding the Constitution as the most effective basic law. The first Constitution in history is associated with the founding of the United States of America (1787).

---

\* Lecturer in Constitutional Law, Hanoi Law University

<sup>1</sup> Hanoi Law University, Vietnamese Constitutional Law Curriculum, Police Publishing, Hanoi, 1998, page 41.

<sup>2</sup> K.C Wheare (1962), Modern Constitutions, Oxford University Press Publishing, London (translated: Nguyen Quang, Sai Gon, 1967, page 7).

There are many definitions of “the Constitution”, according to two British researchers B. Jones and D.Kavanagh: "*The Constitution is a document expressing the spirit and political line*"<sup>3</sup>. Or according to British scholars, M.Beloff and G.Peele, it can be defined as "*...the combination of regulations that govern and delimit the division of state power in the political system.*"<sup>4</sup>

In Vietnam, the Constitution "*is the system of legal norms with the highest legal effect that sets up the most basic issues of national sovereignty, political regimes, economic/culture/society policies, organization of state power, and the legal status of people and citizens.*"<sup>5</sup>

## **II. The procedure for drafting the Constitution in Vietnam currently and challenges posed in the drafting procedure**

In our country's legal system, the Constitution is an important political-legal document, the basic law of the State. The Constitution has the highest legal effect in the legal system. The Constitution regulates the most basic and important social relations, related to issues of political, economic, cultural, social, defense and security regimes, basic rights and obligations of the citizens, organizations, and activities of government agencies. Stemming from the Constitution's position and role in this legal system, all the work from drafting, consultation, approval, and publication of the Constitution must follow a strict order. However, so far, the National Assembly has not issued a specific document about the procedures for drafting the Constitution. From the first Constitution in 1946 until now, Vietnam already has five Constitutions, but the regulations on the drafting procedure of the Constitution have not been completed, so in practice, the drafting activities are mainly based on the specific conditions, circumstances, procedures for promulgating laws, and some creativity for each time.

Through the practical implementation of constitutional activities, the procedures for drafting the Constitution includes the following steps:

- The competent authority proposes and decides on the drafting of the Constitution;
- Establishing a Constitution Drafting Committee;
- Drafting the Constitution;
- Conducting a public consultation on the draft Constitution;
- Considering and approving the draft Constitution;
- Conducting the Referendum on the Constitution;
- Proclaiming the Constitution.

However, within the scope of this article, the author would like to deeply analyze the drafting procedure, to introduce the most recent Constitution of Vietnam, the 2013 Constitution. According to

---

<sup>3</sup> B.Jones, D.Kavanagh, *British Politics Today*, Manchester University Press, 2003, p.8

<sup>4</sup> M. Beloff, G.Peele, *The Government of the United Kingdom: Political Authority in a changing society*, London, 1980, p.10.

<sup>5</sup> Hanoi Law University, *Vietnamese Constitutional Law Curriculum*, Police Publishing, Hanoi, 2020, page 47.

Resolution No.38/2012/QH13 dated November 23<sup>rd</sup>, 2012, of the National Assembly, on January 2<sup>th</sup> 2013, the Commission which was established for drafting the 1992 Constitution's amendments officially submitted the Drafting Amendment for the 1992 Constitution to conduct public consultation<sup>6</sup>. When the Constitution was announced, it was called the 2013 Constitution of the Socialist Republic of Vietnam.

1. The competent authority proposes and decides on the drafting of the Constitution

**Firstly**, the authority who proposed to amend the Constitution is essential. In the Constitutions of our State, from the 1946 Constitution to the 1992 Constitution, all recognized the right to initiate legislation of the competent authority. According to Article 87 of the 1992 Constitution, and the Law on Organization of the National Assembly, the President, the Standing Committee of the National Assembly, Council on Ethnic Minorities, and Committees of the National Assembly, the Government, the Supreme People's Court, The Supreme People's Procuracy, the Vietnam Fatherland Front, and its member organizations have the right to submit law and ordinance projects to the National Assembly and the Standing Committee. National Assembly delegates have the right to propose laws and ordinances to the National Assembly and the Standing Committee. However, who has the right to submit a proposal to amend the Constitution (also known as a constitutional initiative) has not been specified in the legal documents of our State.

In fact, amending the Constitution shows that the proposal to amend the Constitution is made by many different subjects. In particular, it may be proposed by the Government (in 1945 the Government proposed to draft and promulgate the 1946 Constitution); or by agencies of the National Assembly (in 1957, the Standing Committee of the National Assembly proposed to amend the 1946 Constitution; in 1989 the State Council proposed to amend and supplement a number of articles in the 1980 Constitution; in 2001 and 2011, the Standing Committee proposed to amend and supplement the 1992 Constitution); and sometimes it may be proposed by the Government and agencies of the National Assembly (in 1988 the Council of Ministers, the Committee on External Relations and the Committee on Laws of the National Assembly proposed to amend the 1980 Constitution's Preamble) or based on the guidelines and policies of the Communist Party of Vietnam (in 1976, the 1959 Constitution was revised).

Normally, agencies and organizations that propose amendments to the Constitution submit a project on amendments or supplements, or the drafting amendment of the Constitution to the National Assembly. This project includes a proposal to the National Assembly and proposed amendments and supplements to the Constitution. In order to submit a project of amendments, supplements, or the drafting amendment of the Constitution to the National Assembly with good quality, effective, and on

---

<sup>6</sup> <http://baohinhphu.vn/Tin-noi-bat/Chinh-thuc-cong-bo-Du-thao-sua-doi-Hien-phap-1992/158230.vgp>

schedule, a research group, which is commonly known as the Research Committee or Sub-Committee, will be established to assist the proposed agency or organization that proposed. The Committee or Sub-Committee is responsible for studying and proposing issues within the scope of amending or supplementing the Constitution or the drafting amendment of the Constitution.

Implementing the Resolution of the 11th National Party Congress which "*expeditiously study the amendments and supplements to the 1992 Constitution (amended and supplemented with a number of articles in 2001) in accordance with the new situation*" and Resolution of the Second Conference of the 11<sup>th</sup> Party's Central Committee, the Standing Committee proposed to the National Assembly, which was moderated by its Chairman with representatives of central agencies and organizations' leaders<sup>7</sup>, at the first session to issue a Resolution on amending and supplementing the 1992 Constitution and establishing the Commission for Drafting Amendments to the 1992 Constitution.

**Secondly**, it is followed by the procedure for deciding the amendment of the Constitution. One of the constitutional amendment principles, which have been recognized from the 1946 Constitution to the 1992 Constitution, is that the amendment of the Constitution must be approved by at least two-thirds of the total number of National Assembly delegates. This regulation is understood as, before drafting a project to amend the Constitution and submit it to the National Assembly for consideration and approval, the National Assembly must vote on whether to amend the Constitution or not, and to amend a part of the Constitution or the entire Constitution (scope of amendment). If two-thirds of the total number of National Assembly delegates approve, the constitutional activity will be "*initiated*". Normally, the National Assembly decides to consider amending the Constitution through these following steps:

- Agencies and organizations that propose to amend the Constitution shall submit their proposals to the National Assembly;

- The National Assembly discusses and decides to amend the Constitution. The National Assembly's decision on amending the Constitution comes in the form of a Resolution and must be approved by at least two-thirds of the total number of National Assembly delegates. In fact, the National Assembly's decision on amending the Constitution may be in a separate resolution, or in a resolution on the National Assembly's Law-and-Ordinance-making program. For example, in 1957, when amending the 1946 Constitution to promulgate the 1959 Constitution, the National Assembly issued a Resolution on amending the Constitution and appointed a Constitution Amendment Committee to research and prepare a project about amending the Constitution. In 1988, when amending the Preamble of the 1980 Constitution, the National Assembly issued a Resolution affirming that the National Assembly approved the amendment of the Constitution's Preamble and then carried

---

<sup>7</sup> Report No.12/TTr-UBTVQH13 dated August 2<sup>nd</sup>, 2011 of the National Assembly's Standing Committee.



out constitutional activities. In 2011, the National Assembly issued a Resolution on amending and supplementing the 1992 Constitution and established The Commission for Drafting Amendments to the 1992 Constitution. During these constitutional amendments, the National Assembly issued its own resolutions on amendments to the Constitution, serving as a basis for the constitutional activities of agencies and organizations tasked with preparing proposals for the constitutional amendment. Accordingly, those agencies and organizations shall submit their proposals to the National Assembly. After that, the National Assembly considers the proposals and decides to amend the Constitution by a Resolution of the National Assembly. In case that the National Assembly approves the amendment of the Constitution, the National Assembly shall establish a Commission for Drafting Amendment to the Constitution, which is responsible for studying, drafting, and preparing the Constitution amendment project to submit to the National Assembly for consideration through.

Thus, this procedure is similar to the procedure of reviewing and approving laws and ordinances, in that: before carrying out the activities of promulgating laws and ordinances, the National Assembly considers and decides on the law-and-ordinance-making program, in order to plan this activity for the whole term each year. In constitutional activities, the National Assembly also discusses and votes on amendments to the Constitution before proceeding to next stages of the constitutional procedure. The decision on the law-and-ordinance-making program or the Constitution's amendment, is formed in a separate National Assembly's Resolution. However, if a resolution on the law-and-ordinance-making program only needs to be approved by more than half of the total number of National Assembly delegates, the constitutional amendment must be approved by two-thirds of the total number of National Assembly delegates. This difference comes from the position, role, and legal effect of the Constitution: The Constitution is the basic law of the State and has the highest legal effect and the amendment of the Constitution is relevant to and directly affects every aspect of the whole society. Therefore, the decision to amend the Constitution must be approved by at least two-thirds of the total number of National Assembly delegates.

In fact, there have also been some cases when the National Assembly decided to amend and supplement the Constitution but did not issue a separate resolution, instead, through the approval of law and ordinance making programs, such as the amendment and supplementation of the 1992 Constitution in 2001. According to this procedure, the National Assembly only decides on the National Assembly's law-and-ordinance-making program, and the amendment and supplementation of the Constitution are one of the contents of that program. Thus, instead of promulgating a resolution on the law-and ordinance-making program (of law-and-ordinance-making activities) and a resolution on the amendment of the Constitution (of constitutional activities), the National Assembly promulgates only one resolution on the law and ordinance making program. To conclude, the decision to amend the Constitution is made through the procedures of deciding on the law and ordinance making program.

## 2. Establishment of a Constitution Drafting Committee

After considering the proposal for amendment of the Constitution, if the National Assembly approves the proposal, then they shall establish a Committee to draft the Constitution. This Committee is responsible for reviewing the implementation of the Constitution; drafting a resolution on amending or supplementing the Constitution or an amendment Constitution; studying and receiving opinions about the draft from the National Assembly delegates and the people; studying, receiving, and revising the draft resolution on amending and supplementing the Constitution or the draft amendment of the Constitution; and submitting it to the National Assembly for consideration and approval. The establishment of the Constitution Drafting Committee, and the number and composition of the Committee's members are very important, affecting the quality of constitutional activities and the subsequent stages of this procedure.

Deciding to establish the Constitution Drafting Committee shall be made through the following steps:

- Proposing the establishment of a Constitution Drafting Committee.

In fact, through each amendment of the Constitution, the proposal to establish a Constitution Drafting Committee was carried out by many different authorities. It may be proposed by the Council of Ministers (promulgating the 1946 Constitution), or by the Standing Committee of the National Assembly (amendments to the 1946 Constitution in 1959, amendments and supplements to the 1980 Constitution in 1989, the amendments and supplements to the 1992 Constitution in 2001 and 2011). In some cases, it may be proposed by the Chairman of the National Assembly (the 1992 Constitution), etc.. Agencies, organizations, and individuals proposing the establishment of the Constitution Drafting Committee must make a report on the proposed member list of the Constitution Drafting Committee and submit it to the competent authority for consideration and decision;

- Decision to establishing the Constitution Drafting Committee

On the basis of proposals from agencies, organizations, or individuals, the National Assembly discusses and decides to establish a Committee to draft the Constitution. The decision of the National Assembly is represented by a resolution specifying the composition of the Constitution Drafting Committee, including the Chairman, members of the Committee, and the tasks of the Committee. In fact, there was also a special case in 1946, when drafting the Constitution, based on the proposal of the Council of Ministers, the President of the Provisional Government issued a Decree to establish a Constitution Drafting Committee.

Of all eight times carrying out constitutional activities, most cases show that the National Assembly (or the Government) decides to establish the Drafting Committee and assign it the task of drafting a Constitution and submitting to the National Assembly for consideration and approval. The composition of the 1992 Constitution Amendment Drafting Committee (hereinafter referred to as the Constitution Amendment Drafting Committee) was decided by the National Assembly, including

representatives of central agencies and organizations. There were 27 members, including one Chairman and one Vice Chairman of the Committee.

The Constitutional Amendment Drafting Committee was responsible for reviewing the implementation of the 1992 Constitution, developing a draft amendment to the Constitution, and collecting opinions from experts, scientists, administrators, relevant agencies, organizations, and people in order to submit to the National Assembly for consideration and approval. After striving for the submission of the first draft at the end of 2012 session, the committee organized a public consultation for about 2 months, from March to April 2013. During the procedure, the Constitutional Amendment Drafting Committee ensured the correct purposes, requirements, viewpoints, and basic orientations mentioned above. Then, the Committee studied and received opinions to complete the draft, and submitted it to the National Assembly for consideration in mid-2013. After that, the draft amendments to the Constitution were absorbed and revised based on the opinions of the people and the opinions of the delegates, and were submitted to the National Assembly for consideration and approval.

### 3. Drafting the Constitution

The drafting phase of the Constitution - including the project on amending and supplementing the Constitution or drafting the Constitution amendment - is the most important stage of the constitutional amendment procedure. Unlike the procedure of making laws and ordinances, the procedure of amending the Constitution does not have a verification stage. Thus, the quality of the prepared Constitution project focuses mainly on the drafting stage. The result of the drafting is a draft Constitution (amended) or a draft amending and supplementing a number of articles of the Constitution, which will be submitted to the National Assembly for consideration and approval. Drafting the constitution will be carried out in the following order:

**Firstly**, to summarize the practice of implementing the Constitution and law, to study the Party's lines, guidelines and policies, and survey, and to assess the status of social relations within the scope of the constitutional amendment.

Summarizing the practice of implementing the Constitution and law is an important work of amending and supplementing the Constitution. This work requires the Constitution Drafting Committee to collect, analyze and evaluate information and documents from various sources on the actual implementation of the Constitution and law. The results of summarizing the practice of implementing the Constitution and law show the advantages and limitations, even the contradiction between the provisions of the Constitution and current laws. In order to have the inheritance and development, the Committee makes reasonable adjustments and supplements, ensuring the feasibility and consistency of the draft Constitution.

Studying the lines, guidelines and policies of the Party also plays an essential role in the drafting. In our country, the Party is the force leading the State and society. One of the Party's leadership methods for the State is to set out the program, guidelines, and policies, which serve as the basis for the State to institutionalize into law. In other words, the Party's lines, guidelines, and policies are the political basis of law. Therefore, the amendment and supplementation of the Constitution must be based on not only the guidelines and policies in every aspect of the politic, economy, national defense, security, foreign affairs, culture and society, science and technology, organization of the state apparatus, etc. but also the Party's guidelines. Therefore, it can be said that the Constitution recognizes and institutionalizes the Party's line in each development period of the country, demonstrating the interests of the State, country, people, nation, and society.

Surveying and assessing the status of social relations within the scope of the Constitution is the last step of this stage. Law is, after all, a vivid reflection of life. Therefore, in order for the Constitution to be consistent with reality and to be realistic, right from the drafting stage, the Constitution Drafting Committee must conduct a full and thorough survey and assessment of the status of social relations within the scope of the Constitution. It can be said that this is a very difficult job because, unlike laws and ordinances, social relations within the scope of the Constitution are not limited to only one or a certain group of relationships, but also to those most important and basic social relations, associated with determining the political regime, the legal status of citizens, economic regime, culture, education, science and technology, organization, and operation of the State apparatus...

**Secondly**, to draft the Constitution. Based on summarizing the practice of implementing the Constitution and law, studying the Party's lines, guidelines and policies, and surveying and assessing the status of social relations within the scope of the constitutional amendment, the Constitution Drafting Committee shall draft the Constitution project. Drafting an amendment to the Constitution includes the following specific tasks:

- Making an outline for drafting an amendment to the Constitution, including a preliminary outline and a detailed outline. This is for selecting and arranging the proposed contents specified in the Constitution, also serve for future editing work.

- Drafting an amendment to the Constitution. Based on the established outline, the Constitution Drafting Committee drafts the content of the amendment to the Constitution. As follows:

As for the project on amending and supplementing articles of the Constitution, the drafting focuses mainly on the contents, articles, and clauses to be amended and supplemented. For example, during the procedure of amending and supplementing articles of the 1992 Constitution in 2001, the drafting focused on several articles on the organization of the state apparatus and on the economic, cultural, educational regimes, and science and technology, while the unmodified and supplemented contents remained the same. Through the amendments and supplements to the Constitution, it has been shown that, unlike the new promulgation or amendment of the entire Constitution, the amendment and

supplementation of articles of the Constitution are usually in the form of resolutions. When building and completing the constitutional procedure, it is also necessary to pay attention to this issue.

As for the project on amending the entire Constitution, the draft must focus on all chapters, sections, articles, and clauses, such as the Preamble, chapters on the political regime, economy, social affairs, culture, education, science, technology and environment, defense of the Fatherland, human rights, fundamental rights and obligations of citizens, the organizational structure of the state apparatus, national flag, national emblem, national anthem, the capital, National Day, and the effectiveness of the Constitution and amendment to the Constitution.

- Preparing the Report on the draft amendment to the Constitution and documents related to the constitutional amendment project, such as the Report on the implementation of the Constitution, the Report on summarizing opinions of the people, the detailed explanations of amendments and supplements, and a comparative reference to the current Constitution and the proposed amendments and supplements...

#### 4. Conducting a public consultation on the draft Constitution

Conducting a public consultation and collecting opinions from National Assembly delegates on the draft Constitution is an indispensable stage in constitutional activities. This stage improves the quality of the draft Constitution in terms of both content and constitutional technique. At the same time, this is also an appropriate form to popularize, propagate, and raise the legal consciousness among the people, promoting the people's right to mastery in participating in state management and law-making.

Other than this, the purpose of conducting a public consultation on the draft Constitution is to mobilize the people's wisdom and enthusiasm, create the people's consensus, and express the will and aspirations of the people in amending the Constitution. Besides, it is to raise awareness and responsibility of each individual, agency, and organization for the amendment of the Constitution and the implementation of the Constitution.

The content of public consultation can be the entire draft Constitution, but it is suggested to focus on a few contents of the draft Constitution in order to direct the public consultation on some key issues. In the amendment and supplementation to the 1992 Constitution in 2013, the content of public consultation was the entire Draft Amendment to the 1992 Constitution, including Preamble; political regime; human rights, fundamental rights and obligations of citizens; economy, social affairs, culture, education, science, technology, and environment; defense of the Fatherland; the state apparatus; the effectiveness of the Constitution and amendment to the Constitution; and the technique of presenting the provisions of the Constitution. Agencies, organizations, and individuals not only give opinions on the entire Draft Amendment to the Constitution, but based on their functions and tasks, also focus on

giving in-depth opinions on contents that directly related to the field of operation of the agency or organization, and the issues of interest to the agency, organization, or individual.

Objects of the public consultation are all classes of people in the country and Vietnamese overseas; central agencies and organizations: Standing Committee of the National Assembly, Council on Ethnic Minorities, Committees of the National Assembly, and agencies of the Standing Committee; the Government, ministries, ministerial-level agencies, and agencies attached to the Government; Supreme People's Court; Supreme People's Procuracy; State Audit and Committees of the Party; Office of the Party Central Committee and Office of the President; local agencies and organizations: Provincial Party Committee, City Party Committee, People's Council, People's Committee, People's Court, and People's Procuracy; Vietnam Fatherland Front, socio-political organizations, socio-political-professional organizations, socio-professional organizations, and other social organizations; academies, universities, and research institutes; news agencies, press, etc.

The form of public consultation is very diverse and different at each time of amendment to the Constitution and the time of conducting a public consultation. Normally, the public consultation on draft amendments to the Constitution is done through direct comments or written comments sent to competent authorities and organizations, discussion from conferences and seminars, and suggestions through the mass media. In 2013, when conducting a public consultation on the 1992 Draft Constitutional Amendment, people had a new channel of information and comments, which was the National Assembly's website<sup>8</sup>. The Draft Amendment to the 1992 Constitution and documents related to the Draft were posted on this website, so that people could study and comment directly on each article and clause of the Draft. These comments were gathered and transferred to the 1992 Constitutional Amendment Drafting Committee for synthesis into a final report to be submitted to the National Assembly. According to the Report on People's Opinions of the Committee for the Draft Amendment to the 1992 Constitution, from January 2, 2013, to April 30, 2013, there were 1,878 comments on the Draft Amendment to the 1992 Constitution on the website.

Also, when conducting a public consultation, in order to attract the participation and contributions of a large number of people, agencies, organizations, scientists, practical activists, as well as legal experts, the agency assigned by the National Assembly to assume the prime responsibility for drafting the Constitution also organizes conferences to collect opinions directly from a few subjects. For example, when amending and supplementing a number of articles of the 1992 Constitution in 2001, the Committee held two consultation meetings in Hanoi and Ho Chi Minh City, with a composition of leaders of several agencies and organizations at central level, representatives of the Province Party Committees and City Party, the Standing Committee of the People's Council and the People's Committee, judiciary agencies, representatives of the Fatherland Front and socio-political

---

<sup>8</sup> Quochoi. Official website of the National Assembly. Accessed February 22, 2022. <https://quochoi.vn/cSDLth/duthaonline/Pages/duthaoluat.aspx>.

organizations, scientists, practical activists, and legal experts at central and local levels, to get direct opinions on content to be amended or supplemented. Also, when conducting a public consultation on the 1992 Draft Constitutional Amendment, from January to March 2013, the Committee organized an inspection team at a few localities to promptly guide and answer problems in conducting a public consultation on the Draft Amendment to the 1992 Constitution.

The people's opinions are gathered, fully synthesized, and reported to the National Assembly by the Constitution Drafting Committee. When conducting a public consultation on the 1992 Draft Constitutional Amendment in 2013, with the active participation of people from all classes, inside the country and overseas Vietnamese, more than 26 million comments were received, with more than 28,000 conferences, seminars, and talks held. This result reflects the efforts of agencies and organizations through popularizing and propagating the Draft Amendment to the 1992 Constitution on mass media, and organizing various suitable forms of collecting comments to reach each household, workers, students, as well as members of social organizations. Therefore, many people believe that the public consultation on the 1992 Draft Constitutional Amendment in 2013 is a democratic and wide-ranging political-legal activity which attracts the largest number of participants so far. The people's opinions have been fully, honestly, and objectively synthesized by the Committee in the Report on the synthesis of people's opinions on the Draft Amendment to the 1992 Constitution with more than 800 pages, and the Report on synthesizing opinions from agencies of the National Assembly, the Government, the Supreme People's Court, the Supreme People's Procuracy, the State Audit, Party Central Committees, the Central Committee of the Vietnam Fatherland Front and a number of socio-political organizations, and the Vietnam Union of Science and Technology Associations with about 1600 pages, to submit to the National Assembly.

It should be view as the public consultation from all classes of people, state agencies, mass organizations, etc. on the Draft Amendment to the Constitution. It is an effective mechanism for people to participate in the process of state management and lawmaking, turning the Party's guidelines and policies, the people's will and aspirations into the State's laws. The results of the consultation are the basis for building a draft Constitution that ensures quality in both content and form, which will truly become the product of the intellectual crystallization of the entire Party and people.

However, conducting a public consultation on the Draft Amendment to the Constitution encountered some difficulties, such as:

- The time to conduct public consultation was relatively urgent, coincident with the time when ministries and localities had to focus on the implementation of work in 2013, followed by the Lunar New Year as well as the traditional festival season. Thus, the arrangement of human resources and mobilizing the participation of the respondents faced many difficulties, especially in the condition that the respondents are widely distributed and the amount of work to be done is large, whereas resources are limited.

- Besides, the implementation of conducting a public consultation on the Draft Amendment to the Constitution coincided with the time of conducting a public consultation on the Draft Land Law (amended). Hence, the amount of the time to study and contribute opinions on the Draft Constitutional Amendment are more limited.

- Due to the unequal education level, especially in places with extreme geographic features and poor education, propaganda and dissemination are difficult. In this case, the People's interest and participation in contributing opinions are also limited.

- Due to the lack of early guidance on conducting a public consultation, many ministries and localities carried it out in different ways. Not until the Constitution Amendment Drafting Committee promulgated Guideline No. 239/HD-UBDDTSDHP dated February 23, 2013, did the ministries and localities conduct again, which takes extraordinary time and effort.

- Although the Ministry of Finance has provided guidance on the funding for consultation, many agencies and localities are still confused. Because funding had not been allocated in time, it partially affected the progress and quality of this work.

- Regarding the progress and quality of the Reports on synthesizing opinions from ministries, ministerial-level agencies, and agencies attached to the Government, the reports have closely followed the Guideline No. 239/HD-UBDDTSDHP of the Constitution Amendment Drafting Committee. The results of public consultation were basically ensured to be on schedule and a few ministries and localities sent reports ahead of time (March 15, 2013). Many reports of ministries and localities have been elaborately and methodically built, with a large number of opinions, many of which have quality and enthusiasm; Besides, there were also a number of reports that were sketchy, comments were not in-depth, mostly considered technical aspects.

## 5. Considering and approving the draft Constitution

In the current system of legal documents in Vietnam, there is no regulation on the procedure of drafting and approving the Constitution. Therefore, the National Assembly often applies the procedure for implementing laws. The Constitution as a large and particularly important project is often reviewed and approved by the National Assembly at two or more sessions. The procedure is as follows:

- (1) Procedures for submitting the Constitution project to the National Assembly for consideration and comment

- At the first submission, the Constitution Drafting Committee gave a presentation on the Constitution project. The presentation of the project includes the context of the country's political, socio-economic situation, the international situation, the ideas guiding the project's development, the drafting process, the conduction of a public consultation on the draft Constitution, and the basic main contents of the draft Constitution.



- The National Assembly discusses and gives opinions at the National Assembly Delegation on the basic contents and major issues that have different opinions of the draft Constitution at the plenary session. During the National Assembly's discussion, the Constitution Drafting Committee may make additional presentations on issues related to the draft Constitution.

- The Standing Committee of the National Assembly directs the secretariat of the session to gather and synthesize opinions of the National Assembly delegates, serving as a basis for the reception and correction.

(2) Receiving opinions of National Assembly delegates, revising the draft Constitution

Based on the opinions of the National Assembly delegates, the Constitution Drafting Committee shall assume the prime responsibility for and coordinate with concerned agencies and organizations in, studying and receiving the opinions of the National Assembly delegates, revising the draft Constitution. After that, the draft Constitution would be published for a referendum. The decision on publication of the draft Constitution as well as the study, receptive, revision, and completion of the draft Constitution shall be carried out in the time between two sessions of the National Assembly as described at Point 6, Section 1, Chapter I. The Constitution Drafting Committee should prepare a report on the issues of explanation, reception, and revision of the draft Constitution according to the opinions of the National Assembly delegates and the people.

(3) Submitting to the National Assembly for consideration and approval the draft Constitution

The submission of the draft Constitution to the National Assembly for consideration and approval shall be carried out in accordance with the following procedures:

- At the second submission, the Constitution Drafting Committee shall submit a report explaining the receptive and revision of the draft Constitution to the National Assembly based on the opinions of the National Assembly delegates and opinions of the people;

- The National Assembly shall read the draft Constitution which has been received, revised, and discussed on controversial issues;

- The Constitution Drafting Committee should study and receive opinions of the National Assembly delegates and report to the National Assembly on such reception and correction;

- The National Assembly shall vote to approve the draft Constitution. The Constitution will be approved when a two-thirds majority vote is achieved. In the case that the draft Constitution is not approved or is only partially approved, the consideration and approval during the next meeting shall be decided by the National Assembly on the proposal of the Constitution Drafting Committee.

Although the Resolutions which establishes the Constitution Drafting Committee of the National Assembly does not specify a time to terminate its operation, it is usually after the National Assembly votes to approve the Constitution that the Committee terminates its operation.

## 6. Conducting a referendum on the Constitution

The Constitution is the original and basic law, expressing the sovereignty of the people, the will, and the aspirations of the people. Therefore, in principle, it must be decided by the people, through a referendum or through a representative agency of the people.

Among all the Constitutions of Vietnam, only the 1946 Constitution directly stipulated the people's right to decide on the content of the Constitution. It states that the amendments to the Constitution must be introduced to the people for decision after the "*Parliament*" approves them. The people's decision on the Constitution through referendums aims to affirm the people's highest rights as the subject of the Constitution, creating a solid foundation for the effectiveness of the Constitution, raising the awareness and mastery of the people in respecting and implementing the Constitution. The 1959, 1980, and 1992 Constitutions did not directly stipulate the people's right to decide on the Constitution, but it was achieved by the National Assembly, the highest representative body of the people which is directly elected by the people. Therefore, the Draft Constitutional Amendment must not only be approved by a two-thirds majority of the members of National Assembly but also be voted by the people. Because the people's right to vote through a referendum is the natural right for making decision on important issues of the country, including the issue of voting on the Constitution.

## 7. Proclaiming of the Constitution

The proclamation of the Constitution is the final stage of the constitutional procedure to bring the contents of the Constitution to the whole society. The 1946 and 1959 Constitutions only stipulate the authority of the President in promulgating laws that were passed by the National Assembly, but not yet providing for the promulgation of the Constitution. By the 1980 Constitution, the promulgation of the Constitution was assigned to the State Council - the collective chairman of the Socialist Republic of Vietnam. According to the provisions in Article 103 of the 1992 Constitution, the promulgation of the Constitution falls under the authority of the President and is issued in the form of an order of the President. Currently, there is no document specifying the method and deadline for publishing the Constitution. Therefore, the President may apply the National Assembly's regulations on the time limit for law publication to promulgate the Constitution.

In the drafting procedure, in addition to some of the issues mentioned above, there are also several related issues such as constitutional techniques and limitations in the implementation of the Constitution:

In terms of constitutional techniques, the Draft may have unreasonable provisions that are too detailed and not worthy of the Constitution. Some are either too brief and concise, or too lengthy with many different styles of writing. Also, the language may have multi meaning or is too abstract and sometimes not standardized as legal terms.

Beside, some rights in the Constitution are new and unfamiliar in practice as the governing law. And there are many provisions with different interpretations, so it is confusing when being concretized into provisions of Law (Law on Associations, Law on Religion and Folk belief, Law on Protests...). Sometimes, they lead to a "legal vacuum" situation, waiting for the law to specify articles in the Constitution, especially some rights have not been regulated by law, such as the right to live in a clean environment, the rights of social security, etc.

Criteria for assessing the conformity with provisions of the Constitution have not been specified, so it is difficult to state whether or not the draft document conforms with the content and spirit of the 2013 Constitution. This also makes it difficult for the drafting agencies to review the regulations of the project that they are assigned to adjust.

In the process of studying and drafting law-and-ordinance projects to implement the provisions of the 2013 Constitution relating to human rights, fundamental rights, and obligations of citizens, there were many different opinions regarding the interpretation of the provisions in Clause 2, Article 14 of the 2013 Constitution: "***Human rights and citizens' rights may not be limited unless they are prescribed by a law solely in case of necessity or for reasons of national defense, national security, social order and safety, social morality and community well-being***". A few law and ordinance projects stipulate the principle of limiting human rights and fundamental rights of citizens in the direction of repeating the provisions in Clause 2, Article 14 of the Constitution, such as the Law on Access to Information and the Law on Associations. On the other hand, a few laws and ordinances stipulate through the regulation of prohibitions, such as the Law on Religion and Folk belief, Press Law, etc.

### III. Conclusion

In summary, the Constitution drafting procedure, although there are remaining difficulties and obstacles in the procedure of collecting opinions, such as the relatively urgent time for public consultation, the large amount of work to be done, the wide range of subjects to collect opinions, while resources are limited. Basically, the conducting a public consultation on the Draft Constitutional Amendment has been seriously, openly, and democratically implemented by ministries and localities, and strictly followed the Conclusions of the 2nd and 6th Plenums, the Politburo's Directives, the National Assembly's Resolutions, the Plans of the Constitutional Amendment Drafting Committee of the Government, as well as other directive documents of competent authorities in the process of conducting a public consultation. The public consultation truly created a wave of political-legal activities far and wide among all classes of people.

In order for the Constitution to truly become the original law, the provisions of the Constitution can be directly applied to create the most important legal basis for the operation of the state apparatus, and, at the same time, strict implementation of the provisions of the Constitution

through handling unconstitutional acts. The majority of opinions suggested that the scope of issues should be specified in the Constitution to ensure the consistency of policies and regulations in the Constitution, and ensure the transparency, feasibility, and predictability of the provisions in the Constitution.

### References

- Hanoi Law University, *Vietnamese Constitutional Law Curriculum*, Police Publishing, Hanoi, 1998, page 41.
- K.C Wheare (1962), *Modern Constitutions*, Oxford University Press Publishing, London (translated: Nguyen Quang, Sai Gon, 1967, page 7).
- B.Jones, D.Kavanagh, *British Politics Today*, Manchester University Press, 2003, page 8.
- M. Beloff, G.Peele, *The Government of the United Kingdom: Political Authority in a changing society*, London, 1980, page 10.
- Hanoi Law University, *Vietnamese Constitutional Law Curriculum*, Police Publishing, Hanoi, 2020, page 47.
- Person. “Chính Thức Công BỐ Dự Thảo Sửa Đổi Hiến Pháp 1992.” () baochinhpvu.vn. baochinhpvu.vn, June 25, 2021. <http://baochinhpvu.vn/Tin-noi-bat/Chinh-thuc-cong-bo-Du-thao-sua-doi-Hien-phap-1992/158230.vgp>.
- Report No.12/TTr-UBTVQH13 dated August 2<sup>nd</sup> 2011 of the Nations Assembly’s Standing Committee.
- Quochoi. Official website of the National Assembly. Accessed February 22, 2022. <https://quochoi.vn/csdlth/duthaoonline/Pages/duthaoluat.aspx>.

## **7. Freedom of Business: A New Step towards Human Rights in the 2013 Constitution of Vietnam**

**Tran Thu Yen\***

The concept of human rights first appeared in Vietnam officially and specifically in the Declaration of Independence of the Democratic Republic of Vietnam on September 2, 1945. Thenceforth, human rights continued to be asserted and developed in the 1959, 1980, 1992 Constitutions, 2001 Amended and Supplemented Constitution, and 2013 Constitution. Human rights were specifically built up into rights since then, and, for the first time, the freedom of business was recognized in the 1992 Constitution. Although the rights at the time remain limited in governing scope as to only covering subjects doing business freely in areas permitted by the law, compared to previous economic management viewpoints, recognizing the freedom of business in the legislation was considered a particularly significant step. Notably, the 2013 Constitution has acknowledged the freedom of business as one of the basic human rights. This article will proceed in following three points: (i) an overview of the right to conduct business in Vietnam; (ii) an analysis of new aspects of the right to conduct business, which represents a new step towards human rights under the 2013 Constitution; and (iii) the comments on the amendments to the Vietnam legal system to realize the right to freedom of business.

### **I. An overview of Vietnam's freedom of business**

According to Bui Ngoc Cuong, business freedom in Vietnam is one of the manifestations of the rights to freedom and democracy and the embodiment of a commodity economy under the market mechanism. Freedom in general and business freedom in particular are not only the goal of a civilized society but also a driving force for social development.<sup>1</sup> In a more specific content analysis, Mai Hong Quy states that the freedom of business is the ability to act and make choices and decisions consciously of individuals and enterprises concerning business-related issues. For instance, decisions on enterprise establishment matters, choices of business size and business lines, choices of business locations, business partners, or choices of dispute resolution bodies.<sup>2</sup> Business freedom is adopted worldwide as a right of an

---

\* Lecturer, Faculty of International Trade and Business Law, Hanoi Law University

<sup>1</sup> Bui Ngoc Cuong (2004), *Some issues about the freedom to do business in the current economic laws in Vietnam*, National Political Publishing House, Hanoi, p. 43.

<sup>2</sup> Mai Hong Quy (2012), *Freedom to do business and the issue of ensuring human rights in Vietnam*, Labor Publishing House, Ho Chi Minh City, p. 54.

individual to establish and operate an enterprise without interference or hindrance from the State. Thus, the freedom of business is an universally acknowledged basic citizens' right in the world as well as in Vietnam.<sup>3</sup>

That said, it is vital to look at the issue with a critical eye that, over the 40 year period of the centrally planned economy, the freedom of business was not properly recognized in the Vietnamese legal system. Not only did the State not accept the market economy model, it also introduced a policy that abolished private ownership and prohibited free business.<sup>4</sup> Regardless, at the 6th National Congress of the Communist Party of Vietnam (1986), the Party did bravely admit its many mistakes “*in defining goals and steps to construct material–technical facilities, socialist reform, and economic management*”<sup>5</sup> and submitted to find a new development path “*in parallel with developing the state-owned economy and collective economy, strengthening the State’s concentrated accumulation and taking advantage of foreign capital, it is necessary to have a policy to properly use and reform other economic sectors*”<sup>6</sup>. That solution comes from our nation’s reality and is the application of Lenin’s view that an economy having many components is a characteristic of the transition period”.<sup>7</sup> This policy was expressed in the 1992 Constitution (as amended and supplemented in 2001)<sup>8</sup> and thereafter asserted in the 2013 Constitution under Article 51.1 as “*The Vietnamese economy is a socialist-oriented market economy with varied forms of ownership and economic sectors; the state economy plays the dominant role*”.

Thus, the policy of developing a multi-sectoral commodity economy driven by the market mechanism of the Party and the State of Vietnam is the most important foundation for the recognition and protection of business freedom in Vietnam, as well as the prerequisite for the birth of the freedom of business. In the Vietnamese legal system, the freedom of business and business activities by economic

---

<sup>3</sup> Terry Miller & Anthony B.Kim (2010), *Defining Economic Freedom*, The Heritage Foundation & The Wall Street Journal, 2010 Index of Economic Freedom, p. 59.

<sup>4</sup> The Resolution of the 4th National Congress of the Communist Party of Vietnam (1976) stated: “*In order to build collective mastery of the economy, it is crucial to abolish capitalist ownership reform individual ownership regime, establish a socialist ownership regime in two forms: ownership by the entire people and collective ownership, by appropriate methods and steps*”.

<sup>5</sup> Communist Party of Vietnam (2008), *Documents of the Party Congress in the period of renovation and integration (Congress VI, VII, VIII, IX, X)*, National Political Publishing House, Hanoi, p.15-16

<sup>6</sup> “*Other economic sectors include: commodity small-scale economy (craftsmen, individual farmers, individual traders and service providers); private capitalist economy; State capitalist economy in different forms, of which the highest form is public-private partnership; natural, self-sufficient economy employed by parts of ethnic minorities in the Central Highlands and other mountainous areas*”, Communist Party of Vietnam (2008), *Documents of the Party Congress in the period of renovation and integration (Congress VI, VII, VIII, IX, X)*, National Political Publishing House, Hanoi, p. 44

<sup>7</sup> Communist Party of Vietnam (2008), *Documents of the Party Congress in the period of renovation and integration (Congress VI, VII, VIII, IX, X)*, National Political Publishing House, Hanoi, p. 43

<sup>8</sup> “*The State adopts consistent policies on the development of a socialist-oriented market economy. The multi-sector structure of the economy with diversified types of production and business organization is based on ownership of the entire people along with collective and private ownership, of which the first two and the second are the cornerstones*”. (Article 15)

sectors other than the State were not encouraged in the 1959 and 1980 Constitutions. It was not until the 1992 Constitution that the freedom of business officially became recognized for the first time under Article 57 stipulated as “*Citizens enjoys the freedom of enterprise as determined by law*”. Institutionalizing the provisions of the 1992 Constitution and following the implementation of Doi Moi, the National Assembly rapidly promulgated laws to acknowledge and guarantee the freedom of business of Vietnamese citizens and foreigners investing in Vietnam. On December 29, 1987, the National Assembly passed the Law on Foreign Investment 1987, the first law allowing foreign capitalists to invest and do business in Vietnam. On December 21, 1990, the Law on Companies 1990 and the Law on Private Enterprises 1990, which were two of the most important laws on the development of the Vietnam private capitalist economy, were passed by the National Assembly.

The concept of “business” was codified for the first time in the Law on Companies 1990<sup>9</sup>, which was subsequently inherited by the Law on Enterprises 2005 (Article 4.2) and the Law on Enterprises 2015 (Article 4.16): “*Business means the continuous conduct of one, several or all of the stages of an investment process, from production to sale of products or provision of services on the market for profit-making purposes*”.

Inheriting the spirit of the 1992 Constitution, Article 33 of the 2013 Constitution provided that people have the right to freely conduct business in industries that are not prohibited by the law. For the first time ever in Vietnam’s legislative history, the citizens’ right to freedom of business was recognized. Nonetheless, the right remains limited in scope as entities are allowed to do businesses only in areas permitted by the law (freedom in a closed area). The freedom of business under the 2013 Constitution has taken a step forward by applying the principle of “*Everyone has the right to freedom of enterprise in the sectors and trades that are not prohibited by law*” (Article 33). This regulation lays down two important remarks: everyone has the right to do business freely, and that freedom is only limited to the extent forbidden by the law. In other words, the prohibition must be prescribed by law.

## **II. New aspects of the freedom of business under the 2013 Constitution**

In the 2013 Constitution, new points of the freedom of business have shown substantial progress by affirming the important role of business freedom in constituting the system of human rights and freedom. Accordingly, the concept of human rights was first mentioned in Vietnam officially and specifically in the Declaration of Independence of the Democratic Republic of Vietnam on September 2,

---

<sup>9</sup> “*Business means the conduct of one, several or all of the stages of an investment process, from production to sale of products or provision of services on the market for profit-making purposes*” (Article 3.2 of the Law on Companies 1990).

1945. Thenceforth, human rights continued to be asserted and developed in the 1959, 1980, 1992 Constitutions, and 2013 Constitution. Human rights were specifically built up into rights since then, and for the first time, the freedom of business was recognized in the 1992 Constitution. Although the right at the time remains limited in governing scope as to only covering subjects doing business freely in areas permitted by the law, compared to previous economic management viewpoints, recognizing the freedom of business in the legislation was considered a particularly significant step. Notably, the 2103 Constitution has acknowledged the freedom of business to be one of the basic human rights. Accordingly, the freedom of business is enshrined in Article 33, Chapter II of the 2013 Constitution on human rights, basic and obligations of citizens.

In furtherance of the approach to the form and position of the freedom of business in the Constitution, in terms of content, as a specific human right, business freedom in the 2013 Constitution contains several outstanding differences compared to that of the 1992 Constitution (as amended and supplemented in 2001) with two highlights<sup>10</sup> as follows:

1. Expansion of the holders of the freedom of business

In the 1992 Constitution (as amended and supplemented in 2001), the right to freedom of business was stipulated in Article 57, “Chapter V – Basic rights and obligations of citizens”, which prescribed: “*Citizens have the right to do business freely*”. Thus, only Vietnamese citizens had the right to do business, where as those who are not Vietnamese citizens were not entitled to this right.

This was one of the limitations in the provisions on human rights in general and business freedom in the 1992 Constitution (as amended and supplemented in 2001). To overcome this shortcoming, the 2013 Constitution clearly distinguishes between human rights and citizenship, adhering to the original concept of “*human rights*”. “Chapter V – Basic rights and obligations of citizens” in the 1992 Constitution (as amended and supplemented in 2001) was revised to “Chapter II – Human rights, basic rights and obligations of citizens” in the 2013 Constitution. Human rights and citizens’ rights are clearly distinguished by the word “everyone” and the word “citizen”.<sup>11</sup> As to the freedom of business, Article 33 of the 2013 Constitution stipulates: “*Everyone enjoys the freedom of enterprise*”. As such, under the 2013 Constitution, the freedom of business becomes a universal right of all people, not only of Vietnamese

---

<sup>10</sup> Vu Hung Duc, *Some new points on freedom of business in the 2013 Constitution*, Journal of Security Education and Science, Special Issue (December 2014). ISSN 1859-4115 (p. 73-76)

<sup>11</sup> In the 2013 Constitution, human rights and citizens' rights are clearly defined. Accordingly, there are rights reserved only for Vietnamese citizens, such as the right to a lawful place of residence (Article 22), freedom of speech, freedom of the press (Article 25); and there are rights for everyone, such as freedom of belief and religion (Article 24), the right to complain and denounce (Article 30).



citizens. This amendment tackled the long-standing contradiction between business legislation and the 1992 Constitution (as amended and supplemented in 2001). In particular, when the Law on Foreign Investment was passed in 1987, Vietnam acknowledged that business freedom is not only a prerogative of Vietnamese citizens but also a right given to foreign capitalists wishing to invest in Vietnam.

## 2. Expansion of the scope of business freedom

Previously, in the 1992 Constitution (as amended and supplemented in 2001), human rights and citizens' rights were *stipulated in the Constitution and law*<sup>12</sup>. Such regulation has led to the understanding that the State (through the promulgation of the Constitution and laws) is the entity that makes and grants citizenship and human rights. Such an interpretation is inconsistent with the general perception of the international community on human rights, which considers human rights as natural values of all individuals that states are obliged to recognize, respect, protect and guarantee. Therefore, the above provisions of the 1992 Constitution (as amended and supplemented in 2001) were amended and supplemented to: *“In the Socialist Republic of Vietnam, human rights and citizens’ rights in the political, civil, economic, cultural and social fields shall be recognized, respected, protected and guaranteed in accordance with the Constitution and law”* (Article 14.1 of the 2013 Constitution). Additionally, the 2013 Constitution sets a safe boundary for human rights and citizens’ rights by the commitment that *“Human rights and citizens’ rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being”*.<sup>13</sup>

Article 14 of the 2013 Constitution may be regarded as a principle on recognizing the respectful attitude of the State of Vietnam towards human rights and citizens’ rights. The application of this principle to the freedom of business resulted in the amendment of *“freedom of business in accordance with the law”* (Article 57 of the 1992 Constitution) to *“freedom of business in the sectors and trades that are not prohibited by law”* (Article 33 of the 2013 Constitution).

---

<sup>12</sup> Article 50: *“In the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social are respected, find their expression in the rights of citizens and are provided for by the Constitution and the law”*.

<sup>13</sup> Article 14.2 of the 2013 Constitution

### **III. Realizing the freedom of business under the 2013 Constitution in the legal system**

The freedom of business is a legal concept. From this perspective, the freedom of business should be construed subjectively and objectively.<sup>14</sup>

In the subjective sense or from the perspective of right-holders, the freedom of business is interpreted as the ability to act consciously of individuals or legal entities in the process of production and business activities. Correspondingly, the freedom of business includes the capabilities of individuals and legal entities to freely invest capital to establish an enterprise, freely choose the business model, freely choose its business partners, and establish business relationships, or freely make decisions in the settlement of disputes arising from business activities, etc. These capabilities are natural attributes of individuals and legal entities, and are not given by the State. However, in order to be performed in reality and become “real power”, these capabilities must be institutionalized in the law.

In the objective sense or from the perspective of a legal regulation, the freedom of business is a system of legal norms and guarantees provided by the State in order to create favorable conditions for individuals and legal entities to exercise their rights. With that in mind, the freedom of business, on the one hand, includes the rights that individuals and legal entities enjoy. On the other hand, it is the responsibility of State agencies and officials to respect and protect those rights when performing their managerial functions. These two aspects coexist in unity in the legal system on business freedom. If only recognizing the rights of subjects without guaranteeing the conditions for exercising such rights, the freedom of business would remain a mere formality.

Therefore, deriving from the provisions of the 2013 Constitution, the freedom of business has been realized in the legal system on business and enterprises, especially in legal documents such as the Law on Business Administration, Law on Enterprise, and Law on Investment, which all have a great impact on the business community.

Accordingly, the freedom of business has been approached in the direction of simplifying licensing conditions and procedures, abolishing many regulations on business conditions, and concurrently widening enterprises’ self-determination rights. For the first time, a comprehensive list of industries and trades prohibited from doing business and industries and trades with business conditions have been gathered and specifically prescribed in a single legal document. This is considered a breakthrough in policy transparency and is expected to overcome the uncontrolled and unreasonable issuance of business conditions as before.

---

<sup>14</sup> Bui Ngoc Cuong (2004), *Some issues about the freedom to do business in the current economic laws in Vietnam*, National Political Publishing House, Hanoi, p. 19, 20.

This spirit has been expressed very clearly in the Law on Enterprise 2014 and the Law on Investment 2014 approved by the National Assembly on November 26, 2014. The most basic content amendment in the Law on Investment is that the previous “opt-in” approach (the law stipulates the areas that are allowed to invest and do business) was changed to the “opt-out” approach (the law stipulates the areas that are forbidden to invest and do business). According to the explanation in Report No. 767/BC-UBTVQH13 dated November 4, 2014, based on the results of reviewing the current number of industries and trades banned from investment and business, the National Assembly Standing Committee directed the agency in charge of verification as well as the agency in charge of drafting. Furthermore, the Committee reached an agreement with the concerned ministries and branches to narrow down the number of industries and trades banned from investment and business from 51 to 6 as specified in Article 6 of the Law on Investment 2014.

Under the Law on Enterprise 2014, business lines are no longer mandatory content in the business registration application. Previously under the provisions of the Law on Enterprise 2005, business lines were a compulsory content in the application for business registration,<sup>15</sup> which means that the enterprise must register all the lines of business it intends to operate in, and may only conduct business in the lines listed in the Business Registration Certificate. According to the National Assembly Standing Committee in a meeting on a discussion regarding the draft of the amended Law on Enterprise on November 10, 2014, “this regulation is only an administrative procedure which causes unnecessary trouble and risk to the business”.

As a result, according to Article 29 of the Law on Enterprises 2015 on the contents of the Enterprise Registration Certificate, business lines are no longer content of the Enterprise Registration Certificate.<sup>16</sup> This is a step towards simplifying administrative procedures in business registration, changing business registration procedures from 'pre-check' to 'post-audit' in order to improve the initiative and flexibility of enterprises in business activities, demonstrating the “right to conduct business freely in the sectors and trades not prohibited by law” as enshrined in the 2013 Constitution.

The Law on Enterprises 2020, Article 17 recognizes the right to freely choose a business line, meaning that an individual or organization has the right to choose the business lines they want to conduct business where it is not prohibited by the law. For conditional business lines, the business shall be carried out after all the conditions of that business line have been satisfied. This content is reflected in the right to freely choose business lines that are not prohibited by law and regulations on conditional business lines.

---

<sup>15</sup> Article 21.3 of the Law on Enterprises 2005

<sup>16</sup> Article 29 of the Law on Enterprises 2015 on the contents of the Enterprise Registration Certificate

Particularly, as regards the freedom to choose business lines that are not prohibited by law, Article 7.1 of the Law on Enterprise 2020 stipulates that enterprises have the right to “freely conduct business in industries not prohibited by law” and the current enterprise registration certificate does not require the content on business lines. Thus, in addition to the list of prohibited business lines prescribed by the law, enterprises can choose any business lines to conduct business without the permission of the business registration agency. Moreover, the number of industries prohibited from conducting business was reduced from that of previous regulations. The Law on Investment 2020 provides a list of industries and trades banned from investment including 8 industries, more than that of the Law on Investment 2014 (6 industries) but less than that of the Law on Investment 2005 (12 industries).

Second, with regards to conditional business lines, conditional investment and business lines are lines of business in which the performance of business investment activities must satisfy certain conditions for reasons of national defense, national security, social order and safety, social morality and community well-being. Business entities will be entitled to conduct conditional business lines when they fully satisfy those conditions in the course of conducting business activities. The conditions for business investment are applied in the form of licenses, certificates of eligibility, practice certificates, and other documents and conditions as prescribed by law.

This content is also institutionalized in the Law on Investment 2020.<sup>17</sup> Accordingly, Resolution No. 50-NQ/TW dated August 28, 2019 of the Politburo on orientations to perfect institutions and policies, and to improve the quality and efficiency of foreign investment cooperation by 2030 sets forth the policy to develop a specific list of restrictions on foreign investment attraction in accordance with international commitments. Outside of this category, foreign investors are treated equally as domestic investors. Institutionalizing the aforementioned content of Resolution No. 50-NQ/TW, the Law on Investment 2020 establishes the principle of equality in access between foreign investors and domestic investors (except for the list of industries and trades not subject to market access and industries and trades subject to conditional market access applicable to foreign investors promulgated by the Government). In addition, on the basis of laws and resolutions of the National Assembly, ordinances and resolutions of the National Assembly Standing Committee and decrees of the Government and international treaties to which Vietnam is a member, Article 9 of the Law on Investment 2020<sup>18</sup> stipulates that the Government shall publish the

---

<sup>17</sup> Tran Thu Yen, *Discussing some new points of the Law on Investment 2020 regulating cross-border M&A transactions in Vietnam*, Journal of Law and Practice, No. 5/2021, p. 79-86.

<sup>18</sup> Article 9. Business lines allowed in the market with conditions and market access conditions applied to foreign investors

1. Market access conditions applied to foreign investors are the same as those applied to domestic investors, except for the case specified in Clause 2 of this Article.

list of industries and trades with restrictions on market access applicable to foreign investors. The market access conditions for foreign investors include: a) the percentage of foreign capital ownership in the economic organization; b) the form of investment; c) the scope of investment activities; d) the capacity of investors and partners participating in investment activities; and dd) other conditions as prescribed in laws and resolutions of the National Assembly, ordinances and resolutions of the National Assembly Standing Committee, decrees of the Government and international treaties to which Vietnam is a member.

In short, from the provisions on business freedom of the 2013 Constitution, the freedom of business has been realized and enacted in the Vietnamese legal system, especially through legal documents on business and enterprises such as the Law on Investment and Law on Enterprises, hence creating a sizeable impact on the business community.

#### **IV. Conclusion**

The freedom of business under the 2013 Constitution was undeniably realized and enforced in the current Vietnamese business legal system through two preeminent legal documents, the Law on Investment and Law on Enterprises. Accordingly, the increasingly comprehensive regulations made it possible to express the freedom of business in an “original” way as an important component in the system of human rights. Nevertheless, in the context of Vietnam’s increasingly deep integration, in order for enterprises’ freedom of business to be guaranteed and better implemented, it is necessary to approach it as follows: *“When the freedom of business is considered a fundamental human right, human rights, including the freedom of business, are not only recognized and respected by the State but must be protected and guaranteed by the State as well. In other words, it is the responsibility of the State to respect, protect and*

- 
2. Pursuant to Laws and Resolutions of the National Assembly, Ordinances and Resolutions of the Standing Committee of the National Assembly, Decrees of the Government and international agreements to which the Socialist Republic of Vietnam is a signatory, the Government shall promulgate a List of business lines restricted to foreign investors, including:
    - a) Business lines not allowed in market access;
    - b) Business lines allowed in the market with conditions.
  3. Market access conditions applied to foreign investors specified in the List of business lines restricted to foreign investors include:
    - a) Ratio of the foreign investor’s charter capital in a business entity;
    - b) Investment method;
    - c) Scope of investment;
    - d) Capacity of the investor; partners participating in the investment activities;
    - dd) Other conditions specified in the Laws and Resolutions of the National Assembly, Ordinances and Resolutions of the Standing Committee of the National Assembly, Decrees of the Government and international agreements to which the Socialist Republic of Vietnam is a signatory.
  4. The Government shall provide detailed guiding of this Article.

*guarantee such freedom of business, and people naturally enjoy the right to do business freely*".<sup>19</sup> Therefore, in order to ensure the effective exercise of the freedom of business, the following solutions should be considered for implementation.

First, the freedom of business must be enhanced through the logical codification of the legal system between general law and specialized law. Where necessary, a process dedicated to certain professions is advised to be developed, however, without undermining the adherence to general law.

Second, it is necessary to continuously remove barriers set out by the legal framework. The government, ministries and other branches need to be more drastic to eliminate the sub-license system and reduce administrative orders affecting the freedom of business of enterprises. The procedures for confirming business lines, notifying changes in business lines, or requiring the content on business lines in the enterprise charters should be considered for removal to ensure the freedom of business as per the spirit of the Law on Enterprise 2020.

Third, the freedom of business to business entities should be promoted so that they can fully grasp the rights prescribed, protected and allowed to perform in the law. Business entities' awareness is of great significance in creating favorable conditions for them to comply with the law when conducting business and to avoid legal risks. This will promote enterprises to contribute to the economic development of the nation.

---

<sup>19</sup> According to Dr. Nguyen Van Cuong, Director of the Institute of Legal Sciences - Ministry of Justice, Minh Cham, *Freedom of business is a new step of human rights*, <https://vovworld.vn/vi-VN/binh-luan/quyen-tu-do-kinh-doanh-buoc-tien-moi-cua-quyen-con-nguoi-572801.vov>, last accessed on October 29, 2021.

## References

- 1959 Constitution of the Democratic Republic of Vietnam
- 1980 Constitution of the Democratic Republic of Vietnam
- 1992 Constitution of the Democratic Republic of Vietnam (amended and supplemented in 2001).
- 2013 Constitution of the Democratic Republic of Vietnam
- Law on Enterprises 2014, 2020 of Vietnam
- Law on Investment 2014, 2020 of Vietnam
- Communist Party of Vietnam. *Documents of the Party Congress in the period of renovation and integration (Congress VI, VII, VIII, IX, X)*, National Political Publishing House, Hanoi. 2008.
- Cuong, Bui Ngoc. *Some issues about the freedom to do business in the current economic laws in Vietnam*, National Political Publishing House, Hanoi. 2004.
- Cham, Minh. *Freedom of business is a new step of human rights*, <https://vovworld.vn/vi-VN/binh-luan/quyen-tu-do-kinh-doanh-buoc-tien-moi-cua-quyen-con-nguoi-572801.vov>, last accessed on October 29, 2021.
- Duc, Vu Hung. *Some new points on freedom of business in the 2013 Constitution*, Journal of Security Education and Science, Special Issue (December 2014). ISSN 1859-4115 (p. 73-76)
- Quy, Mai Hong. *Freedom to do business and the issue of ensuring human rights in Vietnam*, Labor Publishing House, Ho Chi Minh City. 2012.
- Miller, Terry & Kim, Anthony B. *Defining Economic Freedom*, The Heritage Foundation & The Wall Street Journal, 2010 Index of Economic Freedom. 2010.
- Yen, Tran Thu. *Discussing some new points of the Law on Investment 2020 regulating cross-border M&A transactions in Vietnam*, Journal of Law and Practice, No. 5/2021, p. 79-86.





## **8. The Executive Power of the Government under the 2013 Constitution of Vietnam and the Power of the Court to Supervise the Performance of the Executive Power**

**Tran Thi Hien\***

*Abstract:* The 2013 Constitution of Vietnam, officially recognizes the executive power to be a part of the State power and assigns the Government to execute such power. This recognition represents the view of the legislators when drafting the 2013 Constitution. Although the check-and-balance of power was not recognized in the organization and execution of the State power, the legislators have admitted the position and relative independence of each power branch, including legislation, execution, and judiciary. This Article analyses the executive power of the Government under the 2013 Constitution, including the role of the Court to prevent the abuse of power during the execution of State power from the constitutionalism aspect; and the reasons that the 2013 Constitution has not practically constructed a mechanism for the Court system to exercise the checking power and to reach the balance in the relation with the executive branch.

*Keywords:* Government; executive power; supervise; State power; Court.

### **I. Introduction**

The view of the constitution maker has a great impact on the organization and operation of the state structure. At the current stage in Vietnam, the majority of politician and intelligentsia in the political-legal science area agree that the State power is unified, but it is necessary to clearly specify the legislation, execution, and judiciary power; the enforcement of such powers need to be under a supervising mechanism to prevent abuse of power. Then, in Vietnam, when did the legislation, execution, and judiciary power are viewed as constituents with relative independence in a unified State power that belongs to the people? The scope of duty, rights of each management body, which is responsible for a power branch, play an important part in evaluating the mechanism of power allocation, cooperation, and control among the power branches. The executive power is always viewed as a powerful branch that needs to be supervised to prevent abuse of power. One of the effective supervising mechanisms for executive power is the Court's supervising. However, the 2013 Constitution failed to establish this supervising mechanism. For the purpose of researching and evaluating the effectiveness and suitability of the 2013 Constitution, this article shall analyze the nature of executive power under the 2013 Constitution and the lack of the Court's supervising mechanism upon such execution power.

---

\* Administrative and Constitutional Law Department, Hanoi Law University

## II. The executive power of the Vietnam Government under the 2013 Constitution

Vietnam's Constitution is a political-legal document, clearly reflecting the characteristic of a political system led by a single political party. The entire drafting procedure and the content of the Constitution are directly governed and led by the Party. The idea of separation of powers attracted a lot of attention from Vietnamese society in the late 80s of the last century, especially after the 6<sup>th</sup> Congress of the Communist Party of Vietnam in 1986. In the politic report of the VI Central Standing Committee submitted in the VII National Congress of the Party<sup>1</sup>, it is recorded that "the State manages the society by laws, under the lead of the Party, organizes and operates based on the principle of democratic centralism, exercises a unified power with clear power allocation and separation". After a relatively long period, after careful consideration, the separation of powers among legislation, execution, and judiciary power was officially recorded in the 1992 Constitution amended in 2001, and continue being recorded and developed in the 2013 Constitution.

The new Vietnamese state was established in 1945, and up to now, the National Assembly of Vietnam has promulgated five Constitutions.<sup>2</sup> In these Constitutions, the principle of separation of powers has never been recognized as the principle of organizing State power. However, the view on the assignment of state power by legislators has a direct impact on determining the position of the Government in the Vietnamese State structure over time. The position of the Government as the highest state administrative agency of Vietnam is confirmed in four Constitutions (1946; 1959; 1992; 2013). Except for the 1980 Constitution in which the position of the Government was determined to be the highest state administrative agency of the highest State authority, instead of Vietnam.<sup>3</sup> The position of the Government in the State structure is an important factor to determine the authority of the Government and the relationship of the Government with other agencies in the mechanism of coordination in the exercise of State power.

According to the 2013 Constitution, the position of the Government is specifically defined as "The Government is the highest State administrative agency of the Socialist Republic of Vietnam, exercising executive power, and is the executive agency of the National Assembly".<sup>4</sup> With this provision, the 2013 Constitution does not directly stipulate that the Government is the executive body. That shows the consistent viewpoint of the State of Vietnam that the state power is unified, and not divided, the State structure is not organized according to the principle of decentralization, but only assigns the Government to exercise executive power in a sense of assigning the exercise of unified State power.

---

<sup>1</sup> The VII National Congress of the Party was held from 24<sup>th</sup> to 27<sup>th</sup> June 1991

<sup>2</sup> The 1946 Constitution, the 1959 Constitution, the 1980 Constitution, the 1992 Constitution, and the current Constitution – the 2013 Constitution of the Socialist Republic of Vietnam

<sup>3</sup> Article 104 of the 1980 Constitution

<sup>4</sup> Article 94 of the 2013 Constitution

With the position as determined above, the authority of the Government manifests itself in three aspects, including administrative power, executive power, and execution of legislative power (National Assembly). This is only a relative way of separation, because in fact, the three aspects of power assigned to the Government all mean compliance with the Constitution and the laws. Based on the Constitution and the laws, the Government administers and unifies the management of all fields of socio-economic-cultural life on a national scale. In fact, all the three aspects of power determined for the Government under the 2013 Constitution fall within the concept of executive power. In this sense, the executive power has the basic content of the right to make and administer national policy and the right to organize law enforcement. Of course, administrative power is actively exercised in the service of administering national policy and organizing law enforcement. Therefore, the administrative power of the Government cannot be separated from the executive power, the administrative power is in fact the main way to implement the national policy. On the other hand, administrative power can only be exercised based on executive power.

#### 1. Administrative power of the Government

The Government is the leading institution in the administrative system, holding the highest State administrative power, performing the management and administration of all aspects of socio-economic life on a national scale. The highest administrative authority of the Government is defined with specific rights under the 2013 Constitution, including:

To perform the unified management of the economy, culture, social affairs, education, health, science, technology, environment, information, communications, external relations, national defense, national security, and social order and safety; to carry out orders on general mobilization or partial mobilization or orders to proclaim a state of emergency, and take other necessary measures to defend the Fatherland and to protect the People's lives and property;

To propose the National Assembly for decision the establishment or abolition of ministries or ministerial-level agencies; the establishment, dissolution, consolidation, separation, or adjustment of the administrative boundaries of, provinces, centrally run cities or special administrative-economic units; to propose the Standing Committee of the National Assembly for decision the establishment, dissolution, consolidation, separation or adjustment of the boundaries of, administrative units under the provinces and centrally-run cities;

To perform the unified management of the national administration system; to manage cadres, civil servants, public employees, and the public service in state agencies; to organize inspection and control work, the settlement of complaints and denunciations, and the fight against bureaucracy and corruption in the state apparatus; to lead the work of the ministries, ministerial-level agencies, government-attached agencies, and People's Committees at all levels; to guide and examine the People's Councils in their implementation of the documents of state agencies at higher levels, to create

the conditions for the People's Councils to perform their tasks and exercise their powers which are prescribed by law;

To protect the rights and interests of the State and society, human rights and citizens' rights; and to ensure social order and safety;

To negotiate and conclude treaties in the name of the State, as authorized by the State President; to decide on the conclusion, accession to, ratification of, or withdrawal from, treaties in the name of the Government, except for treaties to be submitted to the National Assembly for ratification as specified in Clause 14, Article 70; to protect the interests of the State and the legitimate interests of Vietnamese organizations or citizens in foreign countries;"<sup>5</sup>

The responsibility of administrative power is defined by the Constitution as "the Prime Minister leads and takes responsibility for the work of the state administration system from the central to the local level, ensuring the consistency and continuity of the national administration system".

## 2. Executive power of the Government

The 2013 Constitution has officially assigned the Government to "exercise executive power". This is the first time in Vietnam's constitutional history that executive power is clearly assigned to the Government. This is the most fundamental change of the 2013 Constitution, marking a big change in the view of Vietnamese legislators on the principle of organizing and exercising State power. In fact, with the position of the Government being the highest State administrative agency of the Socialist Republic of Vietnam and exercising executive power, Vietnam has flexibly applied the doctrine of decentralization in the organization of the State structure. By regulating that the Government is the executive power agency, it is also the recognition that the Government has a relatively independent position, equal to the National Assembly and the Court in the exercise of unified State power.

With the function of exercising executive power, the Government implements policy-making and administration of national policies, organizes the implementation of the Constitution and the laws to maintain and protect public order, and protect the national interests, human rights, civil rights, and the rights to make regulations based on the legal framework issued by the National Assembly (legislative power). The characteristic of the administrative hierarchical relationship (superior-subordinate) in the administrative system is an important basis for policies and legal documents of the Government to be implemented smoothly from top to bottom in accordance with the orders of the Government, the Prime Minister.

Policy-making and administration of national policies is the basic content of the executive power that has been assigned to the Government. Specifically, the 2013 Constitution stipulates that the Government "proposes, develops policies to submit to the National Assembly and Standing

---

<sup>5</sup> Point 3, Point 5, Article 96 of the 2013 Constitution

Committee of the National Assembly to decide or decide according to its competence to perform the duty and powers specified in this Article...".<sup>6</sup> However, the 2013 Constitution also assigns the National Assembly the right "To determine goals, targets, policies and basic tasks for socio-economic development of the country; To decide basic policies on national finance and currency; ... To decide on the ethnicity, religion policies of the State".<sup>7</sup> In certain aspects, these provisions of the 2013 Constitution have partly shown the ambiguity of the assignment and separation of responsibilities between the National Assembly and the Government in the exercise of legislative and executive powers. That may affect the initiative, flexibility, and assertive nature of the executive power.

In addition to the power to make policies and administer national policies, the executive power of the Government also includes the power to make regulations. Article 100 of the 2013 Constitution stipulates that "The Government, the Prime Minister, the Ministers, and the heads of the ministerial-level agencies shall promulgate legal documents to perform their duty and powers, inspect the implementation of such documents, and handle illegal documents in accordance to the provisions of the laws". The right to make regulations brings initiative to the executive power, through making regulations, the Government proactively makes policies, orients long-term, medium-term or short-term policies, consistently manage all aspects of social life on a national scale.

The Government is the body that exercises the executive power, but according to the Constitution, the Government is not the only subject to exercise this right, in addition to the Government, there is also the President (Head of State). In addition, the executive power of the Government is also exercised by local governments according to the decentralized management mechanism in the administrative system. However, the Prime Minister, as the head of the Government, is responsible for "Leading the work of the Government; Leading the policy formulation and organization of law enforcement; Leading and taking responsibility for the operation of the State administrative system from the central to local levels, ensuring the consistency and smoothness of the national administration".<sup>8</sup> Accordingly, the Prime Minister is the person who has the role of promoting the activities of the Government and is responsible for the activities of the Government.

With the view that "The National Assembly is the highest representative body of the People and the highest state power agency of the Socialist Republic of Vietnam",<sup>9</sup> the 2013 Constitution continues to stipulate that the Government is the executive agency of the National Assembly. Accordingly, the Government has the responsibility to explain before the National Assembly, the Standing Committee of the National Assembly, and the State President for the performance of its duties and powers. The Prime Minister is the head of the Government, responsible to the National Assembly for the activities of the Government and assigned duties; to report on the work of the

---

<sup>6</sup> Point 2, Article 96 of the 2013 Constitution

<sup>7</sup> Article 70 of the 2013 Constitution

<sup>8</sup> Point 1, Point 2 of Article 98 of the 2013 Constitution

<sup>9</sup> Article 69 of the 2013 Constitution

Government and the Prime Minister to the National Assembly, the Standing Committee of the National Assembly, and the State President.

The provision “Government is the executive of the National Assembly” can be seen as the over-prudence of the legislators, which sometimes limits the Government’s independence and responsibility. Furthermore, this provision may affect the position of the Government’s “highest state executive” or ensure the check-and-balance mechanism amongst the powers including legislative, executive, and judicial as provided in the Constitution.

### **III. The Institutionalism and the Supervision of the Executive by the Court as Provided in the 2013 Constitution**

With the provisions that the National Assembly is the highest state body having the power to make Constitution and laws, to decide all the most important matters of the country, and to oversee the operation of the State (Article 69 of the Constitution); the Government is the highest executive body of the Socialist Republic of Vietnam, having the executive power (Article 94); and the Supreme People’s Court (“SPC”) is the highest judicial body of Vietnam (Article 104), the 2013 Constitution has quite clearly provided on the allocation of State power amongst the National Assembly, the Government, and the SPC.

To some extent, the provisions provide the balance for the three bodies as the National Assembly, the Government, and the SPC are all the highest in a branch of the State power, namely the Legislative, the Government, and the Judicial. Accordingly, each body has its own final decision in its branch as allocated by the Constitution. However, the contents of the provision “allocation, collaboration and supervision amongst state bodies in implement of the legislative, executive and judicial”<sup>10</sup> have not been seen clear and this would have a bad effect on the implementing principles of the state power. This session of the Article discusses the supervision by the Court on the Government’s power from the perspective of Constitutionalism with the meaning that the state power should be in limit while dividing into the branches namely legislative, executive and judicial.

To present, all countries including Vietnam have recognized that the state power must be clearly allocated or at a certain level and amongst the state bodies should have a balance and check mechanism in order to prevent the abuse of power. Constitutionalism with the main contents that it must ensure the supreme position of the Constitution and the Government can do only what it has been provided to do. Accordingly, even the legislative cannot change the limit for it as provided by the Constitution. Certainly, it is not that when one country has its Constitution would be seen as Constitutionalism is upheld and implemented in the practice. As mentioned by Loukin, Constitutionalism is consist of the following factors: the state bodies formed based on the Constitution;

---

<sup>10</sup> Article 2 of the 2013 Constitution

allocation of state power; people's power and a democratic government; judicial oversee; independent Judiciary; regulated Government; police and military that are under supervisions; and no state power or whatsoever power that can overrule the Constitution.<sup>11</sup> The power belongs to the people and the election held in certain terms is seen as the handover of the people's power to the state. Therefore, the allocation of the state power must ensure the balance-and-oversee mechanism to prevent the abuse of power of the state bodies which has been received the people's power through the Constitution.

As provided by the 2013 Constitution of Vietnam, the executive power is vested in the Government. Implementing the executive, the Government manages all the social-economic aspects of the country, implementing policies to develop the country, organizing the society toward social stability, safety, and safe national security. Moreover, the executive can have a direct effect on the implementation of the rights and obligations of individuals, organizations, and corporations. Therefore, the executive is very powerful and holds the country's resources, including the state budget, natural resources, human resources, civil servants, and public service providers. The threat to overrule other branches of state bodies are inherent in any country. As a result, to oversee the executive power with the aim to prevent the abuse of its power is necessary and is an objective demand of the society as well as the presence of the Constitution Theory.

The 2013 Constitution provides a number of methods to oversee the executive. The first is the management of the Party in power. Article 4 of the Constitution provides that "The Vietnam Communist Party is the force to lead the State and society" and similar provisions are provided in other legislation. The leadership of the Party can be seen as the principle in all aspects and sectors of society. The overseeing of the Party is done as a typical mechanism and is seen as effective while it has directly affected the personnel of the executive with the organizing personnel tasks.

Second, the executive is overseen by the National Assembly. Article 94 of the Constitution provides that "the Government is responsible before the National Assembly and has to report to the National Assembly, the Standing Committee of the National Assembly, and the President". The National Assembly exercises the supreme oversee the Government by listening to the Government's reports, requesting the explanation of the Cabinet's Members, and getting confident votes with the personnel who hold the posts approved or appointed by the National Assembly. However, in the practice, there has not been any report to evaluate the effectiveness of the National Assembly's oversee the executive. Through politicians' speeches and statements or that of researchers in seminars on the National Assembly's overseeing tasks, all have agreed that the National Assembly's overseeing has not been seen effect enough. One of the reasons for such a situation is the lack of remedies that are strong enough and more effective mechanisms to apply a legal liability over the executive. For example, the National Assembly of Vietnam has taken the confident votes with three levels, including

---

<sup>11</sup> Hanoi National University, *On the Rule of Law and Constitutionalism*. 43. Labor-Social Publishing House, 2012.

high confidence, confidence, and low confidence, but there are no confident votes taken. Therefore, such confident votes are merely seen as a way of making discipline statements to the ones who are appointed or approved by the National Assembly. In addition, the executive is overseen by the State Audit, a Unit of the National Assembly with the function of evaluating the effectiveness in using national financial resources by the organizations using the state budget.

Together with the mechanisms mentioned above to exercise the tasks over the executive, the Court's oversee is seen as a need. Apart from the provision "the People's Court is the judiciary of the Socialist Republic of Vietnam, exercising the judicial" and the Supreme People's Court is the highest judicial of Vietnam.<sup>12</sup>

The 2013 Constitution has not had any concerted provision on the oversee of the Court, as the judicial in relation with the Cabinet/Government, the executive. In other words, under the Constitution, there is no collaboration in implementing powers. The term "collaboration in implementing power has been stated in the Constitution, should be understood that there is no state body that could hold a branch of power completely. Each state body must have certain essential designated constitutional-based power, with the legal technique, in order to limit and prevent the exceeded power compared to that provided by the Constitution. In addition, the collaboration of the Court with the implementation of the executive can be seen in some provisions of law level. Particularly, the power of the SPC's Judicial Committee to "provide/issue resolutions, set guidelines for the court system to ensure the uniformity of court decisions, and make precedents for the courts to study and apply while doing the hearing".<sup>13</sup> With this power, the legal documents issued by the Government, Ministries or the like can be applied based on the guidelines of the Court during its operation and hearing.

The 2013 Constitution has not given to the Court the power to oversee number of activities of the executive, such as the power to make plans, develop the country's policies, or issue legal documents. Particularly, the Court cannot announce legal documents of the executive unconstitutional documents. The Court has not given by the Constitution the power to interpret the law or suspend the legal documents issued by the Government or the Prime Minister. On the other hand, this power is vested in the National Assembly's Standing Committee as provided in the Article 74.2 and 74.4 of the Constitution.

It's noteworthy to mention the 2015 Administrative Procedures Law while studying the oversees of the Court with the executive. However, even with this Law, the power of the Court in this regard has been seen as modest in overseeing the issuing legal documents of the executive. For example, during the administrative procedures, the Court just has "the rights to propose to organizations and individuals who have the power to determine, modify, and add or prohibit the legal documents if the documents are seen with any sign of non-conformity with the Constitution, laws and

---

<sup>12</sup> Article 102, Article 104 of the 2013 Constitution

<sup>13</sup> Article 22.2 (a, b, c) of the Law on Organization of the People's Courts



other normative legal documents of the higher lever state bodies.<sup>14</sup>Therefore, from the perspective of the operational and structural study of the administration, the Court’s power should be more open to giving the Court the power to decide on the legality of the legal documents issued by the executive as this would ensure the Court to exercise and check the executive better and, at the same time, not to put any bad effect on its normal operation. Certainly, the principle has remained unchanged that the Court cannot modify the legal documents issued by the executive.

It’s clear that the judicial, with the chiastic of protecting social order through its hearing operation, has been seen rarely overlapped with other state power. The inter-relationship between the judicial and the executive of the Constitution should provide the mechanism to increase the oversee power to the judicial and ensure to a large extent the independence of the Court so the Court can exercise its oversee the executive’s legal documents during the Court’s hearing operation.

#### **IV. Conclusion**

The 2013 Constitution provides that the Government/Cabinet is the highest body in the administration, implementing the executive power, having the main functions and power to make policies and implement such policies nation-wide, organizing the application of the provision of the Constitution and laws in order to maintain and protect the public order, national interests, human rights, and civil rights, and having the function to issue the legal documents to form the management scheme based on the legal framework set by the National Assembly.

The principle that the State power is united with allocation, collaboration, and oversee amongst the state bodies in the implementation of the legislative, executive, and judicial has been generally ensured by the Constitution. However, as mentioned, the 2013 Constitution has not provided an effective and collaborative overseeing mechanism between the executive and the judicial that is in line with the power organizing principle as provided in Article 2 of the Constitution and therefore has not made the necessary strength to the judicial branch.

The World is changing and evolving continuously as a saying “democrat institutions have never been completed”. These instructions are living organs and are always involving”.<sup>15</sup> Therefore, recognizing the deficiency of the institutions operating in the practice and making them more appropriate and better are always necessary.

---

<sup>14</sup> Article 6.2 of the Law on Administrative Procedure 2015

<sup>15</sup> Hanoi National University, *On the Rule of Law and Constitutionalism*, 305. Labor – Social Publishing House.

## References

- The Constitution of Vietnam (1946); The Constitution of Vietnam (1959); The Constitution of Vietnam (1980); The Constitution of Vietnam (1992); and The Constitution of Vietnam (2013).
- Law on Organization of the People's Courts.
- Law on the Organization of the Government (2014).
- Administrative Procedure Law (2015).
- “On Legal based Government and Institution Theory”, Law Faculty, Hanoi National University.
- “The limitation of the State power”, Associated Professor/ Doctor Nguyen Dang Dung, Hanoi National University's Publishing House.
- “Managing better Theory and Practice”, Associated Professor/ Doctor Nguyen Cong Giao and Associated Professor/ Doctor Nguyen Hoang Anh, the Su That National Politic Publishing House.

## 9. The Media's Role in Making the 2013 Constitution of Vietnam

Phan Thi Luyen\*

**Abstract:** The mass media have an important influence on law-making, but there is little empirical research on its role in making of Constitution in Vietnam. This paper analyzes the role of media in the legislative process that resulted in the legal regulation of human rights, and fundamental rights in the Constitution. The analysis of claims made in the media and in parliament shows that during the legislative process, political actors responded to media attention directly and indirectly. Long-term trends in media coverage for specific topics contributed to the introduction of and support for amendments to the Constitution. The mass media have made a public forum for all the social classes to contribute their opinions on the draft constitution. At the same time, the mass media give feedback and comments of scientists and people for law-making activities. On that base, legislators gather information and selectively absorb relevant opinions for the purpose of amending, supplementing and increasingly completing legal documents.

**Keyword:** mass media, Constitution, amendment, newspapers

### I. Introduction

Mass media refer to a diverse array of media technologies that reach a large audience via mass communication. The technologies through which this communication takes place include a variety of outlets. Broadcast media transmit information electronically via media such as films, radio, recorded music, or television. Digital media comprise both Internet and mobile mass communication. Internet media comprise such services as email, social media sites, websites, and Internet-based radio and television. Many other mass media outlets have an additional presence on the web, by such means as linking to or running TV ads online, or distributing QR Codes in outdoor, or print media to direct mobile users to a website. In this way, they can use the easy accessibility and outreach capabilities the Internet affords, thereby easily broadcasting information throughout many different regions of the world simultaneously and cost-efficiently. Outdoor media transmit information via such media as AR advertising; billboards; blimps; flying billboards (signs in tow of airplanes); placards or kiosks placed inside and outside buses, commercial buildings, shops, sports stadiums, subway cars, or trains; signs; or skywriting. Print media transmit information via physical objects, such as books, comics, magazines, newspapers, or pamphlets. Event organizing and public speaking can also be considered as forms of mass media<sup>1</sup>.

---

\* Political and Social Theory Department, Hanoi Law University

<sup>1</sup> "Mass Media." Wikipedia. Wikimedia Foundation, February 3, 2022. [https://en.wikipedia.org/wiki/Mass\\_media](https://en.wikipedia.org/wiki/Mass_media).

The media are a part of popular culture in that the most common leisure-time activities in Vietnam are watching TV and reading newspapers. Nowadays, people's demand for information is increasing, the media is improved, innovated. Media agencies have been applying the achievements of science technology to gradually introduce various types of media. At the end of the twentieth century, along with the printed press, there were also audio and video newspapers, especially electronic newspapers. Printing, publishing, advertising, and marketing technologies are developed with fierce competition, creating media networks all over the world. In Vietnam, the concept of media is regulated in Clause 2, Article 3 of Circular No. 38/2017/TT-BTTTT of the Ministry of Information and Communications dated December 13, 2017: *Mass media refer to using a press agency to provide and transmit information to the masses, including radio stations, television stations, printed newspapers, electronic newspapers, and websites/ Web portal.* On 26th December 2013, there were 838 press agencies printing with 1,111 publications, among which central agencies have 86 newspapers, 507 magazines; there were 113 newspapers and 132 magazines in the locality; there were 70 electronic newspapers, 19 electronic magazines, and 265 electronic information pages of press agencies in Vietnam. In the radio and television network, there were 67 central and local radio and television stations, of which three stations cover the ground nationwide, including Voice of Vietnam, Vietnam Television, and VTC Digital Television stations. There were 64 local radio and television stations. In Vietnam, there were 178 radio and television broadcast channels, including 103 television program channels and 75 radio program channels. Some national radio and television programs and broadcast radio and television programs were broadcasting on the Internet of countries in Southeast Asia and around the world for purpose of external information. Besides the broadcast television system, the Pay-TV system continues to be invested and developed. Particularly, the four biggest television agencies in Vietnam (Vietnam Television Station, VTC Digital Television Station, Hanoi Radio and Television Station, and Ho Chi Minh City Television Station) have produced 73 paying TV shows. In addition, in the Pay-TV system, there are 75 foreign TV channels serving 4.4 million subscribers in the whole country. There are also social media sites such as YouTube, Facebook, Twitter, Instagram, ...

As the mass media have become a pervasive cultural force, concern has grown about their effects on people's lives. The researchers have concluded that the mass media have helped to create a complex popular culture, and products and activities designed for mass consumption and used for leisure or entertainment. The media are a part of the popular culture in that's two most common leisure-time activities in Vietnam are watching TV and reading newspaper. The media also help disseminate information and trends that are a part of popular culture. Mass media provide them with a diverse picture of social reality, thus it is an important socializing medium for individuals. Golding (1974) argues that: *Mass media are central to the delivery of ideas and images that people use to interpret*

*and understand a large part of their everyday experiences*<sup>2</sup>. Mass media is an institutionalized channel for the distribution of social knowledge as well as a powerful tool for social control. Sociologists also point out that the information published in the media always conveys messages and values that are intended to guide the perception and behavior of social classes. For example, the influence of the media on people's political consciousness. The role of the press is regulated in Article 1 of the Press Law in 1989: The press in the Socialist Republic of Vietnam is an essential medium of communication for social life; is the voice of the Party and state agencies, socio-political organizations, socio-political professional, social organizations, and socio-professional organizations; and is a forum of the People.

The tasks and powers of the press has been regulated in Articles of the Press Law in 1989: *a/ To provide truthful information about domestic and world affairs in line with the interests of the country and People; b/ To propagandize, disseminate, and contribute to the formulation and protection of, the line and policies of the Party, policies and laws of the State, achievements of the country and the world according to the guiding principles and purposes of press agencies; to contribute to the political stability and socio-economic development, raise the People's intellect, satisfy the healthy cultural needs of the People, protect and promote the fine traditions of the nation, build and promote socialist democracy, strengthen the great national unity bloc, and build and protect the socialist Fatherland of Vietnam; c/ To reflect and guide public opinion; to act as a forum for the People to exercise their right to freedom of speech; d/ To discover and report on examples of good people and good deeds, new factors and advanced models; to prevent and fight against violations of law and negative phenomena in society; e/ To contribute to maintaining the purity and clarity and development of the Vietnamese language and languages of ethnic minorities of Vietnam; f/ To promote mutual understanding among countries and peoples, participate in the cause of the world people for peace, national independence, friendship, cooperation and sustainable development.*

Legislation is an activity of competent entities to promulgate new normative documents or amend or supplement legal documents according to a special procedure. It is the most basic activity of the state to create effective means for state management and social management. The process of law-making includes drafting and promulgating laws and legal documents, including research, drafting, adoption, and publication of documents. Law-making is the activity of elaborating and promulgating various types of legal documents by competent state agencies and competent individuals at central and local levels. As the original law, amending the 1992 Constitution is an important political activity of the country, this is the main news of the press during the event. Because of the nature of the mass media, it always operates according to clear purposes, prioritizing what information is important and

---

<sup>2</sup> Tony Bilton, Kenvin Bonnett, Philip Jones, Ken Sheard, Michelle Stanworth và Andrew Webster, Translated by Pham Thuy Ba. 1995. *Introduction to Sociology*. Hanoi: Social Science Publishing House, p.381.

valuable. Targeted press agencies and professionally trained journalists give them the ability to focus on big events like the constitutional amendment.

## **II. The press's role in making the 2013 Constitution**

Performing the role of the mouthpiece of Party organizations, State agencies, social organizations and having the task of propagating and disseminating the Party's guidelines, guidelines and policies, and laws of the State, the press provides information on the content of the Constitution and honestly reflects the amendments to the 1992 Constitution. is a bridge for all classes of people to know, to understand and to participate in and to exercise their democratic rights. Because at this time to many Vietnamese people the Constitution seems strange, never even read and invoked.

The constitutional amendment process includes the stages of drafting a draft, collecting people's opinions, discussing, approving, and publishing the Constitution, at any stage in the mass media to ensure implementation. its own responsibility. From August 2011 to January 2013, press agencies from central to local levels, especially key press agencies such as People's Newspaper, People's Army Newspaper, Vietnam Television, Radio The Voice of Vietnam, the online newspaper of the Communist Party of Vietnam, the portal of the National Assembly, the Government, etc. simultaneously propagated the meaning and importance of the Constitution; rights and obligations of citizens in the observance of the Constitution and laws; contributions of the 1992 Constitution; results of summarizing the implementation of the 1992 Constitution; achievements in the process of implementing the constitutions; plans, roadmaps, and activities for amending and supplementing the 1992 Constitution, such as holding several seminars on the topic of amending and supplementing the 1992 Constitution. At the same time, the press agencies kept posting plans, roadmaps, and activities implementing amendments and supplements to the 1992 Constitution by the National Assembly, the Government, the Constitutional Amendment Drafting Committee, branches, organizations, and localities. In fact, the majority of people tend to pay attention to and trust individuals with social prestige, those who have power in what Becker calls the “hierarchy of credibility”—that is, the People with high status or power in society who give opinions on controversial issues will have their opinions accepted, because it is believed that these people have access to relevant information and are more professional than the majority of the population<sup>3</sup>.

With this trend, the press agencies have continuously opened special pages, columns, and topics as well as published special publications and contents related to the amendment and supplement of the 1992 Constitution, especially the articles of experts, scientists, and National Assembly deputies which express their scientific opinions and experience, results of research, surveys, and practical activities at home and abroad. For the opinions of managers who practice in their respective fields,

---

<sup>3</sup> Tony Bilton, Kenvin Bonnett, Philip Jones, Ken Sheard, Michelle Stanworth và Andrew Webster, Translated by Pham Thuy Ba. 1995. *Introduction to Sociology*. Hanoi: Social Science Publishing House, p.387

those articles have contributed to summarizing practice, raising awareness, and providing information to clarify theoretical and practical problems when facing the Constitution amendment. All those articles are valuable for being the reference for members of the Constitution Drafting Committee, National Assembly deputies, and people of all classes in performing their duties and powers.

After the 1992 Draft Constitutional Amendment was published, the National Assembly issued Resolution No. 38/2012/QH13, dated November 23, 2012, on organizing the collection of people's opinions on the Draft Amendment of the 1992 Constitution. Accordingly, press agencies from central to local levels with 838 printed press agencies with 1,111 publications, performed the important political task of propagandizing the content of the 1992 Draft Amendment, by the publication of the full text of the draft and the state's plan to collect people's opinions, introducing the forms of comments, and addressing the agency, which is responsible for receiving comments and discussion contents according to the guidance of the Committee Draft Amendments to the 1992 Constitution.

The objective of information and propaganda work in collecting people's opinions and contributions to the Draft Constitution is to promote the right to mastery, mobilize people's intelligence, create a consensus of the people, and express their opinions; reflect people's will and aspirations in amending the Constitution; raise awareness and responsibility of each individual, agency, and organization for the amendment of the Constitution and its implementation. The contents of information propagated include the entire Draft Amendment to the 1992 Constitution, including Preamble; political regime; human rights, fundamental rights, and obligations of citizens; economic, social, cultural, educational, scientific, technological, and environmental aspects; protect the country; the state apparatus; effect of the Constitution.

The mass media provide official information to guide the public's awareness in order to protect the Party's Platform, Charter, and line. For instance, they use newspapers, magazines, radio and television stations, published books, specialized pages for talks, interviews, commentaries, etc.. The mass media also create discussion forums and publish standard comments and suggestions from representatives of experts, scientists, and practical activists affirming the principles of the Constitution.

In addition to providing information on the contents of the revised Constitution, the press also performs the task of opening a forum to fight against hostile views and to criticize the misconceptions during the implementation of the policy of studying, amending, and supplementing the 1992 Constitution.

Furthermore, the mass media disseminate information to refute information that distorts the guidelines and guidelines of the Communist Party of Vietnam and the laws of the Socialist Republic of Vietnam, such as denying Marxism-Leninism, Ho's thought Chi Minh; denying the path to socialism; denying the leadership role of the Party; demanding the annulment of Article 4 of the Constitution; demanding to change the name of the Party or the name of the country; establishing

organizations to oppose the Party, State, and the socialist regime; demanding the building of a bourgeois political institution.

Mass media agencies play an important role in combating statements that distort, disrupt, and sabotage the implementation of the policy of studying, amending, and supplementing the 1992 Constitution. For example, they rebut information that negates the contribution of the 1992 Constitution; distorts socialist democracy in the process of implementing the Constitution and the law; distorts citizenship and human rights in the Constitution; exaggerates the weakness of the political system to incite discontent, opposition, and internal divisions. Moreover, the agencies correct and overcome distorted views and perceptions about democracy and socialist legality; criticize the views that the amendment of the 1992 Constitution did not create great changes; criticize the statement the revision process is formal, not democratic. Newspapers spend many pages to publish information about socialist democracy to minimize confusion in understanding. The information posted on the content of seminars and talks on amendments to the 1992 Constitution is strictly managed to prevent information that is not popular and personal opinions. Publish articles by experts and scientists participating in refuting the enemy's slanderous and anti-sabotage claims on the mass media, especially on the internet, foreign websites, etc.

The press has the task of propagating and contributing to educating the spirit of vigilance against the "peaceful evolution" plots of hostile forces during the implementation of the 1992 amendments to the Constitution; struggling and criticizing the "self-evolution" and "self-transformation" expressions internally; closely associating between "construct" and "anti" in the solutions to struggling. Through its propaganda activities, the press has contributed to the education of political thought in order to be consistent with Marxism-Leninism, Ho Chi Minh's thought, and the idea of national independence associated with socialism. Last but not the least, it has firmly grasped the spirit of the Constitution, increased the resistance of cadres, party members, and people to the conspiracies and tricks of hostile forces.

The draft amendment to the 1992 Constitution has been propagated and deployed to collect people's opinions nationwide, which aims to attract the attention of all classes of people in the country. Ho Chi Minh City is the largest city and has the largest population. According to a survey by the City Party Committee's Propaganda and Training Committee, the number of city people interested in this poll is 90.4 percent. In which, 70% of people said that they had read the entire draft Amendment Constitution or the content they were interested in. The content of human rights and civic obligations is the most concerned by the people, with more than 40% of people commenting on this content. Regarding the leadership role of the Party, the people of the city all agreed as the draft, saying that the Party has met the people's beliefs. In which, there is an opinion that it is necessary to have a specific provision in the Constitution to ensure people's supervision of the leadership of the Party. During the time of collecting public comments, 1.9 million copies of documents were distributed to households.



In addition, 1 million comments were sent to workers. So far, 92% of the votes have been received. At the same time, there were more than 40,000 conferences, seminars, and workshops to give comments on the draft amendments to the 1992 Constitution<sup>4</sup>.

On a national scale, according to a report of the National Assembly Standing Committee, "After 3 months of serious and democratic implementation of the National Assembly's Resolution and the Politburo's Directive on organizing the collection of people's opinions on the Project, in the draft amendments to the 1992 Constitution, there were more than 26 million comments from agencies, organizations, and individuals on the 1992 Draft Amendment to the Constitution, with 28,140 conferences, seminars, and workshops to collect opinions.

The people are deeply interested, confident, excited, and actively participate in contributing enthusiastic, intellectual, and responsible opinions to the Draft Constitution. Basically, the people agreed with the contents of the 1992 Draft Constitutional Amendment announced by the Constitutional Drafting Committee; at the same time, they also contributed many specific comments on chapters, articles, and clauses of the Draft". However, with the number of 26 million comments contributed to the draft Constitution, the processing of information about 26 million comments need to be detailed by the media about the number of people who agree and disagree with the content of the draft. draft, have any comments on the content of the Constitution.

On November 28, 2013, at the 6th session, the XIII National Assembly approved the Constitution of the Socialist Republic of Vietnam. This is a reflection of the Constitution, which is considered to express the will and aspirations of the People, ensuring a solid political and legal framework for the country to overcome challenges and difficulties and to firmly walk on the path of renewal. the country, building and defending the country, international integration. This is also a Constitution that inherits the great values of the Constitutions of 1946, 1959, 1980, and 1992, while also institutionalizing the viewpoints, orientations, and development contents that have been defined in the Platform for national construction in the transitional period to socialism (supplemented and developed in 2011).

### **III. Conclusion**

With the role of formulation and protection of the line and policies of the Party, policies, and laws of the State, the press has well fulfilled its task of reporting and reflecting on research activities, amendments, and supplements to the Constitution. On that basis, people can grasp the content of the Constitution as well as the issues that need to be amended and supplemented in the Constitution, contribute ideas to promote their right to mastery, and at the same time raise their awareness and sense of responsibility of each individual, agency or organization for the formulation of the Draft

---

<sup>4</sup> "Tiêu Điểm." (the Party Committee of Ho Chi Minh City) Trang tin Điện tử Đảng bộ thành phố Hồ Chí Minh. Accessed February 21, 2022. <https://hcmcpv.org.vn/>.

Constitution, as well as its implementation. These successes have shown the validity of the view that there is an organic, conscious connection between the media and the world-user class in society. The media news is always oriented in a pre-existing frame to refer to the elements that have been pre-positioned.

### References

“Mass Media.” Wikipedia. Wikimedia Foundation, February 3, 2022.

[https://en.wikipedia.org/wiki/Mass\\_media..](https://en.wikipedia.org/wiki/Mass_media..) 28/10/2021

Tony Bilton, Kenvin Bonnett, Philip Jones, Ken Sheard, Michelle Stanworth và Andrew Webster, Translated by Pham Thuy Ba. 1995. *Introduction to Sociology*. Hanoi: Social Science Publishing House.

Press Law of Vietnam in 1989, 2016.

“Tiêu Điểm.” (the Party Committee of Ho Chi Minh City) Trang tin Điện tử Đảng bộ thành phố Hồ Chí Minh. Accessed February 21, 2022. <https://hcmcpv.org.vn/>. 28/10/2021

Constitution of the Socialist Republic of Vietnam in 1992, 2013

## 10. The Role of the Constitution in Controlling the State Power in Vietnam

Cao Thi Ngoc Yen\*

**Abstract:** A constitution is a document that controls the power of the State. The presence of provisions in a constitution aimed at regulating the state power is a sign of democracy and social progress. As an original and the highest legal act, a constitution not only confers public power but also controls public power, by providing a system to effectively limit and monitor power and to protect citizens' individual liberties from government encroachment. The role of the Constitution in controlling state power in Vietnam is affirmed in the Constitutions of 1946, 1959, 1980, 1992, (amended and supplemented with a number of articles in 2001), particularly in the 2013 Constitution. This article analyzes the role of the Constitution as well as the practice of its provisions in controlling state power in Vietnam. On this basis, the article assesses the current status of the implementation of such regulations in Vietnam.

**Keywords:** *Constitution, power control, Constitution of the Socialist Republic of Vietnam*

State power, on the one hand, is essential for maintaining social order; on the other hand, is always a subject to potential abuse by the holders. Therefore, state power needs to be controlled and regulated. The control of power is the principle of the rule of law by which agencies in the state apparatus can effectively and efficiently perform their functions, tasks, and powers according to the law while preventing abuse of power or misuse of authority. As a document with the highest legal value that expresses the will and aspirations of the absolute majority of the people, the Constitution is the most effective mean of controlling state power.

In democracy, the source of power comes from the people. According to the Black's Law Dictionary, a constitution is “...a contract between government and the people, whereby the right to govern is conferred on by the people”. Accordingly, the Constitution is the embodiment of a social contract in which it has the effect of affirming the legitimacy of the state, ensuring that state power belongs to the people and the limitation of the government's power, as well as how to control state power effectively.

### I. Constitution and the control of state power

The role of the Constitution in controlling state power is reflected in the basic functions of the Constitution. The way the Constitution controls state power is shown as follows:

---

\* PhD student, Hanoi Law University

First, *the Constitution empowers the Government*. The essence of empowerment is not simply determining who exercises state power in what ways and for what purpose, but it is also a way to limit the power of the Government. The Constitution prescribes the structure of the state apparatus and grants powers to the main state organs (legislative power to the Parliament/National Assembly, executive power to the Government, judicial power to the Court). The principle of supremacy of the law in the Rule of Law states that "*Individuals and state agencies can only do what the law allows*", meaning they can exercise powers within the limits granted by the Constitution and laws. The failure to allow his behavior to cross the upper bounds is a manifestation of the self-control mechanism of the ruler himself, as Thomas Jefferson wrote in 1798, "*In matters of power, say no more faith in the goodness of man, but must bind him with the chains of the Constitution so that he can no longer do evil.*"

Second, *the constitution establishes mechanisms and institutions to monitor, control and deal with abuses of power by state agencies*. Depending on the country, the constitution provides for different ways of monitoring and controlling power, but they are implemented in both directions:

(1) *Monitoring and controlling within state agencies* (which is characterized by the separation of powers). This mechanism is designed based on the principle of using power to control power, using one coercive power to control another coercive power, preventing those who hold public power, whether selfish or self-interested, from abusing their power.<sup>1</sup> In addition to the provisions on restraint and balance between the three branches of legislative, executive and judicial, the constitutions of some countries, such as Thailand, also provide many other mechanisms and institutions to monitor power that mutually complement and support each other. Specific examples include the regime of incompatibility (prohibiting state officials from holding two positions or playing roles in political parties), the regime of publicity and transparency of assets and income (of state officials), the regulations against conflicts of interest (prohibiting officials and their relatives directly or indirectly from participating in state-owned enterprises or providing public services); and the establishment of independent constitutional institutions to monitor and handle corrupt officials, such as the constitutional court (even a separate criminal court to try those holding high political positions), National Anti-Corruption Commission, National Assembly Inspectorate, National Audit Council, National Human Rights Commission, National Election Council, etc.

(2) *Control external to the state function* (e.g., political parties, social organizations, press agencies and the people), with the expansion of political civil rights, especially freedom of information, through which people can easily monitor the government. According to Patrick Henry, "*[t]he Constitution is not an instrument of the government to oppress the people, but a tool for the people to*

---

<sup>1</sup> See: Luu Van Sung: *Types of contemporary political institutions and reference values for Vietnam today*, Publishing House. National Politics Truth, Hanoi, 2016, p. 229 - 238.

restrain the government...<sup>2</sup>".

(3) *Guaranteeing human rights is both an end and a way to limit power.* Human rights and citizenship are one of the most important and indispensable contents of the constitutions so far. According to Alexander Hamilton: "*The Constitution itself, with its real meaning and real usefulness, is a law of rights*". There is a close relationship between decentralization and human rights as they are like two sides of the same coin. The state implements the decentralization and assignment of duties, controlling the abuse of state power is also one of the tasks to protect human rights<sup>3</sup>. The Constitution recognizes all three basic obligations of the state including the obligation to respect, the duty to protect and the obligation to ensure the realization of human rights. The alienation of power is one of the reasons that human rights and citizens' rights are not guaranteed. In other words, a country where state power is effectively limited and controlled is where human rights and citizenship are best exercised.

A good constitution is the foundation for creating a democratic political institution and a transparent state that effectively manages society and protects the rights of the people. This is an indispensable factor for the country's stability and development.

## **II. Control of state power through the Constitutions of the Socialist Republic of Vietnam**

Controlling state power per se is an essential function of the organization and operation of the socialist rule of law state in Vietnam. That has been confirmed in the constitutions of 1946, 1959, 1980, 1992, 2001 (including amendments and supplements) and especially in the 2013 Constitution. The Constitutions demonstrates the gradual development of legal awareness and views of the Party and State on the issue of state power control.

Before 1992, although the term "control of state power" was not used, the Constitution and the laws on the organization of the state apparatus nonetheless contained provisions of regulations related to this content.

### **1. Assignment and limitation of power**

The 1946 Constitution does not have a separate, explicit clause stipulating the principle of the division of powers, though it can be seen that the organizational structure and tasks and powers of the legislative, executive and judicial organs are clearly defined. The law in the 1946 Constitution has been expressed quite clearly and coherently. The People's Parliament is the highest organ of the Democratic Republic of Vietnam exercising legislative power; the Government is the highest

---

<sup>2</sup> Patrick Henry (1736-1779) - Governor of the American state of Virginia in the 1770s, one of the founding fathers of the United States, member of the 1787 Constitutional Convention, famous for his revolutionary ideas and uncompromising spirit against corruption.

<sup>3</sup> Nguyen Dang Dung, Human rights and the protection and implementation of human rights under the 2013 Constitution, *Journal of Legislative Research*, No. 11(291), June 2015.

administrative body of the whole country exercising executive power (Article 52), the "two-headed executive" regime was also applied in the 1946 Constitution with a part of executive power belonging to the President and to a lesser extent to the Prime Minister; and the judicial power belongs to the court system including the Supreme Court, the Courts of Appeal, the Second-level Courts and the Primary Courts with adjudication functions (Article 63 of the 1946 Constitution). Although shown to be quite flexible, there was no definitive division of authority in the first Constitution. Nevertheless, the aforementioned provisions are an important legal basis to control and limit the abuse of power by state agencies.

The views on the division and control of power in the 1946 Constitution continued to be mirrored in the 1959 Constitution, however, there were some revisions on the organization to exercise legislative, executive and judicial powers in the 1959 Constitution. The legislative power is assigned to the National Assembly, the highest state power agency of the Democratic Republic of Vietnam (Article 44); Executive power is assigned to the Government Council, which is the executive body of the highest state power agency, and the highest state administrative body of the Democratic Republic of Vietnam (Article 71); and the right to adjudication is exercised by the Supreme People's Court, the local People's Courts and the Special Court established by the National Assembly (Article 97). The President was separated into an independent institution and was no longer the head of the executive power branch as previously stipulated in the 1946 Constitution. Thus, starting from the 1959 Constitution, a centralized power mechanism was established under the National Assembly, the highest organ of state power.

The 1980 Constitution was the culmination of the centralization of state power in the hands of the National Assembly. The legislative power is vested in the National Assembly (Article 82); the State Council is the highest body that regularly operates the National Assembly and is the collective chairman of the Socialist Republic of Vietnam (Article 98). The executive power is vested in the Council of Ministers also known as the government of the Socialist Republic of Vietnam, which is the highest State executive and administrative body of the highest state authority (Article 104). Judicial power belongs to the Court (Article 128). The President of the State according to the 1980 Constitution is not an individual but a collective President.

By the 1992 Constitution (amended and supplemented in 2001), the awareness of state power control had seen a new development. Accordingly, we gradually moved from the organization of state power according to the principle of socialist centralism to the organization of power in accordance with the principle of division and coordination. Although the State does not recognize the mechanism of separation of powers, the revised Constitution clearly indicates "three established rights" in the following: "*State power is the unity, assignment and coordination among state agencies in the exercise of legislative, executive and judicial powers.*" (Article 2). Accordingly, legislative

power is assigned to the National Assembly (Article 83) while the executive power, belonging to the government, is the highest administrative body and the executive body of the National Assembly. The way to form the government under the 1992 Constitution is completely different from that of the 1980 Constitution. The 1992 Constitution emphasizes the role of the Prime Minister in the establishment of the government (Article 109). The judicial power is vested in the Court (Article 127). The 1992 Constitution has limited the breadth of power of the President in comparison the 1946 Constitution and 1959 Constitution. According to the 1992 Constitution, the President is the head of State who represents the Socialist Republic of Vietnam on domestic and foreign affairs (Article 101).

The 2013 Constitution inherited the core values from the previous Constitutions and made a remarkable progress in recognizing that state power is unified, with assignment, coordination and control among state agencies in the exercise of legislative, executive and judicial powers. The National Assembly exercises constitutional and legislative rights (Article 69), the government exercises executive power (Article 94), and the People's Court exercises the judicial power (Article 102).

It can be seen that the clear assignment of the nature and scope of power of each type of public authority in the Constitutions not only requires the exercise of state power to be limited, but also creates a legal basis for the professionalization of rights. Moreover, it is also the first element to create an effective power control mechanism among agencies in the state apparatus.

## 2. On mechanisms to control state power

Along with the mechanism of power division, the Constitutions of our country have also developed and stipulated alternative mechanisms for controlling State power through internal and external control mechanisms (people, socio-political organizations, mass media, etc.). The control mechanisms of the state power are increasingly being designed to improve and promote greater efficiency.

### *(1) Control from interior state agencies*

The mechanism of controlling power from within the state organs in the 1946 Constitution is not a drastic counterbalance but rather peaceful one. For example, with regards to the control of legislative power, the President has a veto power over the laws of the Resolution (Article 31), the Government has the right to directly influence the legislative activities of the People's Parliament, as well as the actual effectiveness of this activity (Article 52), the Government has the power to arrest Parliaments when they commit crimes in the act, but must notify the Standing Committee within 24 hours (Article 40), the Court has the power to hear the Parliament (Article 40).

Regarding the control of executive power, the People's Parliament has the right to vote on the budget and to ratify treaties signed by the Government with foreign countries (Article 23); the Standing Committee of the People's Parliament has the power to vote on draft laws of the Government,

to control and criticize the Government and to approve or repeal laws of the People's Parliament (Article 36); the People's Parliament has the right to vote on matters of confidence in the cabinet and may lead to the resignation of the cabinet if it is voted of no confidence (Article 54); and the Courts have the power to try Cabinet employees for common crimes (Article 51). As for Judicial control, all judges are appointed by the Government (Article 64) and has the right to be independent during the trial, to obey only the law, whereas other agencies must not interfere (Article 69).

Until the 1959 Constitution, due to the organization of the state apparatus according to the centralized model, the Constitution emphasized the role of the National Assembly, so that the power balance between the legislature and the executive was much weaker than that of the 1946 Constitution. No agency or position in the state apparatus has the right to control the activities of the National Assembly without the consent of the National Assembly and during the time the National Assembly is not in session. The Standing Committee of the National Assembly may not arrest and prosecute National Assembly deputies (Article 60). As for control over executive power, the 1959 Constitution shows that the National Assembly's control over the Government is mainly that the Standing Committee of the National Assembly oversees the work of the Government Council (Article 53), the National Assembly deputies have the right to question the Government Council and its agencies (Article 59), and the Government Council is responsible for and reports on its work to the National Assembly (Article 71). With regards to the control of Judicial Rights, the Supreme People's Court is responsible for and reports on its work to the National Assembly (Article 104).

With the 1980 Constitution, in its relationship with state agencies at the central level, the National Assembly has an almost absolute advantage, only the National Assembly has the right to supervise and criticize the activities of other agencies without prejudice. The 1980 Constitution only raised the question of legislative control of the executive through forms. The Council of Ministers is responsible for and reports on its work to the National Assembly (Article 104) and for submitting bills, ordinance projects and other projects before the National Assembly and the State Council (Article 107). Each member of the Council of Ministers is personally responsible for his or her work and together with other members is collectively responsible for the activities of the Council of Ministers before the National Assembly and the State Council (Article 112). The control of Judicial Rights remained similar to the 1959 Constitution, in the 1980 Constitution, the Supreme People's Court is responsible for and reports on its work to the National Assembly (Article 136).

Thus, although the 1959 Constitution and the 1980 Constitution contained provisions related to the control of state power, because the organization of state power at that time followed the principle of socialist centralism, it was not transparently assigned and regulated. There is no basis for control mechanism.

The 1992 Constitution, amended and supplemented in 2001, still focuses on vertical control



of power and the supervisory and controlling role of the National Assembly with other branches of power is very clear, especially the executive branch. However, there is almost no reverse control from other branches of power over the National Assembly. Without the consent of the National Assembly and during the time the National Assembly is not in session, the National Assembly deputies may not be arrested or prosecuted (Article 99). The control over the executive power is reflected in the role of the National Assembly in exercising the right to supervise the activities of the Government as the National Assembly deputies may question members of the Government, and the Government is responsible for and reports on its work to the National Assembly, the National Assembly Standing Committee, and the President (Article 83; Article 98; All 109). Judicial control largely remained similar to the 1959 Constitution.

In the 2013 Constitution, for the first time, the principle of "control" in the exercise of power among state agencies was added. This shows the development of theory and the recognition of the absolute importance of controlling state power today. *“State power is unified, with assignment, coordination and control among state agencies in the exercise of legislative, executive and judicial powers”* (Article 2).

*On the control of legislative power.* In the previous Constitutions as well as the 2013 Constitution, there was no regulation on controlling the legislative power of the National Assembly and no specialized agency was identified to control the exercise of state power. However, departing from the 1992 Constitution, the 2013 Constitution removed the phrase "single" to show the coordination in exercising constitutional and legislative rights with other state agencies, especially the Government in the exercise of legislative power (Article 100), and, at the same time, associated with the people's ability to exercise democratic rights through holding referendums. The Constitution further assigns the President the power to veto normative documents promulgated by the National Assembly Standing Committee (Clause 1, Article 88).

*On control of executive power.* The 2013 Constitution continues to affirm the National Assembly's control over the agency exercising executive power in the following ways: the National Assembly has the right to elect, remove and dismiss a number of positions in the Government; cast a vote of confidence in a person holding a position elected or approved by the National Assembly; to decide on the establishment or abolition of ministries and ministerial-level agencies of the Government; to annul documents of the Government and the Prime Minister (Article 70); and to review work reports and to question the Prime Minister (Article 70, Article 80).

The executive power is also limited by the President (Clause 2, Article 88) as the President has the right to attend meetings of the Government. The State President has the right to request the Government to hold a meeting to discuss issues that the President deems necessary to perform the tasks and powers of the State President (Article 90), and the Government must report to the President

on matters falling within its competence (Article 94).

*On the judicial control.* The 2013 Constitution stipulates a mechanism to control judicial power from the legislative body, as demonstrated by the National Assembly's right to elect, remove, and relieve from duty the titles of Chief Justice of the Supreme People's Court, and to obtain votes of confidence and dismissal for positions elected by them, such as Chief Justice of the Supreme People's Court, Judge of the Supreme People's Court. Judges at other levels are appointed by the President at the proposal of the National Council for Selection and Supervision of Judges. This regulation reflects the principle of organizing the state apparatus in the rule of law, enhancing the position of the judiciary with the legislative and executive bodies, and ensures the principle of assignment, coordination, and mutual control among state agencies in the exercise of state power. However, this power control is mainly one-way between the state authority and the judiciary, with almost no control in the opposite direction.

In addition, the 2013 Constitution paves a way forward, unlike the previous Constitutions with the stipulation of independent institutions including the National Electoral Council and the State Audit. The National Election Council is responsible for organizing the election of deputies to the National Assembly, and directing and guiding the election of deputies to the People's Councils at all levels (Article 117). State Audit is an agency established by the National Assembly, operating independently and only obeying the law, that audits the management and use of finance and public property (Article 118). This is an important regulation that helps the election as well as the inspection of public financial performance to be independent, objective, and impartial provided that these agencies only operate in accordance with the Constitution and the law. At the same time, it is an important mechanism to enhance the effectiveness of state power control activities, minimize alienation and abuse of power in the performance of public duties by state agencies.

## (2) Control mechanism from the people

Although it was the very first, the 1946 Constitution clearly expressed the idea that power belongs to the people. This is realized in the election of the People's Parliament by the entire people and in the fact that the people have the right to dismiss their elected representatives (Article 20) as well as the right to vote on the constitution and issues related to the national destiny (Article 21). This is an important and very progressive regulation that is requisite for a true rule of law. It also ensures that people participate in democratic political activities and express their opinions. The right to review the constitution inscribed in the 1946 Constitution is still valid to this day, especially when the National Assembly promulgated the Law on Referendum.

By the 1959 Constitution, the role of the people in controlling State agencies was regulated and clearly demonstrated in the election and removal of elected delegates. All State agencies must rely on the people, stay in close contact with the people, listen to their opinions and be controlled by the

people (Article 6). Citizens of the Democratic Republic of Vietnam have the right to complain and denounce to any State agency about the illegal acts of State agency employees. Complaints and denunciations must be considered and resolved promptly (Article 29). However, the provisions in the 1946 Constitution on issues that, after being decided by the National Assembly, must be approved by the people are no longer retained in the 1959 Constitution.

Inheriting the preeminent values of the Constitutions of 1946 and 1959, the role and mechanism of the people in monitoring and controlling State power continued to be recognized in the 1980 Constitution (Article 7, Article 8, Article 73) and the 1992 Constitution (amended and supplemented 2002) (Article 6, Article 7, Article 8). In addition, the 1980 and the revised 1992 Constitutions also contain specific provisions on the role of socio-political organizations in participating in the activities of State agencies and inspecting, supervising, and operating the State agencies. State agencies such as Vietnam Fatherland Front (Article 9) and the Vietnam General Trade Union participate in State affairs and inspect the operation of State agencies. (Article 10). Other agencies also include the people's collectives working in agencies, enterprises, cooperatives, residential areas, and other grassroots units (Article 11).

Compared to the 1992 Constitution, the provisions on the mechanism by the people to exercise control over state power of the 2013 Constitution show a clear progress of Vietnamese constitutional thinking. It fully stipulate two forms of direct democracy and representative democracy in Article 6 that "*The people exercise state power by direct democracy, by representative democracy through the National Assembly, the People's Council and through the other State agencies*". Regarding the form of direct democracy, citizens have the right to participate in the management of the state and society, to participate in discussions and proposals with state agencies on issues of the grassroots, locality and the whole country, and the right to vote, stand for election, hold a referendum, denounce and dismiss positions in state agencies when they are no longer worthy of their trust (Articles 7, 27, 28, 29, 30). In terms of indirect democracy, the people exercise state power through elected bodies in accordance with the Constitution and the law. It ensures that the National Assembly deputies have close contact with voters and are subject to supervision, implementing the regime of contacting and reporting to voters on the activities of the deputies and the National Assembly, responding to voters' requests and recommendations (Article 79), and implementing the regime of reporting to the People through the mass media on important issues under the settlement competence of the Government and the Prime Minister, Ministers and Heads of ministerial-level agencies (Article 88, Article 99). It is clearly expressed in the Clause 2 of Article 110 that "*[t]he establishment, dissolution, merger, division, and adjustment of boundaries of administrative units must consult local people*". Besides, socio-political organizations such as Vietnam Fatherland Front, Trade Union, etc., perform the function of social supervision and criticism (Article 9, Article 10).

(3) Regarding the recognition of ensuring human rights and citizens' rights

The Constitutions of 1946, 1959, 1980 and 1992 of our country have recognized and guaranteed the implementation of human rights and citizens' rights in accordance with the socio-economic conditions of each period. The Constitutional principles on human rights, especially political and civil rights, are both an important legal basis for the people to exercise the role of monitoring and controlling state power. The rationale for State power to be limited and controlled is to ensure that the values of human rights are respected and fully realized.

The 1946 Constitution contains extremely progressive provisions to ensure human rights and citizens' rights in our society. The chapter "Rights and obligations of citizens" is ranked second and includes 18 articles while prioritizing obligations before interests. For the first time in the history of the Constitution, the right of ethnic equality has been recognized. In addition, the Constitution also stipulates that women have equal rights with men in all respects, have the right to freedom of speech, the right to private property, etc. Accordingly, Vietnamese citizens must not be arrested and imprisoned prior to Court decisions and their houses and correspondence must not be illegally infringed (Article 11). Especially in Article 21, it is noted that "*[t]he people have the right to vote on the Constitution and matters related to the national destiny*". These broad and progressive provisions on individual freedoms of the 1946 Constitution have fully demonstrated the humanistic aspects of a democratic Constitution that protects human rights and the rights of the people.

Inheriting the provisions of the 1946 Constitution, the rights and obligations of citizens continue to be expressed in the 1959 Constitution, provided for in Chapter III, including 21 Articles. Compared with the 1946 Constitution, the 1959 Constitution added new provisions on human rights such as the right to complain and denounce to State agencies (Article 29), the right to work (Article 30), and the right to rest (Article 29, thirty first). The 1980 Constitution stipulates that the new political right is the right to participate in the management of the affairs of the State and of the society, marking a positive change in the State's awareness of the position and role of the people in the state management and social management, demonstrating the broad democratic nature of our State. Like the Constitutions of 1946, 1959 or 1980, the rights of citizens stipulated in the 1992 Constitution have been supplemented and further concretized to reach perfection. The 1992 Constitution was born, with new points that are more suitable than the previous ones. For the first time, the term "human rights" was recognized in the Constitution. The number of rights and obligations recorded in the chapter on Basic Rights and Obligations of Citizens has also grown, not only compared to the previous three Constitutions but also compared to other countries' constitutions. If the 1946 Constitution has 28 Articles on basic rights and obligations of citizens, the 1959 Constitution has 21 Articles, the 1980 Constitution has 28 Articles, the 1992 Constitution has 34 Articles out of a total of 147 Articles of the entire Constitution. It is also due to the increase in the laws compared to the previous Constitutions

that the civil rights in the 1992 Constitution are expanded compared to the previous 3 Constitutions. However, the 1992 Constitution did not clearly distinguish human rights from the basic rights of citizens.

Overcoming that shortcoming, the 2013 Constitution made a distinction between "human rights" and "citizen rights". The 2013 Constitution has made strides in terms of human rights and citizens' rights, which is reflected in the fact that: *Firstly*, for the first time in our country's constitutional history, "human rights" have become the title of the chapter, instead of just calling it "basic rights and obligations of citizens". *Secondly*, the chapter on human rights, basic rights and obligations of citizens is included and put solemnly in Chapter II, following the Chapter I on the political regime. *Thirdly*, the Clause 2 of Article 14 stipulates that "[h]uman rights and citizens' rights may be restricted only in accordance with law in necessary cases for reasons of national defense, security, order and safe society, social morality, public health", which has minimized any abuse or arbitrary deprivation or restriction of the inherent rights and freedoms of people by the government. *Fourthly*, the Constitution emphasizes the role and responsibility of the State in respecting, protecting and ensuring the implementation of human and citizen rights, especially economic and cultural rights society, as stipulated in Clause 2 of Article 24, 26, and 28 that "[t]he State respects and protects the right to freedom of belief and religion", "[t]he State, society and family create conditions for women's comprehensive development, promote its role in society", and that "[t]he State creates conditions for citizens to participate in the management of the state and society; publicity and transparency in receiving and responding to citizens' opinions and petitions, respectively.

It can be said that this change marks the development of theoretical awareness, constitutional thinking, the affirmation of values and the important role of human rights and citizens' rights by upholding the State's responsibility in respecting, ensuring, and protecting the fundamental rights of people and citizens.

### **III. The reality of the implementation of the Constitution in Vietnam**

Ensuring the enforceability of the Constitution is one of the most effective methods of limiting State power. Being well aware of the role and importance of protecting and implementing the Constitution, our Party and State have policies and plans to implement the Constitution in order to ensure the supremacy of the Constitution, and to ensure the constitutionality of the law. The first five years, since the 2013 Constitution was promulgated, have shown the high responsibility of state agencies in the organization and implementation of the Constitution. The National Assembly's supervision over the implementation of the Constitution (constitutionality in law-making activities and supervision and inspection of the implementation of legal documents) has become increasingly important. Constitutional legitimacy has become the most important criterion to consider when

conducting the appraisal, verification, consideration and approval of bills, ordinances, and other draft legal documents. In the exercise and control of State power, state agencies have seriously implemented the assignment according to the Constitution, and the power control mechanisms are also operated in the right direction and effectively.

However, besides the accomplishments, the implementation of the Constitution in our country still has limitations. For example, the exercise of power and control of state power still have following shortcomings

With regards to the activities of the National Assembly, although the Constitution as well as relevant legal documents such as the Law on Organization of the National Assembly demarcates the authority between agencies and assisting parts of the National Assembly, there still remain situations where powers are abused. There are still actions beyond the authority to issue legal documents or perform tasks, powers, activities, and functions under the legislative competence of superiors, such as: Standing Committee of the National Assembly sets a resolution decide on contents falling under the competence of the National Assembly; The Committee of the National Assembly carried out the act of of overriding the supervisory power of the National Assembly Standing Committee. In addition, there are a number of acts of abusing position and power in the course of performing tasks assigned by law, committing illegal acts in order to make it difficult for other subjects to profit, such as: fostering outside the regulations; taking advantage of the authority to examine law/ordinance projects to request ministries and branches to add their children to overseas business delegations, or to recruit relatives to work.

The laws promulgated by the National Assembly can also be found unconstitutional if they violate the conditions of constitutionality and legitimacy and contain provisions that violate basic rights of citizens. For example, Article 292 of the 2015 Penal Code stipulates that the crime of illegally providing computer and telecommunications network services violates Article 33 of the 2013 Constitution on the right to freedom of business. This is also just one of more than 90 errors that resulted in the revision and delay of this Code. It can be clearly seen that the serious consequences of this limitation certainly had a positive effect on the institutionalization of the new spirit of the 2013 Constitution on the organization of the apparatus for exercising judicial rights, which subsequently had a great impact on the people.

The National Assembly's supreme supervision over the remaining branches of power is still sufficiently limited, partly stemming from the respect and ease of reconciliation, leading to a lack of resoluteness in detecting violations of the Constitution and laws of many branches and fields.

As for activities of the executive branch, an abuse of power is very common, diverse, multi-faceted/multi-layered, and can occur at all levels, places, and fields of the state Administration.

In policy making and promulgation of legal documents, there is a phenomenon of policy

corruption, or the manifestation of group interests when creating or orienting to create policies according to subjective will. Promulgating legal documents under the law with contents, processes, and procedures that contradicts the provisions of the Constitution easily causes an abuse of power in the performance of official duties. A number of decrees and circulars have restricted or violated the constitutional freedoms of citizens. For example, the ownership rights, business rights, and the vehicle ownership restrictions according to Circular No. 02/2003/TT-BCA of the Ministry of Public Security dated January 13, 2003, lead to many individuals having to pay extra costs to own a vehicle. Motorbike owners or Decree No. 60/2014/ND-CP of the Government dated June 19, 2014, which stipulates that printing enterprises are not allowed to cooperate with other printing establishments leading to enterprises unable to complete contracts because they only can do one stage in the production process. Article 320 of the 2005 Civil Code allows citizens to use real estate to secure the obligations specified in Article 318, however, the Land Law only allows it in the form of a mortgage. Between 2016 to May 15, 2021, the Ministry of Justice inspected 25,193 documents according to its competence (including 3,277 documents of ministries, ministerial-level agencies, 21,916 documents of the People's Council and Provincial People's Committee). The results detected and concluded that 660 documents contained illegal provisions (including 108 documents of ministerial-level agencies and 552 documents of provincial-level authorities).

In addition, in the process of performing their functions and duties, there are still acts of abuse of power and positions: issuing illegal directing or orders; requesting implementation of appointment, re-appointment and promotion of family members and acquaintances to leadership and management positions; possessing, disposing and using property in contravention of regulations and policies; going abroad or allowing others to go abroad contrary to regimes, standards and policies; setting out illegal administrative procedures, permits, standards, regulations, and processes, causing difficulties and harassment for self-seeking purposes; causing difficulties to the people and directly violating the constitutional rights of citizens. According to the results of detecting and handling corruption in 2020, the People's Police has accepted to investigate 531 cases, 1,245 accused of corruption-related crimes, of which 290 new cases and 616 defendants have been prosecuted. The investigation agency in the People's Army has initiated investigation and found 4 accused. The People's Procuracy at all levels is accepting and investigating 845 cases/1596 accused. The People's Courts at all levels have accepted according to first-instance procedures 436 cases with 1,175 defendants and first-instance trial of 269 cases, 645 accused of corruption crimes, of which 8 defendants were sentenced to life imprisonment or death. It also included appellate trial of 158 cases, 326 defendants<sup>4</sup>.

---

<sup>4</sup> Government, *Report on anti-corruption work* (2020).

In the context of inspection, examination, reception of citizens, settlement of complaints and denunciations, the general inspection and supervision function of the heads of the executive system such as the Prime Minister and Ministers have not been implemented often in practice, though in fact many legal documents applying the law have contents inconsistent with the Constitution and the law.

Regarding the operation of the Court, in order to ensure the independence of the judiciary, Clause 2, Article 103 of the Constitution stipulates that “[j]udges and jurors conduct independent trials and only obey the law; agencies, organizations and individuals are strictly forbidden to interfere in the adjudication of judges and jurors”. However, in the adjudication activities of the Court, there are still manifestations of constitutional violations, mainly in the forms of "judgment review", sentencing reports, pocket judgments or meetings of the three branches of police, court, procurator to " judgment review", showing agreement on the judgment or acceptance of the intervention of the procedure-conducting person or agency. In addition, due to the dependence on operating funds and facilities on superiors or other state agencies, the courts are often interfered in organizing and adjudicating activities, particularly for the settlement of administrative cases, when the defendant is an agency or organization or the head of an agency or organization. The consequences of such interference include misjudgment and wrongful conviction, which seriously infringe on the interests and lawfulness of the people, hindering realization of fair. For example, some famous unjust cases include the 10-year unjust incarceration of Nguyen Thanh Chan for 10 for crime of murder; the “Prisoner of the Century” or Huynh Van Nen in Binh Thuan, who were wrongfully convicted for 17 years in prison for crime of murder until his exoneration; and 46 year old case of Tran Van Them in Bac Ninh on the accusation of murder and robbery.

Thus, it is conspicuous that although the division of power and power control mechanisms have been established in the Constitution, a power alienation and corruption in the exercise of state power still occur occasionally. There are two main reasons, though there are many, for such incidents: 1) not respecting and ensuring the hierarchical validity of the Constitution and distancing the Constitution from the people and other state agencies inevitably lead to disregard for the law and abuse of power; 2) there is no mechanism to monitor the implementation and protection of the Constitution. The fact that the Constitution assigns the task of protecting the Constitution to many different subjects renders no one fully committed to protecting the Constitution. In addition, the constitutional protection mechanism has not yet been concretized. The absence of a mechanism to protect the Constitution might lead to the consequences that the Constitution becomes more of a formality than a law and fails to promote its paramount role in the life of the State and society.

Therefore, in the coming time, the Party and the State need to be more determined and drastic in implementing solutions to ensure the supremacy of the Constitution. Particularly, a special attention should be paid to the establishment of a mechanism to protect the Constitution to safeguard



its supremacy of the Constitution and the perpetual existence of rule of law. Determining which mechanism is appropriate will need further research from both theoretical and practical perspectives. However, one of two options to be considered is to give the Supreme People's Court the authority to protect the Constitution by upgrading the jurisdiction that the Court currently has under the provisions of Clause 7, Article 2 of the Law on Organization of the People's Courts in 2014 or to establish a Constitutional Council as in the draft Constitution amending the 1992 Constitution (a copy of the people's opinion poll from January 2013 to the end of March 2013)<sup>5</sup>.

### References

- 1946 Constitution of the Democratic Republic of Vietnam
- 1959 Constitution of the Democratic Republic of Vietnam
- 1992 Constitution of the Democratic Republic of Vietnam (amended and supplemented in 2001).
- 2013 Constitution of the Democratic Republic of Vietnam
- Grimm, Dieter. *Constitutionalism: Past, Present, and Future*. Oxford Scholarship Online, 2016.  
<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198766124.01.0001/acprof-9780198766124?rskey=PWGZKk&result=6>.
- Hòa, Tô Văn. “The 2013 Constitution and the development in the thought of the rule of law on the supremacy of the constitution and the rule of law”, *Journal of Legislative Studies*. (2020)
- Hùng, Nguyễn Mạnh "Ideology of division of state power in the 1946 Constitution", *Vietnam Legal Science Journal*. (2011)
- Jinyu, Qian. “依宪治国视域下国家权力的建构与控制”, (The construction and control of state power from the perspective of governing the country according to the constitution), *Global Legal Journal*. (2013)
- Phúc, Vũ Văn. “Controlling state power according to the Vietnamese Constitution”, *Journal of State Organization*. (2020)
- Tuấn, Đặng Minh. “Delegation, coordination and control of state power according to the 2013 Constitution”, *Journal of Political Theory*. (2016)
- Tùng, Bùi Huy. “The issue of controlling state power according to the 2013 Constitution”, *Journal of State Management*. (2019)

---

<sup>5</sup> Tô Văn Hòa (2020), “The 2013 Constitution and the development in the thought of the rule of law on the supremacy of the constitution and the rule of law”, *Journal of Legislative Studies*



## 11. Ensuring Human Rights to Life in Vietnamese Constitution and Laws

**Dang Thi Ha\* and Tran Thi Dieu Ha\*\***

### I. Introduction

The right to life is a fundamental and natural human right. It can be said that a person's right to life includes not only the right to the integrity of life but also to all elements which ensure that person's existence. This past decade has witnessed a change in reality which shows that the function of the Constitution in Vietnam in protecting the right to life is being transformed and perfected. Modern society demands that the right to life should be regarded and respected as the highest of all rights. Therefore, as a fundamental law, the Constitution should establish the right to life precisely and follow its values.

### II. The right to life is an essential and inalienable right that must be protected.

In human development, when the primitive communist regime ended, it began a period of fierce struggles to survive, protect, and fight for the most basic rights including the right to life. Terminologically, the 'right to life' describes a belief that human beings are fully entitled to the conditions and elements necessary to live and not be killed by other actors (humans, states, or organizations).

In another more superficial aspect, the right to life is a biological existence where people can survive without being deprived of their lives by anyone. John Locke, a British politician, through the work "Two Treatises on Government,"<sup>1</sup> said that there are three basic inalienable human rights: the right to life, the right to liberty, and ownership rights. Accordingly, human beings have the rights to life and freedom, which any person or force cannot change because these rights originate from the eternal and immutable nature. Based on the ideas of John Locke, Thomas Jefferson strongly affirmed the end of British rule and declared the United States to officially become an independent and free country through the Declaration of Independence in 1776: "*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*"<sup>2</sup> It can be seen that the right to life is not only about existence but also must be associated with freedom and the right to pursue happiness. That is the guideline US legislators used to design a democratic state - a state of the people, by the people, and for the people.

---

\* Law School, Hue University

\*\* Law School, Hue University

<sup>1</sup> Prof. Dr. Nguyen Khanh Vinh- Dr. Nguyen Ngoc Dao, Textbook of History of political and legal doctrines, People's Public Security Publishing House, 2012, page 142.

<sup>2</sup> Prof. Dr. Nguyen Dang Dung, The Idea of a Responsible State, Da Nang Publishing House, 2007, p11.

Inheriting the values in this document, modern international law officially recognizes the right to life as the core right of every individual for the first time. It affirmed this as an "*international legal standard*"<sup>3</sup> in the Universal Declaration of Human Rights (UDHR) in 1948, stating: "*Everyone has the right to life, liberty, and security of person.*"<sup>4</sup> It is also affirmed in the International Covenant on Civil and Political Rights (ICCPR), stating: "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*"<sup>5</sup>. Thus, the right to personal safety associated with life and freedom is understood as the right of each individual to be protected in the community.

In 1982, the Human Rights Committee (HRC) - the body created under the ICCPR to monitor the implementation of this Convention by member states - made two main arguments about the right to life: (i) The right to life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation; (ii) The right to life is not only understood in a narrow sense as the integrity of life, but also includes the guarantee of human existence.<sup>6</sup> Therefore, countries must take many active and passive measures to ensure people's right to life, especially disadvantaged groups in society. HRC upholds the right to life as a fundamental privilege, therefore, it requires countries to take strict measures to protect this right in all aspects.

Through the above documents, it can be seen that the right to life is mentioned in relation to war and violence. In wartime, there is no right to life. In that situation, the stronger gave himself the right to kill the weaker, and however, when faced with resistance, the strong could not guarantee his survival. For example, The Syrian Network for Human Rights (SNHR) announced in its monthly report released today that 1,271 civilians, including 229 children, 134 women, and 104 victims of torture, were killed in Syria in 2021, noting that killing of Syrians has been continuous since March 2011, adding that 69 civilians, including 16 children, seven women, and seven victims of torture, were documented killed in Syria in December 2021<sup>7</sup>. Aware of that, a lot of countries (117 countries join in Human Rights Council as of 2020)<sup>8</sup>, recognizes this right to life as the most sacred and inalienable right. In the Declaration of Independence of Vietnam on September 2, 1945, President Ho Chi Minh reiterated the

---

<sup>3</sup> Dr. Vu Cong Giao, Exercising the right to life in the 2013 Constitution, Journal of Legislative Research, February 2015 issue.

<sup>4</sup> Article 3, 1948 Universal Declaration of Human Rights (UDHR)

<sup>5</sup> Clause 1, Article 6 of the International Covenant on Civil and Political Rights (ICCPR)

<sup>6</sup> Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

<sup>7</sup> <https://reliefweb.int/report/syrian-arab-republic/1271-civilians-including-299-children-134-women-and-104-victims-torture>, access in 17<sup>th</sup> April, 2022

<sup>8</sup> <https://www.ohchr.org/en/hr-bodies/hrc/membership>, access in 17<sup>th</sup> April, 2022

importance of the right to life as in the Declaration of Independence of the United States<sup>9</sup>. He declared to the world that "*All peoples in the world are born equal, every nation has the right to live, to be happy and to be free. Those are the truths that no one can deny*".

In the new era since the war ended, people have entered a period of peace, friendship, and international cooperation. The right to life now has a different connotation than its literal meaning. At the macro level, the right to life is closely related to the quality of life. When making development policies and strategies, all countries consider improving and enhancing people's living standards to the best level. The social security regime, facilities, and services are being developed to ensure the right to live everyday life and meet the most basic needs. The State ensures people have a stable life, reduces child mortality and increases the average life expectancy of the people, eradicates hunger and poverty, and eliminates malnutrition and epidemics.

Article 19 of The 2013 Constitution of the Socialist Republic of Vietnam stipulates that "*Everyone has the right to life. Human life is protected by law. No one may be deprived of life in contravention of law*". The Constitution also adds a constitutional principle that is: "*Human rights and citizens' rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defense, national security, social order and safety, social morality and community well-being*" (Article 14). The 2013 Constitution considers the right to life as a fundamental right of citizens and affirms that protecting this right is indispensable. In the process of developing Vietnam's national policy and legal system, the State attaches importance to peacekeeping, security, and protection in order to limit all acts of infringing upon human life and health. Finally, the State also aims to improve the material and spiritual life of the people, building a happy and robust nation.

### **III. Legal regulation to ensure the human right to life**

#### **1. International legal regulations**

In addition to the regulations of the UDHR in 1948 and the ICCPR in 1966, Clauses 2, 3, 4, 5, and 6 of Article 6 in the ICCPR regulate the basic principles for the application of the death penalty in countries where the death penalty is still maintained. This penalty can be summarized as follows: (i) the death penalty may be used only for the most severe crimes following the law in force at the time of the commission of the crime; (ii) the application of the death penalty must not contravene the regulations of the ICCPR and The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide

---

<sup>9</sup> Vietnam National Day is an official holiday of Vietnam, taking place on September 2 every year, commemorating the day President Ho Chi Minh read the Declaration of Independence at Ba Dinh Square, Hanoi. This day marks the birth of the Democratic Republic of Vietnam, one of the predecessors of the Socialist Republic of Vietnam today.

Convention); (iii) the death penalty shall be carried out only based on a legally valid judgment, rendered by a competent court; (iv) Any person sentenced to death shall have the right to seek pardon or commutation of the sentence; (v) Not to apply the death penalty to persons under 18 years of age and not to execute the death penalty for pregnant women; (vi) Article 6 may not be invoked to delay or prevent the abolition of the death penalty. In addition, in General Comment No. 6 adopted at its 16th session in 1982, the United Nations Human Rights Council (HRC) explained some more aspects related to the meaning and content of the right to life. The important points can be summarized as follows:

**Firstly**, “Right to life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation” (paragraph 1).

**Secondly**, the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. It means the country must take active and passive measures (paragraph 5).

**Thirdly**, war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Therefore, the fight against war and these crimes is also a guarantee of the right to life. According to that approach, the guarantee of the right to life in Article 6 is linked with the obligation to prohibit activities that propagate war and incite hatred and violence in Article 20 of the ICCPR (paragraph 3).

**Fourthly**, States parties are not obliged to abolish the death penalty. They are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes." Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes." This limitation of punishment is also considered a form of guaranteeing the right to life, which includes non-retrospective application, public trial, the presumption of innocence, guarantee of defense cure, appeal and asks for forgiveness, etc. (paragraph 6).

It can be seen that the right to life is an inviolable sacred right and cannot be taken away by anyone, including the State.

## 2. Vietnamese legal regulations

Provisions of the Constitution and laws of Vietnam related to ensuring the exercise of the human right to life include:

### ***The Constitution of 2013***

In Vietnam, people's right to life has long been recognized through human rights and citizens' fundamental rights outlined in the Constitution. However, people's right to life is only specified in the 2013 Constitution "*Everyone has the right to live. Human life is protected by the law. No one shall be illegally deprived of his or her life*" (Article 19).

The 2013 Constitution separates the right to life among human rights into a separate norm showing that the State considers the right to life as the most basic and natural right that needs to be respected, protected, and guaranteed to be implemented by the Constitution and law.

***The Criminal Code 2015, amended and supplemented in 2017***

This Criminal Code sets out the groups of crimes subject to the death penalty - depriving people of life - specified in Clause 1, Article 40: "*The death sentence is a special sentence imposed upon people committing extremely serious crimes that infringe national security, human life, drug-related crimes, corruption-related crimes, and some other extremely serious crimes defined by this Code.*"

Thus, compared with the 2015 Criminal Code, The Criminal Code amended in 2017 has revised provisions on the death penalty in the way of ensuring the implementation of the human right to life as stipulated in the Constitution:

***Firstly***, abolish the death penalty in 07 crimes out of 35 crimes as before: (1) Robbery (Article 168); (2) Manufacturing and trading of counterfeit food or food additives (Article 193); (3) Illegal storage of narcotic substances (Article 249); (4) Appropriation of narcotic substances (Article 252); (5) Destruction of work, facility, equipment important for national security (Article 303); (6) Insubordination (Article 394); (7). Surrendering to enemy (Article 399).

***Secondly***, expansion of subjects that do not apply the death penalty: According to the 2015 Penal Code, only under 18 years of age, pregnant women, and nursing children under 36 months old are not subject to the death penalty. The revised Penal Code has added the case that when "The sentenced person is 75 years of age or older when committing a crime or at trial" the death penalty does not apply.

***Thirdly***, allow the transition from the death penalty to life imprisonment in the following cases: the person sentenced to death for embezzlement or taking bribes, after being sentenced, has returned at least one-third of the property embezzled or bribes were taken, closely cooperates with the authorities in the process of investigation or trial, or has made reparation to atone for the crime.

Moreover, The Criminal Code 2015 (amended and supplemented in 2017) has the regulation about "Illegal abortion" (Article 316) "*Any person illegally performs an abortion on another person in any of the following cases shall face a penalty of up to 03 years' community sentence or 01 - 03 years' imprisonment*": a) The offense results in the death of 01 person or bodily harm to 01 person who suffers from 61% physical disability; b) The offense results in bodily harm to 02 people, each of whom suffers

from 31% - 60% physical disability; c) The offense results in bodily harm to 03 people who suffer from a total physical disability of 61% - 121%; d) The offender was disciplined or previously incurred a civil penalty or has a previous conviction for the same offense which has not been expunged.

### ***Law on Children in 2016***

The right to life was first cemented in Article 12: "*The child has the right to have his/her life protected and to be guaranteed with best conditions for his/her survival and development.*" In addition, the 2016 Law on Children prioritizes the protection of children's right to life by specifying prohibited acts against children such as: Depriving children of the right to live; Abandoning, neglecting, trafficking, kidnapping, fraudulently exchanging or appropriating children; Sexually infringing upon, committing violence against, abusing or exploiting children; Refusing to provide, failing to provide or inadequately and untimely providing assistance, intervention, and treatment for children who are at risk or in danger of suffering bodily, honor and dignity harms, etc. (Article 6). In addition, the 2016 Law on Children also provides measures to protect children in the process of legal proceedings, administrative sanctions, or re-integration into the community so that children's right to life is fully guaranteed.

### ***The subject of the human right to life***

The human right to life is stipulated in both international and Vietnamese documents, however, there are different interpretations when considering the subject matter of the right to life: (1) the subject of this right is any individual who from birth has the right to life and the fetus is still in the womb; (2) the subject of this right is any individual who has the right to life from birth and foreigners. On the basis of the Constitution and laws of Vietnam, the subjects of the right to life can be identified include:

**Firstly**, section 7 on "Safe abortion" in Decision No. 4620/QĐ-BYT dated November 25, 2009, of the Ministry of Health on the promulgation of "National Guidelines for Reproductive Health Care Services," the law prohibits all abortions above 22 weeks of gestation. In addition, Clause 2, Article 7 of the 2003 Ordinance on Population is guided by Clause 3, Article 10 of Decree No. 104/2003/ND-CP stipulating: "Abortion of a fetus for reasons of sex selection by means of abortion; supply and use of chemicals, drugs, and other measures" are prohibited by law. This means the law has recognized the protection of the human right to life in the form of a fetus, but the fetus must be past 22 weeks of gestation.

Secondly, the subject of the right to life by international human rights law is every person (everyone, every human being). This pronoun has shown that the right to life is not only a privilege reserved for the citizens of each country (such as the right to vote and stand for election) but also the right of all other individuals present in the territory of the country (such as foreign nationals, stateless persons, refugees, asylum seekers, etc.).



### **III. Ensuring human rights to life in Vietnamese Constitution and laws**

From a legal perspective, the Vietnamese legal system on the right to life is relatively complete and compatible with international law. However, the law needs to be adjusted to be more compatible with the modern world's human rights laws, ensuring the right to live following its role, specifically as:

#### ***The position of the right to life in the Constitution***

The 2013 Constitution is the first one that specifically recognizes the right to life but still does not guarantee the importance of the right to life compared to other human rights. The right to life is a natural, fundamental, and supreme human right. People must be assured of the right to life before the establishment of civil rights. Therefore, in the Constitution, the provision of the right to life should be placed before the provision of civil rights. That reflects the status of the right to life as the most sacred right and reflects the logic of modern constitutional engineering.

#### ***The subject of the human right to life***

As mentioned above, the subject of the human right to life includes humans from birth, foreigners, and fetuses in the mother's womb. However, countries have different regulations on the human right to life for the fetus in the womb.

Abortion has been a controversial topic throughout the history of human society. It can be seen that pro-choice movements around the world are asking the authorities to legalize abortion. France, Germany, Belgium, and some European countries allow abortion when the fetus is less than 12 weeks old; In the UK, women are allowed to have an abortion within the first 24 weeks of pregnancy; Italy, the Netherlands, and Russia allow abortions up to 24 weeks of age<sup>10</sup>. In the US state of Texas, abortion is only allowed if the fetus is less than 6 weeks old. In particular, Texas is the state with the most stringent anti-abortion law in the United States, which was enacted and took effect on September 1, 2021. This law is enacted to save babies when a fetal heart is detected, which occurs around 6 weeks of gestation, except in the case of a medical emergency. The act also allows citizens to sue abortion providers and any person who is suspected of helping the women access abortion services when they violate the law. One of the reasons given is to save living beings and protect the human right to life from when they are still in the mother's womb<sup>11</sup>.

In Vietnam, Decision No. 4620/QĐ-BYT dated November 25, 2009, of the Ministry of Health on the promulgation of the "National Guidelines for Reproductive Health Care Services" allows abortion if the fetus is less than 22 weeks old. Statistics shows that Vietnam is one of the five countries with the

---

<sup>10</sup> <http://hoilhpn.org.vn/web/guest/tin-chi-tiet/-/chi-tiet/phong-trao-nu-quyen-song-hanh-cung-quyen-%C4%91uoc-pha-thai-30417-4506.html>. Access 14:00 on October 24, 2021

<sup>11</sup> <https://tuoitre.vn/tong-thong-my-len-an-luat-cam-pha-thai-ha-khac-o-texas-20210902004253654.htm>. Access 15: 00 on October 24, 2021

highest abortion rate globally, including cases where the fetus is over 22 weeks old<sup>12</sup>. Therefore, banning abortion does not have a significant impact on reducing the current abortion situation in Vietnam. Modern medicine has methods of determining whether a fetus is developing healthily or is expected to have problems in the future as soon as the fetus is 6 weeks old. Meanwhile, the 22-week-old fetus has a complete form. According to research, the 22-week-old baby has officially had the shape of a miniature newborn baby, which means that the baby has completed the necessary organs and parts of their bodies<sup>13</sup>. Therefore, allowing abortion when the fetus is 22 weeks old is considered by some to be an obstacle to the realization of the right to life in the current context. Although international human rights law does not consider the right to life to be guaranteed, international human rights conventions require national laws to adhere to principles to protect the human right to life to the fullest extent. Therefore, in the authors' opinion, national legislation should stipulate that abortion at less than 12 weeks of age, except in medical emergencies, is appropriate according to current international practices.

#### ***Death sentence***

There are no provisions in International Human Rights Law and the Conventions on human rights that directly prohibit a state from applying the death penalty. Therefore, this penalty is applied differently in each country. Currently, the abolition of the death penalty is a global trend. In the early 20th century, Costa Rica, San Mirano, and Venezuela abolished the death penalty. In 1977, 16 countries abolished the death penalty. Today, 140 countries in the world apply this penalty, nearly 20 countries still legally provide this penalty, but no judgment has been declaring the death penalty for many years.<sup>14</sup> China - one of the countries with an enormous amount of usage of capital punishment in the law - is also currently taking steps to reduce the use of the death penalty in trials. Although China does not publish specific numbers, according to many reliable statistical sources, the number of people sentenced to death halved in 2011 compared to previous years<sup>15</sup>. The trend of abolishing the death penalty is a growing influence of the United Nations and international human rights organizations in their efforts to protect the human right to life in countries.

Although Vietnam's Criminal Law still stipulates that the death penalty is one of the measures to punish crimes, it has moved towards abolishing the death penalty. The 2015 Criminal Code abolished the death penalty for 07 crimes and maintained it for 18 crimes out of a total of 314 crimes, including for 3 main types of crime: (i) Provisions with legal meaning as crimes in chapter XXVI - Disruption of peace,

---

<sup>12</sup> <https://vnexpress.net/viet-nam-thuoc-top-5-nuoc-nao-pha-thai-nhieu-nhat-the-gioi-3646979.html>, access 14:00 on October 24, 2021

<sup>13</sup> <https://www.whattoexpect.com/pregnancy/week-by-week/week-22.aspx>, access 17<sup>th</sup> April, 2022

<sup>14</sup> Thien Tam, Countries that have abolished the death penalty, <https://petrotimes.vn/nhung-quoc-gia-nao-tung-bo-an-tu-hinh-401141.html>, accessed 15:47 on 24 October 2021.

<sup>15</sup> Roger Hood, "Abolition of the death penalty - an urgent human rights imperative", page 21

crimes against humanity, and war crimes; (ii) Regulation is more of a precaution than an application (crimes infringing upon national security); (iii) regulations for practical application (crimes of invasion of life, crimes of drugs). In the National Report on the Implementation of Human Rights at the Universal Periodic Review of Human Rights before the United Nations Human Rights Council, the representative of Vietnam said: "Vietnam still maintains the death penalty but only applies for particularly serious crimes" and "Vietnam is also considering joining the Additional Protocol to the ICIPR Convention to consider the abolition of the death penalty."<sup>16</sup> At the Universal Periodic Review on human rights on January 22, 2019, the representative of Vietnam said that it is not possible to publicize the death penalty data because it is content related to legal provisions on the protection of state secrets. However, according to the Report on Criminal Judgment Execution for 5 years (2011-2016) that the Ministry of Public Security made publicly available in 2017, Vietnam had 1,134 death row inmates. In the three years of 2013-2016, 439 prisoners were executed by lethal injection, and the rest were not executed.<sup>17</sup>

In addition, some scholars believe that maintaining the death penalty not only infringes upon a person's right to life but also causes many other consequences: 1) All criminal justice systems have problems and no system can claim to be perfect, so if innocent people are sentenced to death and deprived of their lives, it is a mistake that cannot be undone; 2) The brutality of the death penalty is unacceptable; 3) the cruel nature of the death penalty makes its application contrary to moral values (especially humanity and tolerance - fundamental moral values that all society needs to cultivate); 4) the preventive effect of the death penalty needs to be re-examined because there is no evidence to support the superior effectiveness of the death penalty in preventing crime (even in some cases, the use of the death penalty also aggravates the crime situation); 5) The meaninglessness and viciousness of the death penalty (Example: A person sentenced to death for murder does not save the victim's life, but also causes another person's death)<sup>18</sup>.

Therefore, Vietnam should abolish the death penalty in the Criminal Code and only apply the death penalty for mass murder. This is consistent with the United Nations and international law views, implementing Resolution No. 49/NQ-TW dated June 2, 2005, of the Politburo on "Strategy for judicial reform to 2020".

### ***Ensuring children's right to life, survival, and development***

---

<sup>16</sup> National Report on the Implementation of Human Rights at the Universal Periodic Review of Human Rights before the United Nations Human Rights Council

<sup>17</sup> Quoc Phuong, what does the EU statement on the Dong Tam trial say? Reference link: <https://www.bbc.com/vietnamese/vietnam-54238069> (last access: 31/01/2021).

<sup>18</sup> Vu Cong Giao – Nguyen Quang Duc, Advantages and challenges by abolishing the death penalty in Vietnam, Journal of Legislative Studies No. 06 (430), March 2021. Access link: [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3604984/Vu-Cong-Giao\\_Nguyen-Quang-Duc\\_Vietnamese.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3604984/Vu-Cong-Giao_Nguyen-Quang-Duc_Vietnamese.pdf).

Article 6 in Convention on the Rights of the Child stipulates: "*States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child*". In that spirit, Vietnam has acceded to the Basic International Convention on Human Rights 1966 (ICCPR, ICESCR) and several other international treaties on the rights of vulnerable social groups, such as the Convention on the Rights of the Child 1989.

The 2016 Law on Children passed by the National Assembly of Vietnam on April 5, 2016, stipulates children's right to life - a vulnerable group that needs national protection. Accordingly, children are protected not only in terms of life, body, and health, but also guaranteed living conditions for development (such as the right to study, the right to receive care, the right to play, right to live with parents, right to property, right to privacy, etc.). However, according to the Government's report from January 1, 2015, to June 30, 2019, the whole country had 8,442 cases of child abuse (with 8,709 children being abused) that were handled criminally and administratively. In which: Sexual abuse: 6,432 children, accounting for 73.85% of the total number of abused children; Violence against children: 857 children (killing children: 191 children, intentionally causing injury: 666 children), accounting for 9.84% of the total number of abused children; Trafficking, kidnapping, appropriating children: 106 children, accounting for 1.22% of the total number of abused children. In addition to the number of children being abused in the above ways, there are also 790,518 children working in contravention of the labor law; 156,932 children are abandoned or neglected, and about 13,489 children 15 years old are married<sup>19</sup>. From the above data, it can be seen that the law has adequate provisions to protect children's right to life, but the reality of children being hurt in Vietnam is at an alarming rate. The cause of this situation is that the legal mechanism to deal with child abusers is not enough of a deterrent, for example, according to Article 151 of the 2015 Criminal Code: "*A person who commits any of the following acts shall face a penalty of 07 - 12 years' imprisonment:*

*a) Transferring or receiving a person under 16 for transfer for money, property, or other financial interests, except for humanitarian purposes;*

*b) Transferring or receiving a person under 16 for sexual slavery, coercive labor, taking body parts, or for other inhuman purposes;*

*c) Recruiting, transporting, harboring a person under 16 for the commission of any of the acts specified in point a or point b of this Clause".*

From the author's point of view, kidnapping a child deprives a child of the right to life, causing psychological consequences for the child and creating extreme losses for the child's family. Therefore, it

---

<sup>19</sup> Government of Vietnam and United Nations Children's Fund, Research Report "Law on prevention, handling, rehabilitation and community reintegration for juveniles who violate the law and the situation of juveniles in violation of the law in Vietnam, Hanoi, 2019".

is not appropriate for the law to prescribe sanctions for this behavior to the same extent as Article 151. Another example is the crime of rape of a child specified in Article 142 of the Criminal Code 2015 (amended and supplemented in 2017), the act of raping a child is only punishable by a penalty from 7 to 15 years in prison, while the consequences of these acts of abuse on a child's life are fierce and irreversible.

In short, the Vietnamese law should have stricter regulations to create a legal framework capable of deterring and preventing crime, creating the best protection for children's right to life and development.

#### **IV. Conclusion**

The right to life is fundamental and natural, one of the most sacred human rights. It requires a firm and guaranteed position in the national legal system, especially in the Constitution – a text of supreme value. From a legal perspective, the current Vietnamese legal system on the human right to life is relatively complete and compatible with international law. However, it is necessary for the law to have more appropriate adjustments to the world's norms of human rights law, especially in the regulations of the Constitution, Criminal Law, the Children's Law, and in strictly defining the subject of human rights.

#### **References**

- Article 3, 1948 Universal Declaration of Human Rights (UDHR)
- Clause 1, Article 6 of the International Covenant on Civil and Political Rights (ICCPR)
- Prof. Dr. Nguyen Khanh Vinh- Dr. Nguyen Ngoc Dao, Textbook of History of political and legal doctrines, People's Public Security Publishing House, 2012.
- Prof. Dr. Nguyen Dang Dung, The Idea of a Responsible State, Da Nang Publishing House, 2007, p11.
- Dr. Vu Cong Giao, Exercising the right to life in the 2013 Constitution, Journal of Legislative Research, February 2015 issue.
- <http://hoilhpn.org.vn/web/guest/tin-chi-tiet/-/chi-tiet/phong-trao-nu-quyen-song-hanh-cung-quyen-%C4%91uoc-pha-thai-30417-4506.html>. Access 14:00 on October 24, 2021
- <https://tuoitre.vn/tong-thong-my-len-an-luat-cam-pha-thai-ha-khac-o-texas-20210902004253654.htm>. Access 15: 00 on October 24, 2021
- Thien Tam, Countries that have abolished the death penalty, <https://petrotimes.vn/nhung-quoc-gia-nao-tung-bo-an-tu-hinh-401141.html>, accessed 15:47 on 24 October 2021
- Roger Hood, “Abolition of the death penalty - an urgent human rights imperative”, page 21
- National Report on the Implementation of Human Rights at the Universal Periodic Review of Human Rights before the United Nations Human Rights Council

Quoc Phuong, what does the EU statement on the Dong Tam trial say? Reference link:  
<https://www.bbc.com/vietnamese/vietnam-54238069> (last access: 31/01/2021).

Vu Cong Giao – Nguyen Quang Duc, Advantages and challenges by abolishing the death penalty in Vietnam, Journal of Legislative Studies No. 06 (430), March 2021.

Access link: [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3604984/Vu-Cong-Giao\\_Nguyen-Quang-Duc\\_Vietnamese.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3604984/Vu-Cong-Giao_Nguyen-Quang-Duc_Vietnamese.pdf).

Government of Vietnam and United Nations Children's Fund, Research Report "Law on prevention, handling, rehabilitation and community reintegration for juveniles who violate the law and the situation of juveniles in violation of the law in Vietnam, Hanoi, 2019".

**CALE Discussion Paper No. 22**

**THE CONSTITUTION OF VIETNAM THROUGH THE LENSES OF  
COGNITIVE CONSTITUTIONALISM**

Editors Ismatov Aziz and Obata Kaoru

Published by Center for Asian Legal Exchange (CALE)  
Nagoya University  
464-8601 Furo-cho, Chikusa-ku, Nagoya, JAPAN  
Tel: +81 (0)52-789-2325 Fax: +81 (0)52-789-4902  
<https://cale.law.nagoya-u.ac.jp/>

Issue date May, 2023

Printed by Nagoya University Co-operative Association

© All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.