

別紙 4

報告番号	※	第	号
------	---	---	---

主 論 文 の 要 旨

論文題目

The Potential Adoption of Centralized Constitutional Review in Vietnam: A Realistic Approach

氏 名

Do Thi Phuong

論 文 内 容 の 要 旨

Vietnam is among a small number of nations which lack constitutional review. This is despite constitutional review having gone global. In Vietnam, the National Assembly and the Prime Minister are tasked with supervising the constitutionality of legal documents. Due to the ineffectiveness of this system of political control, as well as the changes in Vietnamese society brought about by *The Renovation (Đổi Mới)*, the discussions and debates in constitutional review have started in recent decades since 2001. These discussions and debates have resulted in subsequent formal concern from the party and the state. The proposal to establish a constitutional review system in Vietnam was found in the draft constitution before its promulgation in 2013, albeit rejected in the final version. The current Constitution of Vietnam, enacted in 2013, does not contain a constitutional review mechanism. Yet that does not mean that it marked the end of discussion on constitutional review. Instead it has been constant since 2013, and continues to be a debatable topic in Vietnam today. The need to protect human rights, to build “a socialist rule of law state,” to foster the economy, and to maintain social stability, still requires more research in relation to the possibility of the establishment of constitutional review in the country.

One significant finding to emerge from the discourse of constitutional review in Vietnam is that scholars and politicians have discussed three alternative options for the form of constitutional review: (1) to grant judicial review power to the Supreme People's Court; (2) to establish a constitutional commission under the National Assembly; and (3) to create an independent constitutional court. Most Vietnamese scholars lean toward the third option calling for the establishment of a constitutional court as an independent structure. But they have not paid enough attention to the issue of how such a constitutional review mechanism would operate after being established. The potential pitfalls of having a constitutional review system were generally ignored. For example, there exists no serious concern so far for the potential of creating tensions between the very existence of a constitutional court and the ordinary court system in the country, and how such a constitutional court will manage equilibrium in its performance.

I. The Aim of This Thesis

The aim of this thesis is to justify the need for and the potential of the establishment of constitutional review in Vietnam, and explain why the centralized constitutional review model should be adopted there. It also aims to investigate the design option and practical questions, namely, the possible composition and powers of a Vietnamese constitutional review court as well as the possible issues with such a court.

This thesis discusses four main themes relevant to the suggestion of establishing a constitutional review mechanism in Vietnam: (1) background knowledge on constitutional review, (2) two basic models of constitutional review, (3) the prevalence of the centralized constitutional review model, and (4)

a realistic approach toward the creation of a constitutional court in Vietnam. These various discussions lead to the conclusion that the creation of an independent constitutional court is the most realistic option for Vietnam.

II. Four Main Themes of This Thesis

1. Background Knowledge on Constitutional Review

Since research and debate on constitutional review in Vietnam only started in 2001, they are still relatively modest compared to those of other legal fields. In order to justify the need for and the potential of the establishment of constitutional review in Vietnam, this thesis firstly introduces background knowledge on constitutional review.

Many scholars unanimously agree that constitutional review has been adopted in countries where governments are willing to limit their own political power. However, there is division among scholars in relation to differing theories explaining the adoption of constitutional review. The adoption of constitutional review as an instrument to develop the rule of law and protect human rights, as an insurance method, as a coordination and commitment method, and as a product of transnational influence are among the most popular theories. For the case of Vietnam, the growing awareness of rights among people provides the strongest justification for the potential adoption of constitutional review. Other than that, the necessity of constitutional review adoption can be connected with the rule of law, the constitutional commitment, the impact of the globalization of constitutional review. Although the political insurance theory fails to identify the reason for the potential establishment of constitutional review in Vietnam, the domestic political interests, to some certain extent, may feature it. In my opinion, the growing awareness of rights among people provides the strongest justification. When the people become more aware of their

fundamental rights, they will, one way or another, demand that they be respected by public authorities. The Communist Party and the Government cannot and should not ignore the people's legitimate demands. Therefore, the establishment of a constitutional review mechanism, upon which people can rely for the protection of their rights, is essential. That will also provide the basis upon which to maintain social stability, promote economic growth, and grow the reputation of the Communist Party.

There are several problems that a constitutional court, if it is established in Vietnam, must face, such as the possible political influence, or possible tension between the constitutional court and the ordinary judiciary. The discussion on such problems in this thesis plays the role in foreseeing difficult issues that the potential Constitutional Court of Vietnam may be faced with.

2. Two Basic Models of Constitutional Review

There are two basic forms that constitutional review takes: decentralized and centralized. The decentralized model of constitutional review, also known as the American model, has its origin in the United States. Whereas the centralized model was established in several European countries after World War I, and then expanded further within Europe to Germany, Italy, Portugal, and Belgium. It also spread to many new democracies, including South Korea, Thailand, Taiwan, Mongolia, Indonesia, and post-communist countries, particularly former members of the Soviet Union. In the American model, all courts, from the lowest court to the highest court, are tasked with reviewing the constitutionality of legislature and administrative acts. At the highest level, constitutional cases ultimately come to the Supreme Court, which is the highest court in the judicial system. By

contrast, the European model allows only one specific constitutional court, independent from political and judiciary system, to exercise constitutional review.

In order to adopt the decentralized model, it is a requirement that the Vietnamese judicial system must have some level of independence, and ordinary judges have to be capable to deal with constitutional cases. However, the existing judicial system of Vietnam has lost public trust due to its lack of independence, and the judges certainly are not prepared in terms of qualifications. So adoption of the decentralized model is not a realistic option.

Besides, this thesis finds some other institutional differences between the United States' Supreme Court, which represents the decentralized model, and the German Federal Constitutional Court, which represents the centralized model. The differences also indicate that the centralized model will be more applicable to Vietnamese context. First, the German Federal Constitutional Court has three main types of jurisdiction: the abstract review, the concrete review, and the individual complaint, while the Supreme Court of the United States only hears concrete cases. Because of the weaknesses of the Vietnamese ordinary judiciary, the establishment of a specialized constitutional court in Vietnam with broad jurisdictions other than just the concrete review is key for the better protection of human rights.

Second, while the Supreme Court of the United States can merely declare an unconstitutional act inapplicable in a concrete case, the German Federal Constitutional Court has the right to declare an unconstitutional law void with general binding effect. Even though the ruling of the Supreme Court of the United States is only binding upon the parties to the concrete case, it is bound to the rule of stare decisis, whereas there is no such a rule in

the German court system. This difference shows that adopting the German Court should be a better option for countries which lack the tradition of precedent, such as Vietnam.

Lastly, unlike the United States' Supreme Court, the German Constitutional Court applies the principle of proportionality, a method of constitutional interpretation. The principle of proportionality serves as a significant conciliatory instrument with which the Court can reconcile the individual rights provisions and the limitation clauses to these rights in order to ensure that they can co-exist in the Basic Law. Since the Constitution of Vietnam also accords a general limitation clause, that allows justifiable limitations on rights and freedoms, the adoption of the proportionality theory is a possibility.

3. The Prevalence of the Centralized Constitutional Review Model

The centralized constitutional review has been a favorable option, when compared to the decentralized model, for many countries around the world, especially for transitional democracies. Since most countries that adopted centralized constitutional review have followed the civil law system, several scholars believed in the close link between civil law tradition and the attraction to centralized constitutional review. A crucial reason for civil law countries being reluctant to adopt decentralized judicial review are the wide differences between judges in common law and civil law traditions. The lack of the doctrine of precedent in civil law countries also reduces the attraction to the decentralized review model.

Japan's experience indicates several obstacles for the decentralized model to function in a civil law tradition. One of reasons explaining the Japanese Supreme Court's passivism, with respect to the exercising of constitutional review, stems from the nature of civil law tradition. Being a former colony of France, Vietnam's legal system has largely been

influenced by the French civil law system. Therefore, the adoption of the centralized model appears to be more suitable to Vietnam which has the legal system strongly rooted in the civil law tradition.

Unlike Japan, South Korea has adopted centralized constitutional review as the result of long negotiations among political parties. The Korean Constitutional Court, created in 1987, was modelled on the German Federal Constitutional Court. However, the absence of abstract review and the absence of power to review ordinary court decisions are jurisdictional characteristics that differentiate the Korean Court from its German counterpart. In the Vietnamese context, Korean experience would be useful to help the potential Constitutional Court of Vietnam avoid possible rivalries with the existing court system.

The Constitutional Court of Thailand is also introduced in this thesis as evidence of how a constitutional court destroys its reputation by actively getting involved in political matters. Since its establishment, the Constitutional Court of Thailand has delivered some important decisions in favor of human rights. Yet the Court is well known for its deep involvement in politics, which has led to the erosion of its credibility. The introduction of discussion around the politicalization of the judiciary in the Constitutional Court of Thailand seeks to suggest to the potential Court of Vietnam to take a cautious path so that its credibility may be gradually increased.

4. A Realistic Approach Toward the Creation of a Constitutional Court in Vietnam

Since the Supreme Court and a constitutional council under the National Assembly are considered unsuitable in the Vietnamese context, an independent constitutional court appears to be the most favorable option. It is believed that the Vietnamese ordinary judges are neither willing nor capable of taking over the duty of constitutional interpretation. The creation of a specialized constitutional court essentially aims to overcome this hurdle. Furthermore, the socialist power arrangement also makes the option of establishing an independent constitutional court more applicable to Vietnam. Instituting a specialized court to deal with constitutional matters, instead of granting the constitutional review power to the Supreme Court, also may avoid drastically increasing the caseload of the latter. Lastly, the establishment of a specialized constitutional court with adjudicative power can avoid creating authoritative overlap between a constitutional council and other committees of the National Assembly.

Regarding the tenure of judges of the potential Constitutional Court of Vietnam, they should have a fixed, non-renewable term, instead of enjoying permanent appointment. That would help reduce possible influence and pressure put on constitutional judges. A nine-year term is just a suggestion and can be expected to be a reasonable period of time for judges to advance their own ideologies and assert their independence. In addition, the inclusion of academics in the composition of the potential Court is necessary. That is because it will produce a bench with adequate expertise to deal with complex constitutional issues, without them being influenced by the existing corrupted court system.

In terms of jurisdiction of the potential Constitutional Court of Vietnam, it should hold the power to review legislation through abstract review and concrete

review. However, the decisions of the ordinary courts should be kept out of the Constitutional Court's gambit, in order to avoid possible conflicts between the Constitutional Court and the Supreme Court. Furthermore, a constitutional complaint system should be excluded during the early years of the new Court to prevent a flood of litigation. But the absence of a constitutional complaint mechanism should not be permanent.

With regard to the decisions' effect of the potential Constitutional Court of Vietnam, it should be divided into two categories. First, regarding the declaration of the unconstitutionality of laws enacted by the National Assembly, the potential Constitutional Court of Vietnam should be able to make declaratory decisions only. The Court can declare a National Assembly's statute unconstitutional but cannot abolish it. It is to reduce the risk of political attacks. It may create some political and social pressure on the National Assembly to amend or abolish it. However, the form of purely declaratory decisions may be considered as a temporary expedient during the new years of the Court rather than necessarily a permanent institutional feature. Second, regarding the declaration on the unconstitutionality of by-laws, before announcing a ruling on unconstitutionality, the Court must give the organ, that has issued the unconstitutional document, an opportunity to annul or amend the document itself. In case that organ ignores the Court's warning, then the Court must declare that by-law document unconstitutional. Then the Court can set a period of six months, from the issuing date of the Court's decision, for the issuing body to annul or amend the unconstitutional by-law document itself. The Court may also give instruction on how to revise it in accordance with the Constitution. If the issuing

body does not annul or amend the unconstitutional by-law document within the stipulated period, it will be invalidated. During that six-month period, such an unconstitutional document should not be enforced.

The establishment of an independent constitutional court may give rise to tensions between the Constitutional Court and the ordinary judiciary. With the aim to moderate the possible intense interaction between the potential Constitutional Court of Vietnam and the ordinary courts, the accessibility to the former and its jurisdiction has been narrowed: the ordinary courts' decisions are kept away from the potential Constitutional Court of Vietnam, and the constitutional complaint mechanism is excluded during its first years of establishment. Yet it is important to emphasize the coordination between the two court systems. The potential Constitutional Court should seek smooth dialogue and persuasion, and approach matters in a spirit of comity, instead of entering into a fight with ordinary courts.

The outcome of the potential establishment of a Constitutional Court in reality would lay in the details of not only how it is constructed, but also unknown factors such as what the new Court will do with its powers or which approach the constitutional judges will take. In many ways it is always hard to predict how the potential Constitutional Court of Vietnam will function. Therefore, this thesis introduces a cautious approach upon which the potential Constitutional Court will be able to manage equilibrium in its performance. The cautious path is expected to prevent the potential Court from become either an activist constitutional court that would get involved in highly sensitive political issues or just a marginal player that has relatively minor impact in protecting individual rights and upholding the rule of law.