**NAGOYA UNIVERSITY**
**GRADUATE SCHOOL OF LAW**

**DOCTORAL DISSERTATION**

# THE POTENTIAL ADOPTION OF CENTRALIZED CONSTITUTIONAL REVIEW IN VIETNAM: A REALISTIC APPROACH

Student name : Do Thi Phuong

Name of course : The LL.D. (Comparative Law) Program in Law and Political Science (2018-2021)

Student ID Number : 431804028

Academic Advisor : Professor Minori Okochi

Academic Sub-Advisor: Professor Hidenori Moto

Academic Sub-Advisor: Professor Kazuhisa Saito

Date of Submission : December 25, 2020

**Acknowledgement**

First and foremost, I am deeply indebted to Professor Koji Aikyo for his guidance, invaluable advice, and relentless motivation to me until the completion of my thesis. I would not have ended up this thesis without his enthusiastic and devoted supervisor. I would like to express my sincere gratitude to Professor Minori Okochi and Professor Hidenori Moto for their insightful comments in my annual presentations, which could further nurture my idea and mainstream my research cope into the clear direction.

My study would not have been possible without the generous funding that I have received from the MEXT scholarship program. In this respect I would like to thank the Government of Japan for providing the financial support.

Last but not at least, I would like to express my highest and deepest thanks to my beloved family. Thank you mother and father for always supporting me from afar. Thank you Nathan for always being my side with your undoubting love, endless patience, and unfailing understanding. Thank you Minh as you are the reason that brought me here. I am doing my best to be a good role model for you to look up to.

**Abstract**

Constitutional review is the formal power of a local court or court-like body to set aside or strike down legislation and administrative action incompatible with constitutional norms. Nowadays, constitutional review has gone global. However, Vietnam is still among a small number of nations which lack constitutional review and accord the legislature as well as the Prime Minister the power to supervise the constitutionality of the laws and administrative actions. The proposal for establishing a constitutional review system in Vietnam existed in the draft of the Constitution of Vietnam prior to its promulgation in 2013. It was, however, rejected in the final version. Yet, 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.

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.

This thesis also introduces a cautious approach upon which the potential Constitutional Court of Vietnam 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.

**Table of Contents**

## Introduction

The ideas of the rule of law and human rights have spread to many countries in the last century. Although the concept of the rule of law is still in debate, no one can deny that the rule of law means that the government must implement all of its activities within the bounds of the existing law.[1] In the rule of law, the constitution plays a sovereign role controlling the state authorities' power. A state should not be recognized as having the rule of law if the government infringes upon the constitution without there being a mechanism in place to challenge that infringement. In other words without a mechanism for constitutional review, there can be no rule of law.

In Vietnam, the terminology, 'the rule of law', was mentioned for the first time in Article 2 of the amended Constitution adopted in 2001: "The Socialist Republic of Vietnam is a socialist rule of law state of the people, by the people, for the people." In the rule of law, the state government's legitimacy is derived from the people as the ultimate source of authority. The Constitution of Vietnam asserts that all state power belongs to the people. The people, by means of the Constitution, grant power to the government. So once the government infringes constitutional provisions, it means that the people's representatives have breached popular sovereignty. It can be seen that the authorized government, for various reasons, does not always abide by the general will of the people. Therefore, a constitutional review mechanism is necessary for Vietnam to combat the infringement of popular sovereignty, uphold the rule of law, and protect the rights of individuals.

However, since the first Constitution of 1946 until the recent Constitution of 2013, a constitutional review system in which the ordinary judiciary, or a specialized constitutional court, is allowed to review the constitutionality of legal documents has been absent. Instead, Vietnam has adopted the political control of the constitutionality of legal documents. According to Article 70 of

[1] Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009), 210.

the 2013 Constitution of Vietnam, the National Assembly exercises the power of supreme oversight over the observance of the Constitution, laws and resolutions of the National Assembly.[2]

Yet, in reality the National Assembly of Vietnam has never claimed any legal documents unconstitutional. This does not mean the constitutional infringements do not occur in practice. Instead it proves that the National Assembly has absolutely failed to exercise its legislative self-control mechanism. In fact several constitutional provisions have been violated. The *Motorcycle registration debate* in 2005 and the *Household registration case* in 2016 illustrated but two of the many examples where the legal documents conflicted with constitutional norms. These two cases will be described in more detail in chapter IV of this thesis. In this introduction, there is merely a brief description of them.

The *Motorcycle registration debate* was an example where local legal regulations broke the provisions of the Constitution. In order to deal with the raise of chaotic and unsafe traffic conditions, Hanoi and other local police departments began enforcing a legal provision in the national police force's regulations on the registration of vehicles. Under those regulations, implemented by local rules, each person may register only one motorcycle or moped. The local people complained to the authorities and the media. Other critics, including members of the Law Committee of the National Assembly, took the fight further arguing that the local regulation of restrictions on motorcycle and moped registrations to one vehicle per resident violated the right to property enshrined in the 1992 Constitution and the Vietnam Civil Code.[3]

Another example of legal document violating constitutional provisions stems from the *Household registration case* in 2006. In Vietnam, each household has been required to register its members with the local police, as well as to report any changes in the residents' living and residential status. The household registration policy was designed to restrict urban-ward migration. Yet it has imposed heavily upon the migrants' lives, by restricting the status and rights that they previously

---

[2] "The Constitution of Vietnam" (2013), Article 70.2.
[3] According to Article 58 of the 1992 Constitution, "The citizen enjoys the right of ownership with regard to his lawful income, savings, housing, goods and chattels, means of production, funds and other possessions in enterprises or other economic organization."

enjoyed. As a result, the debate on the constitutionality of this policy was raised during the drafting process of the Law on Residence in 2006. The argument was that the household registration system violates citizens' right to freedom of movement and other socio-economic rights, namely the right to housing, to work, to health care service, and the right to education for their children.

Those two cases not only demonstrate the dormant nature of the current method of constitutional protection - the legislative self-control mechanism - but also lead to calls for the establishment of constitutional review as a mean of safeguarding fundamental individual rights.

Furthermore, many human rights problems have arisen in Vietnam. In 2018, the organization *Human Rights Watch* reported that the government violated many civil and political rights, including freedoms of expression, assembly, and association; as well as the freedoms of movement, religion, and belief. Besides, Vietnam was reported to frequently infringe the people's right not to be subjected to torture or inhuman and cruel treatment, as well as the right to a fair trial and legal assistance. Arrests, criminal convictions, and physical assaults against human rights activists have continued to increase in the last couple of years. Police brutality, sometimes leading to deaths in police custody, has been commonplace.[4] *The Freedom House*, an independent watchdog organization also noted in its *2018 Human Rights Survey on Political Rights & Civil Liberties* noted the following human rights problems: "Although some independent candidates are technically allowed to run in legislative elections, more are banned in practice. Freedom of expression, religious freedom, and civil society activism are highly restricted."[5] According to *The Freedom House,* Vietnam is not free in terms of its freedom status, with a score of only 20/100.

In terms of constitutional review in Vietnam, constitutional violations occurred without sanctions and the human rights situation has not been improved partly because of: (1) the

---

[4] Human Rights Watch, "World Report 2018: Rights Trends in Vietnam," January 5, 2018, available at <https://www.hrw.org/world-report/2018/country-chapters/vietnam.>

[5] Freedom House, "Freedom in the World 2018: The Annual Survey of Political Rights & Civil Liberties," 2019, 1100, available at <https://freedomhouse.org/sites/default/files/2020-02/FreedomintheWorld2018COMPLETEBOOK.pdf.>

ineffectiveness of legislative self-control mechanism; and (2) the lack of an institution that can decide on the constitutionality of a legal regulation or of a government official's act. First, according to the 2013 Constitution, legislative control is still self-control, because only the National Assembly has the right to review and amend, or annul laws that are contrary to the Constitution through exercising supervisory power. The principle of the National Assembly being the highest representative body of the people is considered the basis for the empowerment of the National Assembly to have the right to examine the constitutionality of the laws. However, in reality the National Assembly performs this function in an unsatisfactory manner.

Second, Vietnam is still among a small group of nations which lack constitutional review. Before the latest constitutional amendment process in 2013 came to an end, a provision on constitutional council was for the first time included in the draft of revised constitution. Unfortunately, the proposal of the constitutional council was eventually rejected. The 2013 Constitution grants the responsibility of supervising conformity with the constitution to several entities: the National Assembly plays a central role in the mechanism of constitutional protection, exercising the power of supreme oversight over the observance of the Constitution;[6] other governmental bodies, such as the Prime Minister, the Supreme Court, the Supreme Procuracy, and the National Front are also responsible for protecting the Constitution from within their duties and powers. Yet an institution with jurisdiction to adjudicate constitutional violations is still absent in Vietnam.

The vital question this thesis deals with is how to foster the rule of law and protect human rights in Vietnam through the establishment of a constitutional review mechanism. Vietnamese scholars often discussed this topic, especially before the amendment of the Constitution in 2013. They suggested three alternative options for the form of constitutional review in Vietnam: (1) to authorize constitutional review power for the Supreme People's Court, (2) to establish a constitutional commission under the National Assembly, and (3) to create a specialized constitutional court. Most

[6] "The Constitution of Vietnam" (2013), Article 70.2.

Vietnamese legal scholars have leaned toward 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. Therefore, this thesis will not only discuss the need for the establishment of constitutional review in Vietnam but also 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 analyzes four main themes relevant to the suggestion of establishing a constitutional review mechanism in Vietnam: background knowledge on constitutional review, two basic models of constitutional review, the prevalence of the centralized constitutional review model, and a realistic approach toward the creation of a constitutional court in Vietnam. The first theme in this thesis provides background knowledge on constitutional review in order to illustrate the meaning of the establishment of constitutional review in a democracy. 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. Those theories will be discussed more deeply in chapter I of this thesis and will be referred to in chapter V in order to justify which theories are applicable for Vietnam's situation. 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, and the desire to enhance the leadership of the Vietnamese Communist Party.

The second theme is that a constitutional review system can foster the rule of law and safeguard fundamental human rights only if adopting countries have chosen a model of constitutional review which is suitable to their individual circumstances. 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. It is endorsed by the famous case of *Marbury v. Madison.*[7] 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 have the authority to adjudicate constitutional issues in the course of deciding legal cases and controversies."[8] By contrast, the European model allows only one specific constitutional court, independent from political and judiciary system, to exercise constitutional review. Studying these two models will enable a suitable model for Vietnam to be identified.

The third theme argues that centralized constitutional review, among two typical models, has been more favorable, spreading like wildfire throughout many countries, especially countries with civil law traditions. 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. This study suggests that the centralized model is more favorable than the decentralized model because it seems to be more suitable to a country which has the legal system strongly rooted in the civil law tradition like Vietnam.

---

[7] Richard H. Fallon Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*, 2nd ed. (Cambridge University Press, 2013), 12.
[8] Victor Ferreres Comella, "The European Model of Constitutional Review of Legislation: Toward Decentralization?," *International Journal of Constitutional Law* 2, no. 3 (2004): 461.

The fourth theme suggests a realistic approach toward the creation of a constitutional court in Vietnam in order to make sure it will function well under the political, legal, and social conditions of Vietnam. 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.

This thesis will first provide a general understanding of the constitutional review, underlining the reasons why constitutional review was adopted worldwide as well as the conditions for the success of a constitutional review court in Chapter I. The first chapter also addresses the key possible pitfall of establishing a specialized constitutional court. That pitfall being the possibility of creating tensions between such a court and the ordinary judiciary. The discussion then , in Chapter II, to explore two basic constitutional review models: decentralized and centralized. This chapter will highlight the historical backgrounds, jurisdictions and other relevant characteristics, as well as the practice of two constitutional courts representing the two review models, the Supreme Court of the United States and the German Federal Constitutional Court. Chapter III will address how centralized constitutional review spread throughout the world and why it is more suitable to civil law traditions than the decentralized model. In order to discover solutions to the lack of an institution in Vietnam that can decide the constitutionality of legal regulations, Chapter IV examines the actual situation of constitutional protection in Vietnam and defines the need for the establishment of constitutional review. Finally, in Chapter V, this thesis proposes a suggested model of constitutional review for Vietnam, in light of two comparative models of constitutional review, the practice of constitutional review in some selected countries, and particularities in the context of Vietnam. The recommendation

focuses on the possible institutional design of the potential Constitutional Court of Vietnam. Possible difficulties with the potential Court, such as skirmishes between the Court with the ordinary judiciary, and the ability of the Court to manage equilibrium in its performance will also be discussed in Chapter V.

## Chapter I: Constitutional Review – Definition, Theories of its Adoption, Potential Success, and Possible Tensions

### 1.1 The Aim of This Chapter

Nowadays in the world, the theory of constitutional review is no longer a newly discovered land. However, research and debate on constitutional review in Vietnam only started in 2001. Despite having attracted the attention of several domestic scholars, research on constitutional review in Vietnam is still relatively modest compared to that of other legal fields. In order to justify the need for and the potential of the establishment of constitutional review in Vietnam, this thesis will first, through this chapter, introduce background knowledge on constitutional review.

However, there is no need to discuss here every issue of the general theory of constitutional review. Section 1.2 will explain the definition of constitutional review, giving a basic outline of what constitutional review is in general perspective. Following that, in section 1.3, is a discussion on the theories of constitutional review adoption. This section will examine the theories, given by scholars, that explain the global expansion of constitutional review. The potentional success of a constitutional review court will be mentioned in section 1.4. And, lastly, section 1.5 will discuss possible tension between the constitutional court and the ordinary judiciary. These discussions will be recalled in the following chapters of this thesis in order to explain the need for and the potential of the establishment of constitutional review in Vietnam from a comparative perspective.

### 1.2 Defining the Term of Constitutional Review

In its most sweeping form, constitutional review refers to the power of courts to strike down laws passed by legislatures and administrative decisions made by government agencies. [9] Constitutional review can be understood as the evaluation of the constitutionality of laws and

[9] Tom Ginsburg, "The Global Spread of Constitutional Review," in *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), 81.

administrative regulations. It is intended to be a system of preventing violation of rights granted by a constitution, thus assuring the efficacy of those rights, as well as their stability and preservation. As is well known, the term "judicial review" is often used for the American or decentralized model, whereas the European or centralized model sticks to the term "constitutional review." However, in the context of this thesis, the term "constitutional review" refers to both review models.

Basically, constitutional review is understood first of all as reviewing the constitutionality of legislation. However, the practice of constitutional review shows that it was created not merely to review the constitutionality of legislative acts. For instance, constitutional courts in several European and East Asian countries, in addition to reviewing the constitutionality of parliamentary statutes, perform other functions as well, such as resolving disputes between State agencies, between State agencies and local government, and between local governments. These courts, namely the German and Korean Constitutional Courts, also deal with issues of impeachment, dissolution of unconstitutional political parties, and constitutional complains.

A point worth noting is that constitutional review does not mean the same thing in every country. Constitutional review in different countries differs in a number of respects, including whether there are limitations on the kinds of questions a constitutional review court decides; whether the questions can be brought directly to the court or are referred to the court by an agent authority; whether decisions are made by the court as a whole or by panel. How constitutional review varies from one country to another will be analyzed profoundly in Chapter III and Chapter IV of this thesis discussing two basic constitutional review models in the United State of America, Germany, Japan, South Korea, and Thailand.

### 1.3 Theories of Constitutional Review Adoption

After World War II, there was a growing willingness for governments to constrain themselves by constitutional review. Several different theories have been proposed to explain why politicians would adopt constitutional review that appears to limit their own political power, and, what underlies

this radical global move toward "juristocracy."[10] In fact, the hypothetical theories have described the adoption of constitutional review as (1) an instrument to protect the rule of law and human rights, (2) a coordination and commitment method, (3) an insurance method, and (4) a product of transnational influence.[11] This section will briefly describe these theories to explore why self-interested governments would willingly constrain themselves by constitutional review.

Two typical models of constitutional review, centralized and decentralized, have their own reasons for being chosen for establishment in different countries. However, the theories of constitutional review adoption discussed in this section have nothing to do with the actual type of review. Therefore, this section will only take a deep look at theories describing the reasons why constitutional review was adopted in general, whilst the particular accounts of constitutional review model choices will be examined in the next Chapter of this thesis. Studying various models of constitutional review is a necessary part of being able to recommend the establishment of a system that can decide on the constitutionality of laws and government acts in Vietnam, and indeed the necessity of such a system. Hence, before discussing which model of review is more suitable to Vietnam, reasons for having a system of review need to be clarified initially.

### 1.3.1 Constitutional Review as An Instrument to Protect the Rule of Law and Human Rights

From a purely contemporary perspective, it would be inappropriate to form theories concerning the spread of constitutional review without consideration of the association between constitutional review and individual rights and the rule of law. Before analyzing why protection of individual rights generates a demand for constitutional review, it is needed, briefly, to understand the rule of law.

---

[10] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge London: Harvard University Press, 2007).
[11] Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?," *The Journal of Law, Economics, and Organization* 30, no. 3 (August 2014): 587–622.

Although the rule of law is still a debatable concept, most scholars agree that it is a concept distinct from the "rule of men" offering mechanisms that restrain behavior in politics. For Dicey, "it [the rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government."[12] Joseph Raz later gave a clearer definition. According to Raz, the rule of law means that the government must implement all of its activities within the bounds of the existing law.[13] Richard Fallon did not give a definition but clarified the basic elements that constitute the rule of law, including (1) the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs; (2) the efficacy of the law to guide people at least for the most part; (3) the legal stability; (4) the supremacy of legal authority ; and (5) impartial justice.[14] Briefly, although the rule of law is still in debate, in a general sense, it means that the law plays a sovereign role in governing actions of both state institutions and individuals.

The rule of law is a concept that has developed in the British and American legal tradition. In the German Constitution, there is another concept, the *Rechtsstaat,* that is the contemporary German version of the rule of law.[15] Basically, the notion of the *Rechtsstaat* has gone through three phases. In the first half of the nineteenth century, it "meant the liberal concept of a free and democratic state with a constitution, a parliament, fundamental rights, independent courts, and a rule of law"[16] that guaranteed equal liberty for all. But in the second half of the nineteenth century, it came to be understood more in terms of rule by law with the disappearance of most of the substantial elements of the earlier concept. The new substantial *Rechtsstaat* was only enshrined in the post-War period of German self-recrimination under the Basic Law by re-injecting substantive content into the rule of

---

[12] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th Revised edition (Indianapolis: Liberty Fund Inc, 1982), 120.
[13] Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009), 210.
[14] Richard H. Fallon Jr, "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97, no. 1 (1997): 8.
[15] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), 108.
[16] Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart Publishing, 2011), 36.

law. The notion of *Rechtsstaat* now goes "beyond a merely formal understanding of the rule of law by establishing the respect for and the protection of the dignity of man as the guiding principle of all state action."[17]

The rule of law and the principle of *Rechtsstaat* are today widely accepted, both nationally and internationally. Both the rule of law and the *Rechtsstaat* tend to be interpreted similarly today in spite of their different origins and contexts. So, in this thesis, the term "the rule of law" will be used to refer to both the rule of law and the *Rechtsstaat*.

Today, in legal theory, the conceptions of the rule of law are formulated into two basic categories: "formal versions" and "substantive versions."[18] Those who follow the former only attach special importance to the form of legality and procedural requirements for application of the law. The requirements usually include the clarity, and stability of the law as well as an impartial justice that employs fair procedures.[19] Supporters of formal versions do not consider morality as a part of the rule of law. Those who espouse the substantive rule of law go further than that. Even though they do not erase the formal criteria of the law, they emphasize that the law must hold some values in its content, such as democracy, individual rights, and social welfare rights. The most common substantive version includes individual rights within the rule of law.

As has become particularly clear since the 20th century, a purely formal conception is insufficient, and in fact, the rule of law is difficult to split from democracy and protection of human rights.[20] The formal rule of law, Brian Z. Tamanaha finds, is consistent with slavery, segregation, and apartheid, as confirmed by the histories of the United States and South Africa, and it is also consistent

---

[17] Ranier Grote, "Rule of Law, Rechtsstaat and Etat de Droit," in *Constitutionalism, Universalism and Democracy - A Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law (Studien Und Materialien Zur Verfassungsgerichtsbarkeit)*, ed. Christian Starck (Baden-Baden: Nomos Publisher, 1999), 286.
[18] Tamanaha, *On the Rule of Law*, 2004, 91.
[19] Joseph Raz, "The Rule of Law and Its Virtue," 214–19; Fallon Jr, "'The Rule of Law' as a Concept in Constitutional Discourse," 8-9.
[20] Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press, 2013), 212.

with authoritarian or non-democratic regimes, as illustrated by the systems of Singapore and China.[21] Therefore it is often argued that, to serve as a bulwark against tyranny, the core elements of the rule of law must be of most relevance to the protection of individual freedom. In order to protect individual rights the law must be a "good law" that fully expresses the will of the people and serves the majority of society. So the pursuit of the substantive rule of law is necessary to prevent an "evil law" to come about.

Adhering to the rule of law would be meaningless without checking on government actions and upholding the protection of individual rights. The explosion of human rights in the contemporary world has raised concern for the creation of effective instruments to make the protection of rights practical and not merely theoretical.[2223] Constitutional review has been introduced as a must-have method. Through it a "mature democracy"[24] protects itself against the tyranny of majority rule.[25]

Individual rights were acknowledged in many constitutions adopted after World War II indicating the movement towards an international human rights regime. Alongside it were constitutional review provisions as an instrument for the protection of individual rights. Fascist atrocities provided a bitter lesson on the potential dangers of unconstrained democracy. As a result, the significance and legitimacy of constitutional review in many nations after World War II has been a reaction against past governmental abuses.[26] The logical explanation can be expressed this way: the substantive rule of law is upheld to limit the governmental power and protect fundamental rights; and constitutional review is established as a device to make the rule of law work. So, it is clear that the substantive rule of law engenders constitutional review. Cappelletti's argument can be quoted to

---

[21] Tamanaha, *On the Rule of Law*, 2004, 120.
[22] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (New York: Oxford University Press, 1989), 208.
[23] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (New York: Oxford University Press, 1989), 208.
[24] The words were used by Ronald Dworkin in his book *A Bill of Rights for Britain* (Chatto & Windus, 1990).
[25] Ran Hirschl, "The Strategic Foundations of Constitutions," in *Social and Political Foundations of Constitutions*, ed. Denis J. Galligan and Mila Versteeg (Cambridge: Cambridge University Press, 2013), 158.
[26] Cappelletti, *The Judicial Process in Comparative Perspective*, 205.

illustrate how the rule of law generates constitutional review: "At its most advanced and sophisticated stage, constitutionalism has demanded a body, or a group, sufficiently independent from the 'political' power, both legislative and executive, to protect a higher and relatively permanent rule of law against the temptations which are inherent in power. This demand has become especially urgent with the human rights provisions of the modern constitutions…"[27]

However, is the protection of rights the sole, or prerequisite, reason of constitutional review adoption in every polity? The answer given by professor Martin Shapiro is "no, it is not." Shapiro pointed out that nations which first adopted constitutional review "concerned themselves little with individual rights until long after they had achieved institutional legitimacy."[28] According to Shapiro, the German Federal Constitutional Court would still have been created without concern for constitutionalizing individual rights because Germany's federalism would require a constitutional review system to settle highly complex disputes between States. Yet, he did not forget to stress that the German Federal Constitutional Court obviously was founded in part to protect individual rights and in fact has been the guardian of human rights from the beginning of its operation.[29] So, to be clear, Shapiro's point is not to deny the hypothesis of connection between constitutional review and rights consciousness, but to emphasize that such a connection has become more obvious in contemporary constitutional review than in the very first part of its history.

### 1.3.2 Constitutional Review as A Coordination and Commitment Method

Another approach that provides a plausible explanation for the rise of constitutional review involves commitment and coordination. Ran Hirschl illustrates these sets of explanations as a functionalist approach to constitutionalization.[30] First, one set of functionalist theories suggests that a limited government through constitutional review might help to secure an environment conducive

---

[27] Ibid., 169.
[28] Martin Shapiro, "The Success of Judicial Review and Democracy," in *On Law, Politics, and Judicialization*, by Martin Shapiro and Alec Stone Sweet (Oxford University Press, 2002), 153–54.
[29] Ibid., 153.
[30] Hirschl, "The Strategic Foundations of Constitutions," 161–63.

to property transactions, contracts, and market transactions, and will thus attract foreign investment. In addition to Ran Hirschl, several other scholars have believed that constitutional limitations on government action can foster secure rights and hence economic growth. Tom Ginsburg also depicts constitutional review as an answer to problems of constitutional commitment. In an era of globalization, argued Ginsburg, establishing a constitutional review system is a way of signaling constitutional designers' serious intention to respect the constitution.[31] The commitment theory does not focus on the difference between political situations in various polities. Where a single dominant party controls the political arena or where there are rival many political forces vying for power, commitment theory can be equally applied to explain the adoption of constitutional review.

A second set of functional analyses addresses the emergence of constitutional review as a solution to coordination problems involving the separation of powers and multi-level governance. The establishment of democratic regime resulted in the existence of multi-layered systems in which the power is divided among the branches of government as well as between the central authority and the constituent units. The persistence and stability of such a system, says Ran Hirschl, "requires at least a semiautonomous, supposedly apolitical judiciary to serve as an impartial umpire in disputes concerning the scope and nature of the fundamental rules of the political game."[32] Concerning this point, Shapiro has also introduced the federalism hypothesis suggesting that the complex constitutional boundary arrangements in federalist countries actually necessitate the creation of constitutional review. Shapiro's argument is supported by the evidence of the emergence of the earliest systems of constitutional review in three federalist countries, the United States, Canada, and Australia.[33]

---

[31] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003), 28.
[32] Hirschl, "The Strategic Foundations of Constitutions," 162.
[33] Shapiro, "The Success of Judicial Review and Democracy," 149.

### 1.3.3 Constitutional Review as An Insurance Method

In addition to the sets of theories discussed in the two subsections above, scholars developed another rationale behind the institution of constitutional review - insurance theory. Professor Tom Ginsburg advanced the argument that when the ruling party fears loss of office, the likeliness of the establishment of constitutional review increases.[34] Opposed to the theory of constitutional design reflecting the interest of citizenry, Ginsburg affirmed that constitutional making actually is "dominated by the short-term interests of the designers."[35] Likewise, in response to the claims for constitutional review as a problem-solving form driven by sophisticated ideational platforms, Ran Hirschl offers a modern defense of constitutional review as a by-product of domestic political diffusion, which he calls *hegemonic preservation*.[36] As Ran Hirschl argues, "constitutional courts and their jurisprudence are integral elements of a larger political setting and cannot be understood as isolated from it."[37]

Why constitutional review is considered an insurance method? To answer this question, one should understand the meaning and logic of insurance in general. Those who are worried about personal risk would choose to buy insurance. Ran Hirschl has given a very typical example: one would buy insurance against flooding when he or she lives in the Netherlands but would also cancel it if he or she happens to move from the Netherlands to the Gobi Desert, a very dry area that has never suffered from flood.[38] So, normally before purchasing insurance, the level of risk is weighed against the cost of the proposed insurance policy. The insurance policy costs might be high but the potential financial loss caused, if the risk should eventuate, is possibly much higher. In that case, insurance is a form of risk management that helps to protect the insured from potential loss. The logic of insurance may be applied in understanding why politicians willingly include constitutional review provisions in the

---

[34] This idea was expressed in Tom Ginsburg's works: Ginsburg, *Judicial Review in New Democracies*; Ginsburg and Versteeg, "Why Do Countries Adopt Constitutional Review?"
[35] Ginsburg, *Judicial Review in New Democracies*, 23.
[36] Hirschl, "The Strategic Foundations of Constitutions."
[37] Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 11 (2008): 97.
[38] Hirschl, "The Strategic Foundations of Constitutions," 166.

constitutional text. At the time of constitutional drafting, where a single dominant party believes in its electoral succession, constitutional review as an insurance method is not in demand. The single dominant party must see no potential risk if they are not going to pay for insurance. Conversely, where ruling parties believe that they are unlikely to hold on to political power, they would have a strong incentive for setting up constitutional constraints, including constitutional review system. The reason being that the parties assume that such a system may serve as their agents to reduce the risks they have to face when they are out of office.[39] In short, constitutional review could be adopted as an insurance system where political forces are diffused because "by ensuring that losers in the legislative arena will be able to bring claims to court, judicial review lowers the cost of constitution making and allows drafters to conclude constitutional bargains that would otherwise be unobtainable."[40]

As the insurance theory of constitutional review adoption bases its idea on the uncertainty of the political environment, it is quite insightful to assess this theory during periods of regime change and political transition. The degree of political uncertainty facing politicians, either those on the decline or those insecure in their newly acquired power, is an important predictor of whether or not a constitutional court will be established. The constitutional review systems in South Korea and Israel are two typical examples of how constitutional review resulted from the uncertainty of the future political configuration at the time of constitutional drafting. The creation of the Korean Constitutional Court in 1987 entailed long negotiations and a compromise among political parties. It was expected to provide an alternative forum for those who might lose in the elections.[41]

Israel is another examples that could be provided to prove that "demand for insurance should increase when established political forces believe that they will no longer be able to remain in

---

[39] Jodi S. Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*, 1st edition (University of Notre Dame Press, 2008).
[40] Ginsburg, *Judicial Review in New Democracies*, 33.
[41] Justine Guichard, "Transitioning by Amendment: The 1987 Revision of Constitutional Norms and Institutions," in *Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice*, ed. Justine Guichard (New York: Palgrave Macmillan US, 2016), 23–46.

power."[42] In 1977, the electoral victory of Likud Party, headed by Menachem Begin, ended three decades of Labor Party political dominance. The alternation of political power made political outcomes less predictable and created a public-political vacuum. In that situation, the Israeli Supreme Court got involved more in controversial political and social issues. In its interpretation of the new Basic Laws adopted in the 1992 legislation, the Supreme Court concluded that it has the authority to exercise constitutional review of legislation and to declare laws that contradict the Basic Laws void. [43] According to Ran Hirschl, the establishment of constitutional review in Israel in 1995 was part of a strategic response by Israel's hegemonic secular elite who had been losing its power on the country's majoritarian decision-making arenas.[44]

### 1.3.4 Constitutional Review as A Product of Transnational Influence

Although constitutional review is universally described as an insurance method resulted from domestic political diffusion, "in modern constitutionalism there is a clear trend toward a transnational, indeed a universal acceptance of certain values" and "this trend is especially apparent in the context of judicial review."[45] World history has often been told as the accretion of connections between societies through cultural and economic movements. The influences among countries are therefore obvious. The transnational hypothesis is formed based on the logic that the more countries adopt a particular policy or institution, the more likely others are to follow.

The transnational diffusion theory has proposed a wide range of mechanisms through which constitutional review spreads across national boundaries. Goderis and Versteeg conceptualize diffusion in the constitutional realm and suggest that constitutional provisions, including constitutional review, might diffuse as a result of four distinct mechanisms: (1) coercion, (2) competition, (3)

---

[42] Ginsburg, *Judicial Review in New Democracies*, 57.
[43] Oren Soffer, "Judicial Review of Legislation in Israel: Problems and Implications of Possible Reform," *Israel Affairs* 12, no. 2 (April 2006): 307.
[44] Ran Hirschl, "The Political Origins of the New Constitutionalism," *Indiana Journal of Global Legal Studies* 11, no. 1 (2004): 104.
[45] Cappelletti, *The Judicial Process in Comparative Perspective*, 119.

learning, and (4) acculturation.[46]

The *coercion* mechanism suggests that powerful states, such as former colonizers and aid donors, push for the adoption of specific constitutional arrangement in less powerful states. The evidence of this mechanism can be clearly seen in the case of the United States directing the writing of the 1935 constitution of the Philippines and the 1986 constitution of Micronesia. Another extreme example is that of the Japanese constitution, which included provisions for American style constitutional review because it was imposed by the occupation authorities.[47]

The second mechanism, *competition*, implies that states strategically copy particular constitutional arrangements in order to attract foreign trading partners and investors. Foreign buyers and investors would favor the countries with effective system of human rights protection because it ensures a secure investment environment, secure property rights and a transparent legal system.[48] So, of course, countries with a constitutional review system are considered more attractive to foreign buyers and investors because they provide an instrument to protect individual rights practically. This is certainly true in the case of the Sadat regime in Egypt. As the regime realized that its socialist and nationalist policies put the nation at a comparative disadvantage when potential investors feared expropriation, it created an independent constitutional court mandated to uphold the constitution's anti-expropriation guarantee.[49]

The third diffusion mechanism is *learning*. Under the logic of this mechanism, learning may take place through common legal origin, partnerships, shared language, shared religion, military

---

[46] Benedikt Goderis and Mila Versteeg, "The Transnational Origins of Constitutions: Evidence From a New Global Data Set on Constitutional Rights," February 2013.
[47] P. Allan Dionisopoulos, "Judicial Review and Civil Rights in Japan: The First Decade with an Alien Doctrine," *The Western Political Quarterly* 13, no. 2 (June 1960): 269; Masahito Tadano, "The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan," in *Contemporary Issues in Human Rights Law: Europe and Asia*, ed. Yumiko Nakanishi (Singapore: Springer, 2018), 75; Shigenori Matsui, "Why Is the Japanese Supreme Court so Conservative?," *Washington University Law Review* 88, no. 6 (2011): 1376.
[48] Goderis and Versteeg, "The Transnational Origins of Constitutions."
[49] Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, 1st edition (New York: Cambridge University Press, 2007), 67–70.

alliances, or geographic proximity.[50] Actually, countries tend to follow the successful models of other states. It has become easier nowadays since the developed countries are more active in providing technical assistance to legal field exercises in general and constitution drafting in particular.

The last diffusion mechanism, *acculturation*, suggests that states adopt constitutional review models not because of material cost and benefits but because they want to gain international acceptance and legitimacy. In an era of globalization, it is understandable for countries to conform to worldwide constitutional scripts so that they will not be eliminated from world society. This is certainly true in the case of South Sudan. The youngest constitution in the world was adopted in South Sudan in 2011, when the country established itself as an independent state. The Constitution of South Sudan included human rights provisions that mostly corresponded to international norms. It also provided for a National Constitutional Review Commission to be established within six months of its independence. [51]

### 1.4 Conditions for The Success of A Constitutional Review Court

As discussed above, constitutional review is one of the benchmarks of a liberal democracy and the establishment of this system becomes an indispensable need as the countries adhere to the rule of law. In fact, the establishment of constitutional review has also become a global trend. Nowadays, it is even present in countries that have long protested against it. Does the spreading of constitutional review mean that it is successful wherever it was created? The answer is "no, it does not". Some constitutional review systems are successful whereas others are not. The establishment of a constitutional review mechanism is not a guarantee that this institution will endure or become influential. For example, before the creation of the current powerful constitutional court, in Korea the constitutional adjudication system was established equivalently with each shift of regime since 1948.

---

[50] Goderis and Versteeg, "The Transnational Origins of Constitutions."
[51] Kevin Cope, "Global Constitutionalism Meets Local Politics: The Making of the World's Youngest Constitution," in *Social and Political Foundations of Constitutions*, ed. Denis J. Galligan and Mila Versteeg (New York: Cambridge University Press, 2013).

However, all those constitutional adjudication systems were just regarded as ornamental organs. Another example is the failure of the first Russian Constitutional Court (1991-93) when its decisions were ignored by political actors.

Generally speaking, success or failure of constitutional review rests on following conditions: initial intentions of political elites who design constitutional review courts, political environment after constitutional review courts are established, and court's strategies. But before going to discover elements that constitute the success or cause the failure of various courts deciding constitutional cases around the world, this thesis is going to concisely define what a successful constitutional review system is. Martin Shapiro admitted that it is difficult to define or measure the success of a constitutional review court. Yet he went on to say: "success is a purely institutional one involving whether a constitutional court has achieved acquiescence in its judgments by other public and private institutions, organizations and individuals."[52] Similarly, David Fontana defined the success of constitutional review courts as "the ability of the constitutional court to have their decisions enforced, their legitimacy respected and their political relevance ensured."[53] So generally speaking, a constitutional review court is defined as successful only when it is first used and then its decisions are complied with. Of course, even a highly successful constitutional court may experience a marked lack of success on a particular question at a particular time.[54]

For the purpose of this section, the phrase "constitutional review courts" is used to describe any courts that decide constitutional cases, including both ordinary courts of the decentralized review model and specialized constitutional courts of the centralized model. Despite the institutional

---

[52] Martin Shapiro, "Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience," in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (Kluwer Law International, 2002), 37.
[53] David Fontana, "Docket Control and the Success of Constitutional Courts," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Rochester, New York: Edward Elgar Publishing Limited, 2011), 624.
[54] Shapiro, "Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience," 39.

difference, the courts of both constitutional review models share some basic conditions for success of the system. This section will examine conditions ensuring the success of constitutional review in general, no matter which court model is exercising review power. The success, prevalence and spread of specialized constitutional courts will be analyzed in the next chapter of this thesis.

### 1.4.1 Initial Intention of Political Elites Who Design Constitutional Review Courts

It is safe to assume that a court would become either weak or powerful dependent on the interests of the political elites who design it. If the court is expected to be powerful, and an important part of the political order, it is likely given protection mechanisms to ensure its independence and the authority to set aside unconstitutional acts. In contrast, if the political elites are desirous of a weak court then they will not equip it with protection mechanisms as they would a powerful court. Thus, the court is hamstrung in terms of independence and setting aside unconstitutional acts.

In order to succeed, it is necessary for a constitutional review court to be independent. Independence can be understood as a standing the courts ought to have to protect themselves from any source of influence that affects or might passively affect the judicial decision-making process.[55] Constitutional provisions and legislation for the courts outline the safeguards of institutional independence as well as individual independence of judges. These include selection procedures, professional requirements, judicial tenure, mechanism of transfer and removal, remuneration, as well as procedural rules for the consideration of cases and the rendering of decisions. Of course a constitution and legislation cannot certainly ensure the independence of courts in practice. Yet courts will not be able to reach a certain level of independence without protections accorded by constitution provisions and legislation. Therefore, a successful constitutional review court first depends on the

[55] Georg Vanberg, "Establishing and Maintaining Judicial Independence," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford University Press, 2010), 100.

interests of the political elites at the time the court is established. If politicians just want to set up a weak court, the court is likely to be granted a more limited scope of independence.

While independence may be a prerequisite, it is not the only thing guaranteeing a successful constitutional review court. The jurisdiction of the constitutional review courts and the access to the courts play an important role in defining the success of the courts. The type of constitutional challenge that can be made varies from one country to another. Basically, there are three types of review: abstract review, concrete review, and constitutional complaints by individuals. The choice of types of review reflects the nature of a country's legal tradition. However, this aspect will be discussed in the next chapter. One thing to be examined here is that the choice of types of review also reflects the will of the political elites at the time constitutional review was created. The more types of review the court is given, the more opportunity for access to the court, and the more chances for it to become powerful. For example, the different jurisdictions of the Korean Constitutional Court and the Indonesian Constitutional Court illustrate how the choice of types of review can affect the overall development of constitutional review. The Korean Constitutional Court with a broad jurisdiction including a constitutional complaint mechanism not only makes it possible for individuals to assert their constitutional rights but also gives the Court great potential for independence and judicial activism. By contrast, despite being modeled from the Korean Constitutional Court, the Indonesian Constitutional Court did not adopt the system of direct citizen petition. As a result, the docket of the Indonesian Constitutional Court has been quite not impressive, comparing to that of its Korean counterpart.[56] And more importantly, the Indonesian Constitutional Court has not emerged with a perfect image whilst the Korean Court has become an activist institution.

The authority of constitutional review courts to impose remedies also affect how powerful and successful the courts are. The courts that have the authority to declare laws unconstitutional and strike them down carry with them more possibility for becoming powerful than the ones that can only

[56] Hendrianto, "Institutional Choice and the New Indonesian Constitutional Court," in *New Courts in Asia*, ed. Andrew Harding and Penelope (Pip) Nicholson (Routledge Law in Asia, 2011), 164–65.

recommend the legislature to repeal or amend the unconstitutional laws. But it must be noted that the authority of the court is given by the political elites who design it. So for a constitutional review court to succeed, the initial intention of designers plays an important role as one of the major conditions for success.

### 1.4.2 Political Environment After A Constitutional Review Court Is Established

Since constitutional review courts cannot initiate a constitutional review process, it depends on the petitioners to get involved in dealing with a constitutional case. In case of abstract constitutional review, it is politicians who decide whether to invite the court into the political process or not. In order to survive, the courts first need to receive petitions. So, in which political environment do politicians have more incentive to use a constitutional review court. Tom Ginsburg gives a clear explanation: "where a single party retains its dominant position, we would expect that constitutional courts are less able to exercise judicial power… In contrast, where the party system fragments, the tolerance zones of institutions that might discipline the court expand and with them the possibilities of exercising judicial power."[57]

Ginsburg's argument generates from his insurance theory of the establishment of constitutional review that found the support of other scholars such as Ran Hirschl. The insurance theory views the diffusion of political power as the root of constitutional review. The demand of prospective electoral losers for constitutional insurance to a great extent results from political diffusion, likewise, so too does the success of the court's operation. After the court is established, the diffusion of political power still plays an important role in encouraging the interaction of institutional and political factors. In other words, the fragmented political situation is where the political forces' demand for the insurance provided by constitutional review courts increases. Such demand is one of the factors that make constitutional review courts more accessible and powerful.

---

[57] Ginsburg, *Judicial Review in New Democracies*, 252.

The evidence of successful constitutional review due to political diffusion can be clearly seen in the cases of Korea and Hungary. The Korean Constitutional Court has been arguably very successful in demonstrating its independence and expanding judicial power. One way to explain its success is that Korea presents an ideal political environment for the exercise of constitutional review power. The design of the Korean Court reflected insurance needs since at the time of the constitutional bargain, the strength of its three political parties was almost equal. So the creation of the court served the interests of all parties. Then, subsequent to the court's establishment, the potential threat of instability due to the equal weakness of the three parties remained – and still remains today. Therefore, the parties have a strong incentive in empowering the Constitutional Court. Clearly, the political dynamic is crucial in the Korean Constitutional Court's performance making it become one of the most respected institutions in Korean society, also one of the most important constitutional courts in the world.[58]

In a similar case in Europe, the Hungarian Constitutional Court's success also resulted from a fragmented political environment. The Hungarian Constitutional Court was first established in 1989 when communist rule in the Hungarian People's Republic came to an end. In the years following the Revolution of 1989, politics in Hungary failed to face up to its instability as various parties sought to control the Parliament. In such political diffusion, politicians of course needed to seek political insurance. As a result, the Hungarian Constitutional Court emerged as a major political actor, taking an active role in shaping the new constitutional order.[59] However, the Hungarian Constitutional Court's success did not remain for long. The Court has critically been weakened since the constitutional amendment of 2002. The Constitutional Court of Hungary has turned into a loyal body to government power instead of the independent and genuine counterbalance it should represent. The reasons why the Court lost its integrity will be discussed in the following subsection.

---

[58] Tom Ginsburg, "The Constitutional Court and Judicialization of Korean Politics," in *New Courts in Asia*, ed. Andrew Harding and Penelope (Pip) Nicholson (Routledge Law in Asia, 2011), 145.
[59] Ginsburg, *Judicial Review in New Democracies*, 100.

In contrast to the above successful cases, Japan is a good illustration of how a single party holding on to political power could cause passivism within the court when it comes to exercising the power of constitutional review. As David S. Law and Shinegori Matsui observed, conservative political values have dominated Japanese judicial behavior for many decades.[60] In Japan, the conservative Liberal Democratic Party ruled uninterrupted for most of its postwar history. Of course, having an unchanged government for a long period of time would have a strong influence upon the composition of the Supreme Court of Japan and thus shape the conservative ideology of justices. The Supreme Court of Japan, argued David S. Law, "exercises a large measure of self-restraint in the area of judicial review, and especially so where politically sensitive issues are involved."[61] Furthermore, the Liberal Democratic Party must have no incentive to seek political insurance as it sees no threat harming its position.

### 1.4.3 Court's Strategies

Legal scholars generally agree that constitutional review court judges must be careful to balance their decisions in order to prevent the court from self-destruction. As mentioned earlier, in order to succeed, a constitutional review court must be used. Thus if the court's actions destroy politicians' incentive to continue to invite it into the political process, that means the court fails to protect its legitimacy and reputation. As Tom Ginsburg stated, "the choices of courts are crucial for determining how the system of judicial review operates and whether or not it will emerge as an important part of the political order."[62] What is more, once a constitutional review system is established its judges become the actors who play one of the main roles in enhancing the court's power as well as shaping the level of public attention. Therefore, the court's strategies, cautious or aggressive, actually reflect its judges' ideology.

---

[60] David S. Law, "Why Has Judicial Review Failed in Japan?," *Washington University Law Review* 88, no. 6 (2011): 1425–66; Matsui, "Why Is the Japanese Supreme Court so Conservative?," 1375–1423.
[61] Law, "Why Has Judicial Review Failed in Japan?," 1447.
[62] Ginsburg, *Judicial Review in New Democracies*, 104.

One reason why constitutional review courts should act with caution and prudence is that being too active in challenging authorities may lead the courts to be counteracted. A constitutional review court is not defined as successful if it cannot secure compliance. Securing compliance is even more challenging when they are young courts with many institutional vulnerabilities. To ensure compliance, different courts pursue different strategies. Some courts have succeeded while some others failed. Success or fail, it greatly depends on the court's strategies. This can be seen in contrasting cases of the United States Supreme Court and the first Russian Constitutional Court. For much of the 19th century, constitutional cases were conspicuous for their absence in the Supreme Court of the United States. It actually took 54 years after *Marbury v. Madison* before the Supreme Court got around to declaring another act of congress unconstitutional that was *Dred Scott v. Sanford*. By contrast, the first Russian Constitutional Court (1991-93), early on after the creation, was directly involved in conflicts regarding the distribution of powers that led to its suspension at the end of 1993. A well-known example of the Court's involvement in politics, especially in the separation of powers, is its decision overturning President Yeltsin's decree "On the creation of the Ministry of Security and Internal Affairs of the RSFRS." The decree was found unconstitutional primarily because the Russian President did not have the authority to create ministries or reorganize the structure of executive organs. This very first action of the Court was highly political and surprised the President of the executive very much. After the military seizure of parliament in October 1993, President Yeltsin suspended the first Russian Constitutional Court and Valerii Zorkin was forced to resign as its chairman. One of the explanations for the failure of the Court is that it did not maintain its neutrality whilst its power was still not sufficiently stable. The Court's eagerness to take part in political order harmed itself.

Similarly, the Hungarian Constitutional Court has been packed due to its early activism. It was believed to be "the most active and the most powerful constitutional court in the world"[63] having been involved in highly political issues such as the abolition of the death penalty and drawing the line

[63] Georg Brunner, "Development of a Constitutional Judiciary in Eastern Europe," *Review of Central and East European Law* 18, no. 6 (1992): 539.

between the competences of the president and the executive. The Hungarian Constitutional Court's decisions, at the time it was still a new institution, often generated strong political reactions, sometimes even anger.[64] However, the Court did not remain active for long. The Court's activism has been restricted in several significant ways, such as by limiting its power to review the constitutionality of law, by packing through appointment of judges, and by curbing the powers of judicial self-administration.[65] Upon the completion of the nine-year term of the first constitutional court judges in 1998, the Court was shaped into a loyal body consisting of new judges supportive of the governing majority's agenda. In short, from the above mentioned examples, it can be said that "[judicial] activism is dangerous not only to the political system and parliamentarism, but to the institution of constitutional jurisdiction itself."[66]

For a number of obvious reasons, it is convenient to turn next to the question of how the constitutional review courts can balance their decisions, challenging authority but securing compliance at the same time. Basically, there are two strategy options for the courts to pursue in order to establish judicial power: (1) gradually build diffuse support by avoiding politically sensitive matters, and (2) resolve more important political controversies and ruling in favor of the more powerful actor in the given dispute.

With regard to the first option, there are basically two reasons for some courts choosing to avoid deciding a politically sensitive issue. First, the issue presented to the courts might be so polarizing that judicial decisions on it could generate more political toxins than the courts could manage.[67] By deciding sensitive cases, the courts might set themselves on a path to destruction when faced with the risk of counterattack by the losing side or the fierce reaction of the public. Thus,

---

[64] Istvan Stumpf, "The Hungarian Constitutional Court's Place in the Constitutional System of Hungary," *Civic Review* 13 (2017): 242.
[65] Hungarian Helsinki Committee, "Attacking the Last Line of Defense: Judicial Independence in Hungary in Jeopardy," June 15, 2018, available at <https://www.helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf>.
[66] Stumpf, "The Hungarian Constitutional Court's Place in the Constitutional System of Hungary," 244.
[67] Fontana, "Docket Control and the Success of Constitutional Courts," 628.

restraining themselves from dealing with some particularly politically sensitive matters would help the courts to secure their legitimacy as well as reputation. The Supreme Court of the United States is a good example of successfully developing institutional power by having restrained itself from dealing with excessive political conflicts. This strategy of the Supreme Court of the United States is known as the political question doctrine that will be discussed in the next chapter of this thesis. By applying the political question doctrine, the American Supreme Court, for instance, avoids the sensitive problems of holding a war to be unconstitutional. This is evident in notable cases when the Court refused to hear cases related to the constitutionality of the Vietnam War[68] and when it reversed a ruling by Justice William O. Douglas in 1973 ordering the military to stop bombing Cambodia.[69]

While the first reason why constitutional review courts choose to avoid politically sensitive issues focuses on the content of issues, the second one relates to the quantity of constitutional review. Deciding too many cases, argues David Fontana, can be damaging to established and secure, as well as new and vulnerable, constitutional review courts.[70] A decision of a constitutional review court always creates a winning party and a losing party. The losing party is of course never happy with the court's ruling. Subsequently the court will be flooded with more political criticism than it can handle. Therefore, fewer cases that the court decides, the fewer enemies the court will be making and the more stable the environment for it to build up its legitimacy and gain popular support. In the early years of the newer constitutional review courts in Central and Eastern Europe only about fifty or so cases were decided,[71] it can be argued that this is what partly constitutes the success of those courts.

The second option that constitutional review courts could choose as a strategy to develop effective institutional power is to engage directly in important political disputes and always defer to the more powerful political actor in the given dispute. Early on during the existence of a constitutional

---

[68] Rodric B. Schoen, "A Strange Silence: Vietnam and the Supreme Court," *Washburn Law Journal* 33 (1993-1994): 275–322; William Conrad Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, Part II: 1961-1964* (Princeton University Press, 1986), 409.
[69] Schlesinger v. Holtzman, 414 U.S. 1321 (1973).
[70] Fontana, "Docket Control and the Success of Constitutional Courts," 631.
[71] Ibid.

review system, it is understandable when the court is inclined to involve itself in political controversies as a mean of establishing its reputation. Moreover, becoming embroiled in matters of high politics is regarded as a way to generate incentives for politicians to appeal to the court. As a young institution, the court would desire a great level of public attention. So engaging in major political controversies does help to make the court an important political actor. What is more, if the court chooses to rule in favor of the more powerful party in the certain case, then it seems to be able to ensure maximum compliance. It follows that, other things being equal, the possibility of success of constitutional review is quite high.

However, opportunities for success of this strategy also carry with them some obvious dangers. As having discussed above, the court's activeness in dealing with political disputes may lead to the institutional destruction. Besides, what would happen if the constitutional review court always ruled in favor of a particular politician, branch of government, or party. As a matter of fact, politicians would use the court more if they win and less if they do not. Losing in the court all the time definitely impacts upon the losing party's prestige. Therefore, one thing to keep in mind is that if every petitioner gets satisfaction from the court, then the incentive to use it would certainly increase. If the court is always one-sided in its rulings, then politicians' incentive to file petitions will be destroyed because they would see no chance of winning. In that case, the court will fail to become a powerful political actor.

Thus far, this thesis has argued that there are actually two contrasting strategies for a constitutional review court, especially a new court, to ensure its success. However, if the court is too aggressive in playing the insurance function for political losers in the short term, it may undermine its long-term survival. On the other hand, if it is too cautious by entirely avoiding all political matters, it will fail to fulfill its role as a political insurer and will be only a marginal player. Therefore, the court should know when it is the right time to get involved in a major political controversy and also must balance its decisions so that political actors will not cease to engage the court. These actions are

necessary for the court to ease the tension between the weakness of the institution and the need to expand institutional power.

### 1.5 The Tension between the Constitutional Court and the Ordinary Judiciary

As is well known, and as will be examined in chapter II of this thesis, there are two typical models of constitutional review existing in the world: decentralized (the American model) and centralized (the European model). While in the American system of constitutional review, every court has the power to review whether a law is unconstitutional and therefore void, the centralized European system reserves the power of constitutional review within a single body, called a constitutional court. In a decentralized review system, "any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional."[72] Thus, the American model of constitutional review is inherently free from the possible tension between the constitutional court and the ordinary judiciary.

The possibility of conflict arising between the constitutional court and the ordinary judiciary emerges as one of the typical features of centralized constitutional review. The special constitutional courts of the centralized review system are typically conceived as single judicial organ sitting outside of, rather than on top of, the regular judicial apparatus.[73] In other words, the centralized model introduces a parallel court system where the courts' jurisdiction is distinctly divided into two areas: ordinary courts are responsible for applying and defending ordinary laws, while constitutional courts answer questions involving constitutional law referred to them. The existence of this parallel court system leads to inevitable tension between the constitutional court and the ordinary courts. Because the tension between the two court systems emerges "as a necessary component of centralized judicial

[72] Martin Shapiro and Alec Stone, "The New Constitutional Politics of Europe," *Comparative Political Studies* 26, no. 4 (January 1994): 400.
[73] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (New York: Oxford University Press, 1989), 132–33.

review,"[74] it will be a real problem facing Vietnam if the country adopts the European model of constitutional review.

### 1.5.1 The Interaction between the Constitutional Court and the Ordinary Judiciary

The judicial cohabitation between the constitutional court and the ordinary judiciary has never been easy. In theory, it seems very clear and simple when it comes to the orthodox division of these two court systems' jurisdiction. While ordinary courts concern themselves with all concrete cases and controversies involving the application of ordinary law, constitutional courts do not get involved in how those cases and controversies are resolved, but solely answer constitutional questions posed to them. That means that the ordinary judges cannot decide constitutional issues and basically are excluded from the process of constitutional review because the power to declare a statute unconstitutional is reserved exclusively for the constitutional court.

However, as Alec Stone Sweet argued, this delimitation of jurisdiction is "totally outmoded."[75] Stone found that the reason for the persistence of this belief is mainly because of the incapacity of judges and legal scholars "to reconstitute the legitimacy of the juridical order differently than they have in the past."[76] The practice of constitutional law is quite new to civil law countries where constitutions are mainly considered as political instruments rather than as highest law in a legal system. So, it would be difficult for the judicial cohabitation between the new constitutional court and established ordinary courts to always go smoothly.

As far as the cohabitation of the constitutional court and ordinary courts is concerned, it is necessary to look at why the delimitation of jurisdictions cannot guarantee an absence of conflict between them. Historically, there was not any direct links between the ordinary and constitutional

---

[74] Lech Garlicki, "Constitutional Courts Versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (2007): 44.
[75] Alec Stone-Sweet, *Governing With Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 115.
[76] Ibid.

litigations when the first constitutional court was established under the 1920 Constitution of Austria. The Austrian Constitutional Court from 1920 to 1929 only conducted abstract review of the constitutionality of laws in actions initiated by a public authority. The Court exercised abstract review without taking into account the precise circumstances of any concrete case that is litigated before an ordinary court. The Austrian system was modified by the constitutional amendment of 1929, under which a procedure for the concrete review by the constitutional court was introduced. The new procedure allowed the Supreme Court and central administrative court to refer the question of the constitutionality of a law to the constitutional court when such a question arose in cases being tried by them.[77] Since then, "different combinations of abstract and incidental review of statutes have become a common feature of all the constitutional courts gradually emerging in Europe."[78]

The emergence of a procedure of concrete review has created a direct link between the constitutional court and ordinary courts. Concrete review is initiated by the ordinary courts. Ordinary judges have the right to refer the question of the constitutionality of a law to the constitutional court. According to Alec Stone Sweet, generally a presiding judge will refer a constitutional issue to constitutional judges when he or she finds the fulfilment of the following relevant conditions: (1) the answer from the constitutional court will have an impact on the outcome of the concrete case and (2) there is a reasonable doubt in the judge's mind about a possibly unconstitutional provision of a law which is relevant to his or her decision.[79] Referrals suspend proceedings pending a review by the constitutional court. Once the constitutional court has taken its ruling, the referring judge must apply it to the case. The constitutional court's decision is final and binding on all other courts. In sum, the procedure of concrete review leads to the constitutional court impacting upon the adjudication of particular cases by ordinary courts.

---

[77] Mauro Cappelletti, *Judicial Review in the Contemporary World*, 1st ed. (Indianapolis: Bobbs-Merrill, 1971), 72–74.
[78] Garlicki, "Constitutional Courts Versus Supreme Courts," 46.
[79] Stone-Sweet, *Governing With Judges*, 45.

Furthermore, without the referral of ordinary courts, the constitutional court cannot operate. While the constitutional court has no power to initiate the constitutional review of legal provisions, ordinary courts have the exclusive power to decide whether to make a reference to the constitutional court. Thus, the constitutional court and ordinary courts must cooperate well so that a constitutional review proceeding can be initiated.

Aside from concrete review, there is another procedure proving that it is impossible to have an exclusive separation of jurisdictions between constitutional and ordinary courts. That is the procedure for constitutional complaint. Constitutional complaints are requests lodged by individuals with the constitutional court. Once judicial remedies have been exhausted before ordinary courts, individuals can complain directly to constitutional judges. Individual complaints may challenge (1) any administrative act by a public official that they think has violated their constitutional rights (i.e., in Austria, Germany and Spain) or (2) judicial decisions with respect to constitutionally granted rights (i.e., in Germany) or (3) a legal rule (i.e., in Austria, Poland and Belgium). Amongst those different objects of constitutional complaint, complaints challenging the constitutionality of final judicial decisions comprise, by far, the largest class, whereas those litigating statutory provisions are rare. The complaint may target a legal rule only when it satisfies some more restrictive conditions, such as when "the complainant's rights have been abridged in some 'personal' and 'direct' way."[80] However, it should be noted that not all centralized constitutional review systems in the world include the procedure of individual complaint. For example, in Italy and Indonesia, individuals do not have the right to file a complaint to their constitutional courts. In such a case, the absence of a direct appeal leaves ordinary courts free to decide whether to refer a constitutional matter at issue to the constitutional court.

All things being equal, both the procedure of concrete review and individual complaint fade the notion of the courts' monopoly on jurisdiction. As Alec Stone Sweet observed, "the greater the

[80] Ibid., 46.

level of interaction between constitutional court and any given court system, the more the distinction between constitutional jurisdiction and ordinary jurisdiction collapses."[81] Such a collapse requires the cooperation as well as a certain level of delicacy between the two court systems.

### 1.5.2 The Inherent Tension between the Constitutional Court and the Ordinary Judiciary

The creation of a specialized constitutional court as an outsider of the ordinary judiciary might produce an impression that the constitutional designers intended to prevent the two court systems from intervening in each other's work. But from the analyses in the previous section, it can be concluded that it is likely impossible to have a complete separation of jurisdiction between the constitutional court and ordinary courts. Garlicki has labeled the existence of a certain level of conflict, or certain tensions, between the courts, as "systemic in nature."[82] That means it actually is an inherent element of every system of centralized constitutional review. Sharing the view with Garlicki, Frank Michelman believes that a pursuit of "perfect separation" between exercises of ordinary and constitutional jurisdiction is unrealistic. What is more, adds Frank Michelman, "demands for imperfect acoustic separation between constitutional and ordinary jurisdiction have occupied national constitutional reform efforts over the past century, in places around the world."[83] Briefly, a genuine delimitation of jurisdictions can never be addressed as one of the features when its comes to the relation of the constitutional court and ordinary judiciary.

To make it much clearer, some authors pointed out that conflicts between constitutional and ordinary courts emerged in any countries where specialized constitutional courts are established, not solely in countries transitioned from authoritarian regimes. Garlicki produces two examples, France and Belgium, to prove courts' tensions still occurred even in places where constitutional tribunals (the

---

[81] Ibid., 115.
[82] Garlicki, "Constitutional Courts Versus Supreme Courts," 63.
[83] Frank I. Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Edward Elgar Publishing, 2011), 279–80.

French Conseil Constitutionnel and the Belgian Cour d'Arbitrage) were not created after the fall of authoritarianism.[84] In the same way, while continuing to emphasize the nature of the "battles of the courts" in the post-Communist systems, Mark Tushnet also clarifies that "skirmishes have occurred in nearly every system with a specialized constitutional court."[85] To give an overview, conflicts between the specialized constitutional court and ordinary judiciary seem to be natural and unavoidable for every system of centralized constitutional review.

With regard to what causes the battles between the courts, there are several possible explanations, which can be grouped into two categories: subjective and objective. The basis for conflicts between courts as a subjective ground may lie in the non-cooperation of ordinary judges. Since the docket of the constitutional court remains largely dependent on the willingness of ordinary judges to refer constitutional questions to it for a decision, tensions may occur when the latter decides not to submit a question of constitutionality to the former. Such an unwillingness is often traced to the professional self-esteem of judges. Constitutional judges and ordinary judges basically differ in the professional background. In civil law tradition, whereas ordinary judges usually are "career judges" who enter judiciary at very early age and stay within it until retirement, most constitutional judges come from academia and politics. Ferreres Comella has wondered if more people, who have a non-judicial background, are appointed to the constitutional court, then will the potential tension increase?[86] Ferreres Comella's concern is a likely rational as different backgrounds usually produce judges with different views and attitudes, especially when it comes to constitutional interpretation. Because of that, in systems where constitutional judges have the power to quash the decisions of ordinary judges, the conflict would even be more intense.

---

[84] Garlicki, "Constitutional Courts Versus Supreme Courts," 63–64.
[85] Mark Tushnet, "Comparative Constitutional Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford University Press, 2006), 1245.
[86] Victor Ferreres Comella, "The Rise of Specialized Constitutional Courts," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Edward Elgar Publishing, 2011), 273.

However, the reasons for conflicts and tensions between courts not only lies in the professional self-esteem of judges. The main reasons actually are objective ones. First, the evolution of the role of modern constitutions has broken down the boundary between the constitutional law and ordinary statutes, this thus produces courts' tension. The evolution of the role of modern constitution comprises, by far, the judicialization of constitutions and the constitutionalization of specific areas of law.[87] The judicialization of constitutions implies that national constitutions are not regarded solely as political instruments anymore, but become a supreme law of the land that can be applied not only by the constitutional court but also by all other courts. What is more, as constitutionalization of specific areas of law deepens, ordinary judges necessarily apply and interpret ordinary statutes on the basis of constitutional norms. In effect, both the judicialization of constitutions and constitutionalization results in the overlap of functions of the constitutional court and those of ordinary courts. Since the distinction between constitutional jurisdiction and ordinary jurisdiction pales, it in one hand requires some level of interaction and cohabitation from both court systems, but on the other hand it also triggers large collisions and disputes.

The second objective reason generates from a structural problem. In the centralized constitutional review system, there is no way for the constitutional court to impose sanction on or correct ordinary courts if the latter refuses to comply with decisions of the former or not apply them correctly. Since the constitutional court has no real power over ordinary judges (especially in countries where an individual complaint mechanism is not provided), numerous conflicts and disputes arise as an inevitable upshot.

South Africa is a good illustration of the conflict between the constitutional court and ordinary judiciary. In a non-cooperative manner with the Constitutional Court, South Africa's head of ordinary judiciary, the Supreme Court of Appeal, attempted to build a firm barrier between ordinary law and constitutional law. The Supreme Court of Appeal "chose to base its judgments strictly on ordinary law,

[87] Garlicki, "Constitutional Courts Versus Supreme Courts," 65.

expressly disclaiming any sort of reference to or influence from substantive constitutional law, even when constitutional law would have supported identical case outcomes."[88] The Supreme Court of Appeal believed that when its judgments were based solely on ordinary law, they would be able to avoid review by the South African Constitutional Court. However, the conspiracy of the highest ordinary court of South Africa was turned out by the Constitutional Court. In its decision, the Court clearly denied the existence of parallel legal systems while affirming that all laws must be subject to constitutional control.

### 1.5.3 How to Secure Cooperation between the Constitutional Court and the Ordinary Judiciary

The coexistence of the new constitutional tribunal and the well-established ordinary judiciary always runs a risk of the ordinary judges disregarding constitutional decisions. Courts' tension arises as an unavoidable component of centralized constitutional review; as a result, the devices to secure cooperation also are created as a natural need. According to Mark Tushnet, there is no device that can perfectly guarantee the complete absence of collisions between courts.[89] Yet there is always a way to reduce, to some extent, those potential tensions.

Concerning how to reduce the institutional collisions as well as secure the cooperation between the constitutional courts and the ordinary judiciary, a number of scholars note that the former needs to maintain a harmonious relation with the latter through some kind of self-restraint.[90] This seems to be a prudent path for constitutional courts since they are newly established courts, which "appears as weaker participants"[91] within the judicial structures of their own countries. Of course, the position of constitutional courts varies from one country to another largely depending on the scope of authority granted to each constitutional court. For instance, the constitutional courts of Germany, Austria, and South Korea are generally more powerful than those in countries where constitutional

---

[88] Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction," 286–87.
[89] Tushnet, "Comparative Constitutional Law," 1246.
[90] Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction"; Tushnet, "Comparative Constitutional Law"; Garlicki, "Constitutional Courts Versus Supreme Courts."
[91] Garlicki, "Constitutional Courts Versus Supreme Courts," 68.

complaint does not exist together with abstract and concrete review. The power of the Federal Constitutional Court of Germany is even more extreme in that it has the competence and opportunities to set aside judicial decisions. However, only a few constitutional courts in the world has been given such ability. Furthermore, the constitutional courts, which have the ability to suppress ordinary court's decisions, cannot review all cases, but only those submitted by complainants. Therefore, it is advisable for the constitutional court to make use of "dialogue and persuasion" rather than get involved to "open conflicts and confrontations with other jurisdiction."[92]

A notable example of self-restraint is the German Federal Constitutional Court. The German Federal Constitutional Court was known as one of the most successful courts in its early years. It was the first constitutional jurisdiction established in Europe after the World War II. It had considerably favorable conditions in which to become a powerful jurisdiction: (1) it emerged as a total newcomer, while the other specialized courts had to face difficulties of institutional reconstruction after the Nazi regime; (2) it was created as an instrument in preserving the supremacy of the Constitution;[93] and (3) it is vested with broad power to be able to rule on abstract review at the request of the Federal Government, a Land Government or one third of the members of the Bundestag, concrete review upon the referral of ordinary courts, and constitutional complaints filled by any individual.[94] Consequently, The FCC unsurprisingly has built a high level of reputation as well as the public's trust. It is not necessary to espouse the FCC's achievements in detail in this section. However, one thing deserving of mention here is that despite considerable chances for success, the Court was still willing to exercise judicial self-restraint. As Frank Michelman observed, "the FCC quite visibly strives to avoid presenting itself as a super [ordinary] court."[95] Although the number of individual complaints filled to

---

[92] Ibid.
[93] The Constitution of Germany (The Basic Law) marks as a radical break with the country's past. Therefore, the Basic Law emphasizes its supremacy and binding effect in several of its provisions. The supremacy of the Basic Law is relatively expressed in Articles 1, 19, 20, and 79 of the document.
[94] The constitutional complaint procedure even gives the Federal Constitutional Court of Germany the power to invalidate final judgments of specialized courts.
[95] Michelman, "The Interplay of Constitutional and Ordinary Jurisdiction," 290.

the Court is overwhelming, yet "in reality, the Constitutional Court only rarely quashes decisions of ordinary courts, assuming the role of a court of cassation."[96]

However, constitutional courts' internal self-restraint is certainly not a guarantee that the problem of institutional tensions between courts will be completely solved. Also, that does not mean that constitutional courts should avoid all confrontations with ordinary courts. It would be unhelpful if they are all the time unable or unwilling to trigger backlashes against ordinary courts. Thus, the internal self-restraint by constitutional courts should only be a part of a package of other measures as well. The other measure in the package could be enabling constitutional courts to sometimes enter institutional battles, ensuring jurisdictional issues are frankly dealt with. As Ferreres Comella argued, "it is sometimes better not to suppress conflicts: a solution needs to be worked out that can serve as a precedent for the future."[97]

### 1.6 Conclusion

Constitutional review is the power of a court or court-like body to set aside or strike down legislation and administrative actions incompatible with constitutional norms. It has been invented to prevent violations of rights granted by a constitution, thus assuring the efficacy of those rights, as well as their stability and preservation. Nowadays, constitutional review has gone global. The adoption of constitutional review has been explained by various theories. Those theories are ideational, coordination and commitment, political insurance, and transnational influence. In Vietnam, discussion on constitutional review has taken place since 2001, yet Vietnamese scholars have not focused on theories explaining why the country needs to adopt constitutional review. Therefore, the theories discussed in this chapter will serve to explain the necessity of adopting constitutional review in Vietnam as discussed in chapter V of this thesis.

---

[96] Garlicki, "Constitutional Courts Versus Supreme Courts," 52.
[97] Comella, "The Rise of Specialized Constitutional Courts," 273–74.

This chapter does not cover all issues related to constitutional review but rather focuses on the issues that are informative to the discussion on constitutional review for Vietnam in the following chapters. This thesis will suggest the establishment of a specialized constitutional court for Vietnam. Creating a constitutional court is fundamental, but unsatisfactory because the success of this court much depends on how judges exercise their power. 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 chapter will play the role in foreseeing difficult issues that the potential Constitutional Court of Vietnam may be faced with. The issues with the potential Vietnamese Court and some suggested solutions for them will be considered in chapter V.

## Chapter II: Two Basic Models of Constitutional Review

### 2.1 The Aim of This Chapter

This chapter discusses two basic models of constitutional review: decentralized (the American model) and centralized (the European model). It starts with a brief discussion of how constitutional review is organized and practiced differently in two prominent Courts: the United States' Supreme Court, which represents the decentralized model, and the German Federal Constitutional Court, which represents the centralized model. This chapter focuses on giving fairly detailed information on these two courts from a comparative perspective. The information illustrates the differences between the decentralized and centralized constitutional review models in terms of origin and institutional arrangement. Taken together, these differences will serve to indicate which model of constitutional review appears to be more suitable to the Vietnamese context.

It may be asked why this thesis only discusses two basic constitutional review models, while letting other distinctive ones, such as those found in France or Commonwealth countries, fall outside its gambit. Several explanations are outlined as follows. First, the American model and the European model of constitutional review have become the worlds' normative models. Moreover, this thesis, in chapter III, will discuss constitutional review in Japan, where the decentralized model has been adopted, and that in Korea and Thailand, where the constitutional courts were created based on the centralized model. Therefore, the study on these two basic models is considered a wise and pragmatic approach. The second reason is that the focus on analyzing these two basic models merely aims to give an overview of contemporary constitutional review rather than to suggest the direct import of any model into Vietnam. The constitutional review varies in different countries. It is not established or operated in the exact same way in other countries despite them having adopted either decentralized or centralized review models. Although Vietnam's conditions indicate that the centralized constitutional review model may be generally more suitable to the country, it does not mean the centralized model or the German Constitutional Court can be transplanted directly into the Vietnamese context without

modification. A distinctive type of constitutional review can be created in Vietnam to suit the country's own political and legal situation.

### 2.2 Decentralized Model (the American Model)

The decentralized model of constitutional review, also known as the American model, has its origin in the United States. Since, in the American model, all courts have the authority to examine an executive or legislative act and to set aside that act if it is contrary to constitutional principles. Despite that "most Americans today probably take it for granted that courts should interpret and enforce the Constitution," [98] constitutional review actually was not enshrined in the original text of the Constitution. Those who framed and ratified the Constitution also had no "general understanding about the particular form that the judicial review would take and the role that the Supreme Court would therefore assume."[99]

Despite the absence of precise text in the Constitution about constitutional review, after *Marbury v. Madison*, the Supreme Court of the United States has sparingly exercised its power to determine the constitutionality of congressional enactments. Therefore, the Court has gradually become an institution playing a crucial role in American society. The Court was active in protecting human rights, and indeed took a pioneering role in fighting against racial segregation. In 1954, in deciding the *Brown v. Board of Education* case, the Warren Court's unanimous decision declared state laws establishing separate public schools for black and white students to be unconstitutional. Another example is the *Leser v. Garnett* case of 1922 in which the Court held that the Nineteenth Amendment to the United States Constitution had been constitutionally established. The Amendment ratified in 1920 guaranteed that the right to vote could not be denied on account of sex; however, the right was

[98] Fallon Jr, *The Dynamic Constitution*, 11.
[99] Robert G. McCloskey, *The American Supreme Court*, 5th ed. (Chicago and London: University of Chicago Press, 2010), 4.

not fully secured until the Supreme Court decided *Leser v. Garnett*. It is clear that constitutional review has had much impact on American society.

Constitutional review plays a key role in protecting the rule of law and individuals' rights against violations of state power. Furthermore, it has become a prominent way for the United States' judiciary to exercise and assert utmost power. However, the decentralized constitutional review model still "has not been so influence in its entirety."[100] In other words, the American model has not been very popular despite the fact that the United States is the birthplace of the theory of power of courts to review the actions of the executive and legislative branches. There are only few countries in the world today, such as Japan, India, Malaysia, and Singapore, that have adopted this review model. This section will mainly focus on exploring the features of constitutional review in the United States. Its fundamental characteristics will be examined to provide an overall view of the decentralized model.

### 2.2.1 Decentralized Constitutional Review – Diffusion of Constitutional Review Power throughout Ordinary Judiciary

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. Unlike the centralized model of constitutional review, there is no a specialized court in the United States that has the judicial monopoly to reconsider the constitutionality of the statutes and strike down them. All the courts at both federal and state level are equally capable in dealing with constitutional questions.

Since the power of constitutional review diffuses throughout all the American courts, a constitutional case is regarded as one of many types of legal disputes that courts can decide. At the highest level, constitutional cases ultimately come to the Supreme Court "through the normal appellate system and not through any special procedure."[101] The Supreme Court is the highest court in the

---

[100] Klaus Von Beyme, *America As a Model: The Impact of American Democracy in the World* (New York: Palgrave Macmillan, 1987), 96–97.
[101] Mauro Cappelletti, "Judicial Review in Comparative Perspective," *California Law Review* 58, no. 5 (October 1970): 1045.

judicial system, and thus its statements in constitutional cases are the final word. This institutional feature plainly explains the reason why judicial review in the United States is called the decentralized or diffuse model.

Regarding the rationality of giving the entire judiciary the duty of constitutional interpretation, Mauro Cappelletti believed that it relates to the particular function of common law judges.[102] When dealing with a case, it is the function of judges to interpret the laws in order to apply them to that case. Where an applicable legislative norm and the Constitution are in conflict, the judge must also interpret both the legislative norm and the Constitution and eventually disregard the former and apply the latter.[103] Every court, and every judge in the United States is authorized, and indeed required, to determine which law is prevailing in an actual case. It is this traditional "common law" feature that distinctively supports a decentralized system of judicial review.

### 2.2.2 Jurisdiction of the Supreme Court of the United States over Constitutional Issues

Unlike the German Federal Constitutional Court that has a broad jurisdiction to deal with both abstract and concrete reviews, the American courts do not practice abstract review, only hearing concrete cases. Article III of the Constitution provides distinctly that the judicial power extends only to "cases or controversies." Therefore, constitutional issues cannot be considered abstractly outside specific legal problems. The American courts certainly do not have jurisdiction to hear constitutional questions raised in the absence of an actual case or controversy.

The "cases or controversies" requirement is actually the basis for the Supreme Court to develop the "standing doctrine". The "standing doctrine" allows the courts to exercise judicial review only if the parties are individually injured. One cannot ask for the judicial intervention if he or she cannot prove that he or she is harmed by an allegedly unconstitutional act. The Supreme Court of the

---

[102] Cappelletti, *The Judicial Process in Comparative Perspective*, 135.
[103] Ibid.

United States, in *Lujan v. Defenders of Wildlife* case of 1992, held that a woman did not have standing to sue the court to fight against a federal agency that provided the financial assistance for the constructing of Aswan High Dam on the Nile River in Egypt. Having traveled to Egypt to observe the Nile River crocodile was not a convincing foundation for her standing in the case because there was no "injury in fact" caused to her.[104] Another example involves the decision of the Supreme Court in *Allen v. Wright*. In that case, the Court declared that the plaintiffs, parents of black public school children, lacked standing to challenge the granting of tax exemptions to racially discriminatory private schools.[105]

Interestingly, the standing doctrine is a doctrine created by the Supreme Court itself; so, it is not always rigidly adhered to when the Court is considering constitutional issues in some specific cases. In *Roe v. Wade* on the issue of abortion, Jane Roe did not present an "actual case or controversy" because she had already given birth to her child and thus would not be affected by the court's decision. Jane Roe also would have had no standing to claim the rights of other pregnant women. Yet the Court still deliberated on the issue and ended up ruling on the case.[106]

Apart from the standing doctrine, the Supreme Court of the United States also developed the political questions doctrine as another application of the "cases or controversies" requirement.[107] The political questions doctrine is often described as a type of judicial self-restraint to demarcate the power of the judiciary and the other political branches. The Court has concluded that as a matter of constitutional requirement or judicial prudence, there are some issues that are committed to Congress or the President without judicial review. From very early when the judicial review system had just been established, Chief Justice Marshall had clearly stated that: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive … performs duties in which

---

[104] Ibid., 152.
[105] Allen v. Wright, 468 U.S. 737 (1984).
[106] Roe v. Wade, 410 U.S. 113 (1973).
[107] Fallon Jr, *The Dynamic Constitution*, 288.

they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[108]

Richard Fallon, while rejecting a notion of judicial supremacy, affirmed that "although the Court possesses decisive power with respect to a hugely important set of questions, that set is actually quite limited."[109] According to Fallon, there are two "threads" of the political questions doctrine highlighting that the American courts are limited in exercising judicial review to decide some specific legal issues. First, some constitutional provisions explicitly give the Congress or the President the power to deal with specific matters, the judiciary thus has no jurisdiction to decide such issues. In *Nixon v. United States* of 1993, the Supreme Court held that the courts are forbidden to review the impeachment trial of a federal judge named Walter Nixon.[110] The Court said that since Article I, Section 3, Clause 6 of the Constitution gave the Senate "the sole power to try all impeachments," the courts have no discretion in impeachments at all. Second, the courts refrain from ruling on some legal questions that "are not well suited for judicial resolution." In order to clarify this point, Fallon took an example of the denial of several lower courts to declare the Vietnam War unconstitutional. The plaintiffs claimed that Congress had never formally declared the war before the president committed troops as Article I, Section 8, Clause 11 of the Constitution required. However, the courts' decision on such a matter would not only smear the image of the government but also make the situation even more complicated and stretched. So, the courts ended up concluding that issues about war were non-justiciable political questions and were left to the president and the Congress.[111] As a result, judges, by exercising the political questions doctrine, allow the legislative and executive branches to develop government policy. This is a clear sign of how the American judicial branch respects the separation of powers doctrine.

---

[108] Marbury v. Madison, 5 U.S. 137 (1803).
[109] Fallon Jr, *The Dynamic Constitution*, 277.
[110] Nixon v. United States, 506 U.S. 224 (1993).
[111] Fallon Jr, *The Dynamic Constitution*, 288–89.

However, the barrier that the Supreme Court has created is not always easy to define. In many cases, the Court still decided on constitutional issues relating to political factors.[112] The political questions doctrine only encourages courts to refuse to rule in certain categories of controversial cases involving constitutional structure but not individual rights. The American Supreme Court's decisions made in *Brown v. Board of Education*[113] and in *Bush v. Gore*[114] demonstrate the will of the Court to have a voice when the public requires. The extent to which the public relies on the judiciary today gives the Supreme Court the power to "authoritatively resolve constitutional issues concerning an impressively broad array of issues."[115]

### 2.2.3 Effect of the Decisions of the Supreme Court of the United States

The Supreme Court of the United States has the power to declare that an unconstitutional act will be invalid in a concrete case. However, the Court does not have the power to null and void that act. The Constitution of the United States did not give the Court the right to annul a law enacted by the legislature. This is a sign of how the Court respects and upholds the separation of powers. The judiciary does not interfere with and take the right of enacting the laws away from the legislature.

The Court, although in principle cannot void an unconstitutional law and that law will still exist after the Court decision has been rendered, in practice it is counteracted. That is because the Court is bound by the rule of stare decisis. Stare decisis ensures that cases with identical facts be approached in the same way and judges are obliged to defer to the precedent established by prior decisions. With respect to the precedent, the Court will refuse to apply a law that has been declared unconstitutional in a previous case. This legal tradition works smoothly in the United States and other common law countries.

---

[112] Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis*, 2nd ed. (Hart Publishing, 2015), 156–146.
[113] Brown v. Board of Education, 347 U.S. 483 (1954).
[114] Bush v. Gore, 531 U.S. 98 (2000).
[115] Fallon Jr, *The Dynamic Constitution*, 284.

With respect to the effect of the Supreme Court's decisions on constitutional issues, one thing that needs to be mentioned is that it is very difficult to overturn those decisions. As Friedman indicated , "when the Justices base a ruling on the Constitution, the country must live with that decision unless and until the Court reverses itself or the rare constitutional amendment is adopted."[116] Since the Supreme Court is the court of last resort, the most common way of overruling its decision is through concluding, by the Court itself, that the decision was erroneous and should be annulled. For example, the Supreme Court's decision in *Brown v. Board of Education* effectively overruled the decision made fifty eight years before in *Plessy v. Ferguson*. A Supreme Court decision can also be overturned through constitutional amendment. However, constitutional amendment is both rare and difficult.

### 2.2.4 Appointment of Justices and the Justices' Term

American Supreme Court Justices are non-elected and serve for life. They are nominated by the president and are appointed through Senate confirmation. Because they are not elected, they can be free from any influence or pressure that comes with periodic accountability to a re-election process. Additionally, since there is no way to remove a Justice from office other than when he or she is impeached and convicted by Congress for committing treason, receiving bribes or for high crimes and misdemeanors,[117] most of Justices stay on the bench for life (unless they resign or retire).[118] The constitutional tradition of life tenure for Justices serves an important purpose. It limits the amount of political influence on Justices and thus plays an important role in maintaining and enhancing judicial independence. Briefly, the appointment process and life tenure for American Justices help to free them from the political pressure and electoral accountability.

However, the mechanism for the appointment of Justices still raises the question of whether the Court defers to the Presidents' interests or not. Despite a concern that "Presidents can use Supreme

---

[116] Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009), 5.
[117] No Justice has ever been removed so far in the United States.
[118] Under the Chief Justice Rehnquist, the Supreme Court had gone 11 years without a change in membership.

Court appointments to bring the Court into line,"[119] the long judicial history of the United States has many times witnessed how the Justices acted in the way that the nominating presidents did not anticipate. The presidents normally nominated those who shared the same ideological and philosophical views as them. However, after being appointed to the Court, many Justices asserted themselves and decided cases contrary to the president's views and expectations. One famous instance is the *United States v. Nixon* case of 1974.[120] The case was decided with the unanimous vote of eight Justices[121] ruling against President Richard Nixon, ordering him to deliver tape recordings and other materials to the District Court during the Watergate scandal. Three out of the eight justices, Warren E. Burger, Harry Blackmun, and Lewis F. Powell, were appointed to the Court by President Nixon during his first term.[122] Another Justice whose decision ran contradictory to the nominating president's expectation was Chief Justice Earl Warren. President Dwight Eisenhower appointed him as the Supreme Court's Chief Justice in 1953 with the hope that he would become a conservative justice. However, in the subsequent years, Warren's Court made a series of liberal decisions that upset Eisenhower so much that he called his appointment of Warren "the biggest damn fool mistake" he ever made.[123]

### 2.2.5 Criticisms of Judicial Review in the United States

Constitutional review is the idea that congressional statutes and acts of the President are subject to review and possible invalidation by the judiciary. It allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the Constitution. It also is an effective way to protect the rights of American people. However, constitutional review in the United

---

[119] Tushnet, *The Consotitution of the United States of America*, 143.
[120] United States v. Nixon, 418 U.S. 683 (1974).
[121] Justice William Rehnquist declined to sit on the case as he had previously served in the Nixon administration as Assistant Attorney General.
[122] A. E. Dick Howard, "The Burger Court: A Judicial Nonet Plays the Enigma Variations," *Law and Contemporary Problems* 43, no. 3 (1980): 15.
[123] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (ABC-CLIO, 2001), 264; John J. Patrick, Richard M. Pious, and Donald A. Ritchie, *The Oxford Guide to the United States Government* (Oxford University Press, 2001), 690.

States cannot avoid being criticized for having raised the issues of counter-majoritarian difficulty and the apparent unaccountability of justices whom hold their offices for life.

First, the Supreme Court of the United States often is in tension with the advocates of counter-majoritarian difficulty. Some argue that since the Constitution is the supreme law, the right to interpret it must belong to the elected body. Alexander Bickel in his book, *The Least Dangerous Branch*, claimed the counter-majoritarian as the antidemocratic nature of judicial review.[124] Bickel pointed out that when the court exercised judicial review it was "…not on behalf of the prevailing majority, but against it."[125] Barry Friedman also stated that "throughout history, the chief complaint against judicial review has been that it interferes with the right of the people to govern themselves."[126] The *Lochner* era is a period in American legal history from 1897 to 1937 that witnessed unelected judges conquering the will of the majority by overruling the lawmaking of elected representatives. It has been largely "painted" by scholars as "the primary example of judicial activism."[127] During the *Lochner* era, the US Supreme Court struck down several state and federal pieces of legislation under the due process and equal protection clauses.[128] Notably, the Supreme Court of the United States crippled President Franklin Roosevelt's effort to cope with the Great Depression of the 1930s. During that period of time, Roosevelt introduced a series of advanced remedies called the New Deal. However, the Court invalidated many of the New Deal laws including several laws created to save the country from economic crisis and distress.[129]

---

[124] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edition (New Haven: Yale University Press, 1986), 16–23.
[125] Ibid., 17.
[126] Friedman, *The Will of the People*, 5.
[127] Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," *New York University Law Review* 76, no. 5 (November 2001): 1385.
[128] James E. Fleming and Linda C. McClain, "Liberty," in *The Oxford Handbook of the U.S. Constitution*, ed. Mark Tushnet, Mark A. Graber, and Sanford Levinson (Oxford University Press, 2015).
[129] The US Supreme Court invalidated many of New Deal laws, such as the National Industrial Recovery Act, which established production quotas and placed restrictions on the entry of other companies into the alliances; the Agriculture Adjustment Act, which was designed to boost agricultural prices by reducing surpluses; the Fair Labor Standards Act, which set maximum hours and minimum wages for most categories of workers; the Railroad Retirement Act, which was designed to encourage older rail workers to retire, thereby creating jobs for younger railroaders desperately in need of work.

Second, it cannot be denied that life tenure, to some extent, enables justices to serve into their senile years when they do not, or are unable to, necessarily adhere to society's values. Justices that never face election and hold office for life tend to become more and more conservative and restrain the court from changing and growing. President Roosevelt once criticized on the American Supreme Court Justices, "the old men 90", as "childish as boys of 9" and he emphasized that "in case of a 5 to 4 vote one old man controls the affairs of the nation."[130] How "one old man" sitting on the bench controls the affairs of the nation can be illuminated through the *Legal Tender* cases involving the constitutionality of the Legal Tender Act of 1862. In 1869 the Supreme Court declared by a four-to-three vote that the statute was unconstitutional. The point worth noting here is that the senescent Justice Robert Griver voted with the majority and resigned on the same day when the first Legal Tender case was decided. Also on the same day, President Ulysses Grant nominated two new justices to the Court, Joseph Bradley and William Strong. Bradley and Strong subsequently voted to reverse the first Legal Tender decision and the Court upheld the statute by a five-to-four vote.[131]

### 2.3 Centralized Model (the European Model)

The history of the centralized constitutional review of legislation in Europe did not begin until 1919 when the Austrian Constitution was promulgated. The Austrian Constitution was a product of a compromise between various forces and political groups and so was the Austrian Constitutional Court. Hans Kelsen was referred to as the main contributor to the establishment of the first Austrian Constitutional Court. So it is believed that Hans Kelsen had developed an alternative institutional model for constitutional review. That is why the centralized constitutional review model is also called the Kelsenian model.

After the collapse of the old empire, there was a debate regarding the institutional form that the Austrian First Republic would take. The heart of the dispute was about which institutional design,

---

[130] William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford University Press, 1996), 104.
[131] Tushnet, *The Constitution of the United States of America*, 143.

a federation or a confederation, would be more suitable to the country. If the Socialists were favorable to a unitary design, then the Christian Socialists, the main conservative party, in contrast, opted for a federation. At the end of the debate, the federation option prevailed. Kelsen rejected giving the power of constitutional review to ordinary courts and created a specialized tribunal playing the role of the arbitrator that guaranteed the equilibrium between the Center and the regions in the new Austria. So, the Constitutional Court of Austria, officially introduced on 25 January 1919, was not formed to protect fundamental rights, but to mediate and resolve potential conflicts between central institutions and the regions (Laender), as Kelsen himself advocated in his memorandum written in 1918.[132]

A further reason for Kelsen's rejection of American-style judicial review was his consideration that the Constitution was a set of legal norms superior to ordinary legislation, thus requiring enforcement.[133] As a result, constitutional norms should be interpreted in a particular way by a special court other than by ordinary judges. Briefly, Kelsen entrusted the constitutional court to maintain the order as well as the validity of the legal system.

After World War II, there has been a trend towards the development of public law in civil law jurisdictions. Although "the pace of this movement and the range of solutions adopted vary from one civil law nation to another,"[134] several European countries, such as Germany, Italy, Portugal, and Belgium, have ended up establishing special constitutional courts as a solution.[135] This movement was considered a way to protect individual rights through reviewing the constitutionality of legislation and administrative actions. Nowadays, many new democracies including South Korea, Thailand, Taiwan,

---

[132] Georg Schmitz, "The Constitutional Court of the Republic of Austria 1918–1920," *Ratio Juris* 16, no. 2 (2003): 245–46.
[133] Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution," *The Journal of Politics* 4, no. 2 (1942): 186.
[134] John Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. (Stanford, California: Stanford University Press, 2007), 135.
[135] The first European countries that established constitutional courts were Austria and Czechoslovakia (1920), Liechtenstein (1921), and Spain (1931).

Mongolia, Indonesia, and post-communist countries,[136] have chosen to adopt this model instead of American model.

As explanation for the wildfire like spread of the European model, Ferejohn believed that a new written constitution after the collapse of authoritarian systems posed the demand for constitutional courts. He added that this trend in post totalitarian countries did not appear in the "old (stable and successful) democracies," for example Britain, New Zealand, the Netherlands, and Sweden.[137] So constitutional courts are established in order to effectively enforce the new constitutions and are regarded as a break with the authoritarianism of the past. This section will take a look deeply at the characteristics of the German Federal Constitutional Court as one of the most successful constitutional courts in the world. The features that form this German institution will be analyzed in order to give a background knowledge of how a centralized constitutional court performs its function in reality.

### 2.3.1 Centralized Constitutional Review – Constitutional Review Power Accorded to A Specialized Court

Unlike the American model where all the ordinary courts are empowered to declare a statute unconstitutional, in the countries that have adopted a centralized model of constitutional review the jurisdiction to determine the constitutionality of legislation belongs to a specialized court. The specialized court is detached from the regular judicial system. Constitutional disputes are kept out of the hands of the ordinary judiciary and are decided by constitutional courts only. In Germany, the Federal Constitutional Court is "the supreme guardian of the Basic Law" and "no other court, not even

[136] Almost all formerly socialist countries chose to establish some institution to exercise constitutional review, mostly in a form of separate constitutional courts. The Czech Republic, Hungary, Poland, Rumania, Russia, Slovakia, Slovenia, and twelve former Soviet republics have constitutional courts; Kazakhstan has the constitutional council; Estonia has a constitutional supervision chamber in the Supreme Court; and only Turkmenistan has not established any organ of constitutional review yet.

[137] John E. Ferejohn, "Constitutional Review in the Global Context," *New York University Journal of Legislation and Public Policy* 6 (2002): 51.

a high federal court, is empowered to declare a statute unconstitutional, for this power is reserved exclusively to the Federal Constitutional Court."[138]

Since the Federal Constitutional Court is the only body authorized to interpret and apply constitutional law, there is some debate as to whether the Court enjoys absolute power in notable extent. Criticism has pointed out that Article 1 of the Federal Constitutional Court Act (BVerfGG), and the German Federal Constitutional Court itself, elevate it to the same level as the Bundestag, Bundesrat, and Federal President. Conversely, defenders once asserted that even though being detached from the ordinary judicial system, the German Federal Constitutional Court is still a part of the judiciary exercising judicial power as regulated in Article 92 of the Basic Law. Furthermore, it is the Basic Law that all constitutional organs have to comply with rather than the Court alone.[139] Despite the disagreement on the status of the Court, there is no doubt that the German Federal Constitutional Court "is not a sovereign power but only a single part within the concert of constitutional powers."[140]

### 2.3.2 Jurisdiction and Access to the German Federal Constitutional Court

Unlike the US Constitution that contains no express reference to any judicial power reference to pass upon the validity of legislative or executive decisions, the Basic Law, by contrast, codifies all of the Federal Constitutional Court's jurisdiction. The Court is authorized to hear cases involving the following actions: (1) forfeiture of basic rights; (2) constitutionality of political parties; (3) review of election results; (4) impeachment of the federal president; (5) disputes between high state organs; (6) abstract review; (7) federal-state conflicts; (8) concrete review; (9) removal of judges; (10) intrastate constitutional disputes; (11) public international law actions; (12) state constitutional court references; (13) applicability of federal law; (14) constitutional complaints; and (15) other disputes specified by law.[141] From general observations, it appears that the German Federal Constitutional Court has a

---

[138] Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40 (1991): 840.
[139] Heun, *The Constitution of Germany*, 168.
[140] Ibid., 188.
[141] "Basic Law for the Federal Republic of Germany" (1949), Article 93.

broader jurisdiction over constitutional issues than the US Supreme Court. For the purposes of this thesis, only jurisdictions involving abstract review, concrete review, and constitutional complaints are introduced and discussed here.

**a) Abstract Constitutional Review**

One of the most prominent characteristics of centralized constitutional review is the abstract review procedure that allows designated authorities to initiate constitutional challenges against legislation without a concrete case or controversy. In Germany, the Basic Law provides for the right to challenge the constitutionality to the federal government, state governments, and one third of the German Bundestag. These designated bodies can challenge the constitutionality of the law even before it does any harm. The applicants do not have to demonstrate the injury in fact caused by the violation of their own constitutional rights. By exercising abstract constitutional review, the federal constitutional court rules on the disputes between the legislative and executive departments concerning their respective powers. It resolves "disagreements or doubts" concerning the constitutionality of laws or the compatibility of federal law or Land law with the Basic Law, or the compatibility of Land law with other federal law.[142] One of the most well-known cases in which abstract constitutional review procedure was conducted was when one third of the German Bundestag challenged the constitutionality of the Abortion Reform Act of 1974 and the Court ended up striking down the law on February 25, 1975 soon after its enactment.[143]

So, clearly speaking, abstract review is what that distinguishes the centralized model of review from the decentralized one because the Supreme Court of the United States would possibly address those "disagreements or doubts" as "political questions" and refuse to undertake them. Conversely, the German Federal Constitutional Court's jurisdiction is to "resolve constitutional doubts

---

[142] Ibid.
[143] Rolf Schwartmann, "The Role of the Basic Law in Major Social Conflicts," in *The German Constitution Turns 60: Basic Law and Commonwealth Constitution German and Australian Perspectives*, ed. Jurgen Brohmer (Frankfurt am Main: Peter Lang Pub Inc, 2011), 116.

about laws and the operations of government, not to consign them to the limbo of non-justiciability or to reject them because they present a 'political question' unfit for judicial resolution."[144]

The Federal Government, a Land Government or one third of the members of the Bundestag can request the Federal Constitutional Court to carry out abstract review of the constitutionality of any legal norms, including laws properly passed by Parliament, statutory orders, by-laws adopted by municipalities or other types of corporate bodies.[145] However, drafted laws before promulgation are not subject to constitutional review. The party can only apply for abstract review of an enacted statute, even it has not been in force yet.[146] Actually, in practice, it is commonly the political opposition in the Bundestag or a Land Government ruled by the opposition party that uses abstract review procedure in order to try to reverse the outcome of legislative process.[147]

**b) Concreate Constitutional Review**

Apart from abstract review, Germany also permits incidental review. Constitutional questions can be raised by German ordinary judges within the context of a genuine, adversarial legal dispute. According to Article 100 of the German Basic Law, a court must refer constitutional questions raised in any case, that it is hearing, to the Constitutional Court for a decision if it concludes that the validity of the law its decision depends upon is unconstitutional. When the constitutional proceeding is undertaken, the original proceeding is postponed. When the decision of the Constitutional Court is issued, the original proceeding is resumed and conducted complying with it.

However, concrete constitutional review in Germany is not wholly the same as the concrete review exercised by the US Supreme Court for two reasons. First, an actual case is just an original cause for the German ordinary court to refer a constitutional question to the Federal Constitutional

---

[144] Donald P. Kommers, "Germany: Balancing Rights and Duties," in *Interpreting Constitutions – A Comparative Study*, ed. Jeffrey Goldsworthy (Oxford University Press, 2007), 175.
[145] Wolfgang Zeidler, "Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms," *Notre Dame Law Review* 62, no. 4 (1987): 505.
[146] Heun, *The Constitution of Germany*, 172.
[147] Ibid.

Court. Subsequently, the Federal Constitutional Court will decide on the constitutionality of the law autonomously from the case. Second, the German Federal Constitutional Court has the right to declare the law void with general binding effect.[148] The latter will be examined more in depth in the following section discussing the effect of a Constitutional Court's decision.

**c) Constitutional Complaints**

Abstract review and concrete review are not the only ways to challenge the constitutionality of legislation in Germany. A most popular procedure is the constitutional complaint, which may be filled by any person alleging that one of his or her constitutional rights, such as the right to vote and the right to be heard, has been infringed by public authority.[149] Since the overall purpose of introducing the mechanism of constitutional complaint in German perspective is to allow the individuals to bring claims against public authorities in case of violation of their rights. Thus, it has been recognized as a tool that significantly enhances the potential of the constitutional court to effectively protect fundamental rights.[150]

The constitutional complaint is a totally new procedure in Germany born only after the enactment of the Basic Law. In the proceedings discussed previously in this section, access to the German Federal Constitutional Court is limited to governmental organs, certain parliamentary groups, and judicial tribunals. A constitutional complaint, by contrast, can be lodged by any person as far as he or she may claim to have suffered the violation of one of his or her human rights. "Any person" within the meaning of Article 93 (1) [4a] of the Basic Law includes natural persons, as well as corporate bodies and other "legal entities" to which basic rights can be attributed. Public legal entities such as local governments or agencies may not file a complaint since they are considered to be a part

---

[148] Ibid., 173.
[149] Basic Law for the Federal Republic of Germany, Article 93(1), no. 4a.
[150] Klaus Von Beyme, "The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Political Laender," in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Countries Europe in the Comparative Perspective*, ed. Wojciech Sadurski (Kluwer Law International, 2002), 114.

of the state.

The public authority, which is subject to complaints, may be the judiciary, the executive or the legislative power. So, the constitutional complaints may be pointed against any act taken by legislative and administrative agencies or court decisions. The act of public authority has to have legal effect, however, excluding mere informal acts or foreign policy decisions without immediate domestic legal effect, since a complaint requires that a violation of basic rights is indeed possible.

Generally, a legislative act has to be applied to the individual by an administrative body or a court. For this reason, the constitutional complaint may only be lodged after all remedies have been exhausted if legal recourse to other courts exists. However, in some exceptional cases, people can anticipate the law's potential infringement upon their rights even when the law is recently enacted. For instance, the enactment of a statutory expropriation or criminal statutes would not require a direct effect for the complainant to file a constitutional complaint to the Court. In such a situation, a constitutional complaint lodged directly (before all remedies were exhausted) against a law or legal norm is admissible.

Apart from the exceptional cases mentioned above, the complainant has to be affected himself, directly and presently.[151] Heun explained that "the complainant must be affected neither merely in the future nor in the past without any present effect."[152] This requirement is regarded as a way to restrict access and ease the workload of the Court because the number of complaints filled to the Court is quite overwhelming.[153]

Indeed, because the procedure for filling complaints in the German Federal Constitutional Court is moderately easy and inexpensive, the Court has been flooded with petitions. There has been a steady raise in the number of complaints in the Court. In the 1950s, there were under 1,000

---

[151] "The German Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG)" (1951), Article 90(2).
[152] Heun, *The Constitution of Germany*, 174.
[153] Kommers, "Germany: Balancing Rights and Duties," 175.

complaints per year. But they had increased to around 3,500 per year in the mid-1980s and reached around more than 5,000 per year in the mid-1990s.[154]

### 2.3.3 Effect of the Decisions of the German Federal Constitutional Court

First, according to Article 31 of the BVerfGG, the German Federal Constitutional Court's decisions are final and binding upon not only the parties to the case but also binding upon Federal and Land constitutional organs as well as on all other courts and administrative authorities. However, the decisions of the Federal Constitutional Court are not binding on the Court itself.[155] The Court has explicitly declared that it is permitted to dismiss legal opinions stated in earlier decisions, regardless of its importance to the earlier decision.[156] Despite of this, in reality, the German Constitutional Court modifies and overrules its own decisions with greater reluctance than the American Supreme Court.[157]

Second, the German Federal Constitutional Court, while exercising constitutional review, has the power to declare a legal norm null and void.[158] According to Wolfgang Zeidler, "this legal regulation is based on the traditional German doctrine which states that a norm that violates a higher norm is void *eo ipso* and *ex tunc*."[159] Here, it can be seen that the Court's decision enjoys the status of statutory law[160] because it can nullify the legislation. Thus, the Constitutional Court's decision has the political nature that the other courts' decision does not. Another distinguishing feature between the decisions by the Constitutional Court and by the other courts is that there is no mechanism for appeal against the former.

---

[154] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Duke University Press, 1997), 15.
[155] Zeidler, "Federal Constitutional Court of the Federal Republic of Germany," 521.
[156] Ibid.
[157] Heun, *The Constitution of Germany*, 176.
[158] The German Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG), Article 78.
[159] Zeidler, "Federal Constitutional Court of the Federal Republic of Germany," 508.
[160] Basic Law for the Federal Republic of Germany, Article 94(2).

Third, unlike constitutional review in the United States, where the Supreme Court ruling is bound to the rule of stare decisis, there is no such rule in the German court system. However, in reality the Court does respect its own prior decisions. Donald P. Kommer stated that "while the Constitutional Court has spun a complicated web of doctrine around the Basic Law, and while its opinions brim with citations to earlier cases, its judges can more easily maintain the fiction that they are interpreting the documentary text rather than building upon their own precedents."[161] As a result, once a provision has been earlier declared unconstitutional, the legislature is prevented from re-promulgating it again.

Finally, the Federal Constitutional Court enjoys the capacity to issue "admonitory decisions." There are three sorts of "admonitory decisions" that can be made by the Federal Constitutional Court. First, together with declaring a law unconstitutional and invalid, the Court sometimes gives Parliament instructions on how to revise the law in accordance with the requirements of the Basic Law. Second, the Court can pronounce a statute's provision unconstitutional but not void. The purpose of the Court in doing so is to "avoid the injustice or political inconvenience of a decision that nullifies a statute altogether."[162] Kommers, in his article, gave an example regarding an income tax law. The Federal Constitutional Court stated that some provisions of the law were unconstitutional in that they violated the principle of equality. However, the Court, after considering the potential disadvantages that might be caused by declaring the statute unconstitutional, set a specified time frame for the Parliament to amend, revise, or reform that law. During that period, the application of the law was banned. The Court also warned the Parliament that the unconstitutional provisions of the law will be abolished if they still do not meet constitutional requirements after the specified period of time.[163] Third, the Court can declare a statute 'still constitutional' but incompatible with the Basic Law. For instance, the Court found the mal-apportionment of voting wards but instead of quashing the election, the Court required Parliament to enact a new redistricting law complying with the Basic Law.[164]

---

[161] Kommers, "German Constitutionalism," 845.
[162] Kommers, "Germany: Balancing Rights and Duties," 205.
[163] Ibid., 205–6.
[164] Heun, *The Constitution of Germany*, 177–78.

### 2.3.4 Appointment of the German Federal Constitutional Court's Justices

The Federal Constitutional Court is the only tribunal in Germany whose composition is constitutionally specified. The Court consists of federal judges and other members and is divided into two senates, each of which comprises of eight justices elected by a two-thirds vote for a single, non-renewable term of twelve years. Half the members of each senate are chosen by the Bundestag's twelve-member Judicial Selection Committee, an elite group composed of leading members of all parties in proportion to their strength in the chamber. The Bundesrat selects the remaining justices.[165]

Generally speaking, the process of constitutional court appointment reflects bargaining among major political parties and often between the Bundestag and Bundesrat. It is often said that Social and Christian Democrats share an equal number of seats in the Court and sometimes "a minor party has received a seat on the Federal Constitutional Court as a reward for joining one of the major parties in forming a governing coalition."[166] Since the appointment process requires a compromise among the political parties, some scholars suspect political influence on the performance of justices.[167] Even if the political parties' influence to the appointment of Constitutional Court justices is under suspicion, in reality German justices are still appreciated for their independence, technically competency and for being politically moderate.[168]

In order to qualify for an appointment as a Justice to the Federal Constitutional Court, candidates must reach the age of forty and be qualified to hold judicial office under the German

---

[165] Basic Law for the Federal Republic of Germany, Article 94.
[166] Kommers, "Germany: Balancing Rights and Duties," 174.
[167] Anja Seibert-Fohr, "Constitutional Guarantees of Judicial Independence in Germany," in *Recent Trends in German and European Constitutional Law: German Reports Presented to the XVIIth International Congress on Comparative Law, Utrecht, 16 to 22 July 2006*, ed. Eibe H. Riedel and Ruediger Wolfrum (Heidelberg: Springer, 2010), 278.
[168] Donald P. Kommers, "Autonomy Versus Accountability: The German Judiciary," in *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, ed. Peter H. Russell and David O'Brien (University of Virginia Press, 2001), 144.

Judiciary Act.[169] This means that they need to have completed the two state examinations in law or to be a professor of law at a German University. Three out of eight justices of each Senate have to be selected from among judges of one of the five federal supreme courts.[170] It is unacceptable for the Justices to serve concurrently in the Bundestag, the Bundesrat, the Federal Government, or in any corresponding bodies of a Land. An exception is made for teaching as a law professor at a German higher educational institution.[171] These regulations result in a significant number of Justices of the German Constitutional Court being recruited from within academia. This thesis will refer to this specific characteristic of the German Court in chapter V while discussing the necessary of the inclusion of professors of law in the membership of the potential Constitutional Court of Vietnam.

### 2.3.5 Constitutional Interpretation

The German Federal Constitutional Court adopts a combination of methods when it comes to interpreting the Basic Law. These include textual, grammatical, systematical, and historical methods, teleological interpretation, as well as proportionality.[172] However, this thesis only examines the principle of proportionality, a remarkable method of interpreting the constitution applied by the German Constitutional Court. A brief discussion, with respect to the function and components of the proportionality principle is presented in this subsection. This discussion serves to give a recommendation on the adoption of this method of constitutional interpretation, as a way to allow the potential constitutional review body of Vietnam to balance its performance after it is created.

The theory of proportionality has its roots in Germany.[173] And according to Aharon Barak, since the day it was established, where an interference with a fundamental right has been found, the

---

[169] "The German Federal Constitutional Court Act Act in the Version of 11 August 1993 (Federal Law Gazette, p. 1473), Last Amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette, p. 3546)" (n.d.), section 3.1 and 3.2.
[170] Ibid., section 2.3.
[171] Ibid., section 3.3 and 3.4.
[172] Heun, *The Constitution of Germany*, 181.
[173] Aharon Barak, "Proportional Effect: The Israeli Experience," *University of Toronto Law Journal* 57, no. 2 (2007): 369–82; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," *University of Toronto Law Journal* 57, no. 2 (2007): 384–85.

German Federal Constitutional Court always rendered its decisions strictly based upon a breach of the principle of proportionality.[174] From Germany, the concept of proportionality expanded to many other countries from Europe and the United Kingdom to Canada, New Zealand, and Australia. It then flowed to Asia, South Africa, and South America. The German Constitutional Court, notably, served as the inspiration giving rise to the European Court of Human Rights and the European Court of Justice developing the doctrine of proportionality.[175]

Regarding the function of the proportionality principle, Aharon Barak observed that "proportionality serves as a major component of the constitutional model shared by many democracies."[176] The principle of proportionality is most meaningfully applied to reconcile conflicts between fundamental rights and the intrusions on them by legislative power.[177] In constitutional law, proportionality requires that the latter upon the former be justified. In other words, a constitutional right may be limited by law, yet the limiting law must be proportional and the larger harms imposed by government should be justified by using reasons bearing more weight.[178]

Regarding the components of proportionality, Aharon Barak clarified that they are not exclusively recognized in the same way in every legal systems.[179] However, in his point of view, the principle of proportionality, in its most expanded sense, encompasses the four following elements: proper purpose, rational connection, necessary means, and a balancing between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right.[180] First, proper purpose means that a limitation on a constitutional right is proportional only if it was invented to protect other

---

[174] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), 180.
[175] Ibid., 181–201; Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," 384.
[176] Barak, *Proportionality*, 181.
[177] Bernhard Schlink, "Proportionalioty (1)," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (Oxford University Press, 2012), 729.
[178] Vicki C. Jackson, "Constitutional Law in an Age of Proportionality," *The Yale Law Journal* 124, no. 8 (2015): 3098.
[179] Aharon Barak, "Proportionalioty (2)," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (Oxford University Press, 2012), 742.
[180] Ibid., 742–47.

rights. Proportionality requires justifications for intrusions upon the limitation on rights and freedoms to be grounded in public reasons. Only a legitimate purpose can justify an intrusion on a fundamental right. The second element, rational connection, entails that the means used by legislative power in the limiting law must have the potential to advance the realization of its proper purpose to some extent.[181]

The third element of proportionality requires the means used by the limiting law to be appropriate and necessary. As Bernhard Schlink argued, "the means had to work, there had to be no other means that would be equally effective but less intrusive, and the end had to be important enough to justify the intrusion."[182] The fourth element of proportionality requires balance between social benefit of using intrusive means in order to realize the proper purpose and that of avoiding the limitation of constitutional rights.[183] While applying the principle of proportionality, the court must always strive to answer the question of whether the particular result that the state is seeking to achieve is worth the limitation of constitutional rights. In conclusion, a failure to comply with these four elements renders a limiting law unconstitutional.

In Germany the principle of proportionality came into its own in administrative law, before the enactment of the Basic Law. It was first developed by German administrative courts in the late nineteenth century and applied as an additional constraint on police action.[184] Under the Basic Law, the German Constitutional Court, soon after it was established, began to transfer this principle into constitutional law and applied it to laws that limited fundamental rights. The Basic Law contains a bill of rights that grants individuals a wide variety of rights and freedoms. Yet it also attaches special limitation clauses to most of these rights and freedoms. Some of these clauses contend themselves with a statement that limitations are only allowed "by law or pursuant to law," without adding further constraints. Other limitation clauses contain further checks on purpose, conditions, or means of

---

[181] Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1995), 28.
[182] Schlink, "Proportionalioty (1)," 728.
[183] Barak, "Proportionalioty (2)," 744.
[184] Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," 385.

limitation.[185] So, it is the German Federal Constitutional Court that has to take the responsibility of reconciling the individual rights provisions and the limitation clauses. The principle of proportionality serves as a significant conciliatory instrument with which the Court can reconcile conflicting provisions in order to ensure that they can co-exist.

The evidence of the application of proportionality in the German Constitutional Court can be clearly seen in the *Arrested Admiral* case.[186] The case concerns the legitimacy of an "arrest for investigation" imposed on a 76 year old admiral who was accused of murder after World War II. The action that caused him to be accused occurred in 1944, yet the "arrest for investigation" was issued in 1965. Therefore, the German Federal Constitutional Court, by applying the principle of proportionality, held that the arrest was not justified. The reason given by the Court was that there was no sign that the accused would flee and he was not a potential danger to public. In other words, the arrest for investigation in this case is out of proportion when balanced against individual rights and freedoms.[187]

### 2.3.6 Criticisms of Constitutional Review in Germany

Although the German Federal Constitutional Court plays a very important role as the guardian of the Basic Law, it is often criticized for its political role and for exceeding its power. What exposes the Federal Constitutional Court these criticisms is its use by many government agencies and party leaders as a tool to resolve important political issues.[188] The German Federal Constitutional Court can decide on the political issues because the idea of judicial self-restraint, as the opposite of judicial activism, in fact is not acknowledged in Germany. According to Heun, "self-restraint is considered as

---

[185] Ibid., 386.
[186] Bundesverfassungsgerich [BVerfG] [Federal Constitutional Court] December 15, 1965, 19 Entscheidungen des Bundesverfassungsgerichs [BVerfGE] 342.
[187] This case was mentioned in: Patrick Quirk, "An Australian Looks at German Proportionality," *University of Notre Dame Australia Law Review* 1 (1999): 40–41.
[188] Kommers, "German Constitutionalism," 843.

self-authorization which is constitutionally prohibited."[189] In other words, if the Basic Law requires the Court to rule in specific issues, it is not allowed to deny doing so.

Additionally, the procedure of abstract review is occasionally rebuked. Abstract review forces the Federal Constitutional Court to decide the constitutionality of a legal norm without access to sufficient information regarding the implementation of the norm or its implication. What is more, abstract review is considered as a contradiction of the separation of powers. It seems that the Court has authorized itself to interfere with the legislature by invalidating several legislative projects as well as issuing 'admonitory decisions'. So, the limit of constitutional review power is actually a topic discussed in Germany nowadays.

The criticisms are not an attack on the Court but are actually helpful in the extent to which the Court's activism would be restricted. It is explained that, for the long term, the approval of the people and the law community is essential for the Court's decisions to be enforced. For this reason, the criticisms do help to keep the Court in line with boundaries that make sure the Court will not create and impose unwanted values on the people.

### 2.4 Conclusion

There are two basic models of constitutional review: decentralized and centralized. This chapter has discussed how constitutional review is organized and practiced differently in two prominent Courts: the Supreme Court of the United States, which represents the decentralized model and the German Federal Constitutional Court, which represents the centralized model. In Germany, constitutional disputes are kept out of the hands of the ordinary judiciary as the specialized constitutional court is detached from the regular judicial system. Whereas, all American 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,

[189] Heun, *The Constitution of Germany*, 184.

which is the highest court in the judicial system. Thus, 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, as will be discussed in chapter IV, 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 chapter finds some other institutional differences between these two constitutional review systems. 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, this chapter presented the principle of proportionality, a method of constitutional interpretation, applied by the German Constitutional Court. 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 will be suggested in the conclusion of this thesis.

## Chapter III: The Spread of Centralized Constitutional Review

### 3.1 The Aim of This Chapter

As discussed earlier in chapter II of this thesis, there exists two basic models of constitutional review: decentralized and centralized. However, the expansion around the world of these two constitutional review models differs. While there is only a comparatively small number of countries that have adopted the system of decentralized constitutional review, there have been that have adopted the centralized model.[190] After World War II, the centralized model expanded from Austria and became the prevailing model in Europe.[191] Since 1989, in several countries in Asia and Eastern Europe, the creation of specialized constitutional courts was considered "a key part of the standard model of constitutional transition" from authoritarianism to democracy.[192] Section 3.2 of this chapter seeks to analyze reasons which may be useful in explaining why the European model has been popular and why the American one has been rejected by constitutional makers in many legal systems.

In order to find a suitable model for Vietnam, it will be helpful to study the institutional designs and operations of constitutional review in other countries. This chapter introduces some case studies, including Japan, South Korea, and Thailand, to better understand how constitutional review has worked in different nations. Section 3.3 discusses the Japanese constitutional review system in order to show the obstacles to decentralized model adoption in a civil law tradition. The Korean constitutional review system is examined in section 3.4 as a practical example of how to avoid tensions between a constitutional court and ordinary courts. Lastly, section 3.5 will analyze the unprecedented intervention of the Constitutional Court of Thailand in politics as an obstacle to building the rule of law in a transitional country.

---

[190] Ginsburg and Versteeg, "Why Do Countries Adopt Constitutional Review?," 560–61.
[191] Comella, "The European Model of Constitutional Review of Legislation," 461.
[192] Stephen Gardbaum, "Are Strong Constitutional Courts Always a Good Thing for New Democracies?," *Columbia Journal of Transnational Law* 53 (2015): 287.

It is impossible to introduce every detail of constitutional review in Japan, South Korea, and Thailand within the context of this thesis. Therefore, this chapter merely attempts to show some particular traits in order to draw a sketch of each constitutional review system. Information introduced on the pages that follow in this chapter will serve to identify lessons for Vietnam, that will form the core of chapter V of this thesis.

### 3.2 Reasons for the Prevalence of Centralized Constitutional Review

Nowadays, the centralized model exists in about eighty five countries around the world and "in a global sense, only very few courts without British or American colonial experience have adopted a decentralized of judicial review."[193] A particularly noteworthy point is that the system of centralized constitutional review is more typical of civil law countries than common law jurisdictions.[194] So, is there any link between civil law legal tradition and the centralized Kelsenian model of constitutional review? Actually, since the spread of centralized constitutional review has been a worldwide movement, this question has been taken up by a number of legal scholars. In order to understand the reasons that account for the adoption of a centralized constitutional review model in a large number of civil law countries, some analysis of the scholars' point of view is necessary.

Scholars unanimously supported the argument that the wide differences between judges in common law and civil law countries are reasons for the latter being reluctant to adopt decentralized judicial review. John Henry Merryman, in his book *The civil law tradition*, has affirmed that "the traditional image of the judge and the judicial function… made such review by the ordinary judiciary an unacceptable solution."[195] Mauro Cappelleti also observed the unsuitability of the traditional civil

---

[193] Tom Ginsburg, "Constitutional Courts in East Asia: Understanding Variation," *Journal of Comparative Law* 80, no. 3 (2008): 91.
[194] Victor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven: Yale University Press, 2009), 36; Garlicki, "Constitutional Courts Versus Supreme Courts," 44–45.
[195] Merryman and Pérez-Perdomo, *The Civil Law Tradition, 3rd Edition*, 134.

law courts and the attitude of their judges to be reasons for a desire of constitutional review by a specialized court.[196]

Common law judges are appointed or elected to judicial position after successful careers as legal practitioners while civil law judges take part in the judiciary comparatively early in their careers. Most civil law judges are typically selected and appointed as junior judge shortly after graduation from law school. As a result, civil law nations are suspicious of American constitutional review because "in their system, that review can be exercised by a twenty-five year old with a fresh law degree."[197]

What is more, common law judges are entrusted with broad interpretive power. Civil law judges, however, must only apply the law as it is written. Civil law countries such as Germany and France adopted a rigid separation of powers that gives only the legislature the power to make law and prohibits judges from doing so. Civil law judges are even expected to refrain from interpreting incomplete, conflicting, or unclear legislation. In general, "the net image of judges [is] as operators of a machine designed and built by [the] legislator."[198] However, interpreting the constitution in many cases is seen as creating new laws because unlike criminal or civil law, constitutional provisions are often abstract and vague. Therefore, it is not appropriate for ordinary judges in a civil law tradition to decide on constitutional questions.

Furthermore, the limitation in interpretive power of civil law judges has a close link to the great difference between the civil and common law traditions relating to the doctrine of precedent. Of course, the difference between the two systems nowadays is no longer as sharp as before. In the countries under common law, statutes are also cited as authority precedent. Conversely, decisions of civil law courts are based now not only on statutes but, increasingly, on precedents as well. However, common law legal systems still place great value on deciding cases according to consistent principled

---

[196] Cappelletti, *The Judicial Process in Comparative Perspective*, 142–46.
[197] Ferejohn, "Constitutional Review in the Global Context," 58.
[198] Merryman and Pérez-Perdomo, *The Civil Law Tradition, 3rd Edition*, 36.

rules so that similar facts will yield similar and predictable outcomes. Whereas the code law system has been so dominant in the civil law tradition that it seems impossible for civil law nations to accept the decisions of ordinary courts to have authority as law. The clear and coherent code laws have reduced the interpretive discretion of civil law judges.[199] This is one of the explanations for the reluctance of civil law countries to adopt a decentralized review model.

The lack of the doctrine of precedent also reduces the attraction of the American review model because this constitutional review model raises the question of legal certainty if adopted in countries without *stare decisis*. Generally speaking, in a civil law country, decisions rendered by a court do not bind the other courts. So, if a civil law court declared a law unconstitutional, that law was not applicable in the concrete case. But the court did not have the power to annul it. This might lead to a situation in which the other courts still applied that law in other cases despite it having been declared unconstitutional in a previous case. Therefore, creating a single constitutional court is probably a solution to promote legal certainty and resolve the problem of contradictions among courts.[200] To sum up, one can refer to Cappalletti's observation, "the absence of a principle comparable to *stare decisis* in civil law jurisprudence" is one of the principle reasons to "account for adoption of a centralized system of judicial review in a growing number of civil law countries."[201]

### 3.3 Constitutional Review in Japan – Obstacles of Decentralized Model Adoption in a Civil Law Tradition

#### 3.3.1 Japan Adopted Decentralized Instead of Centralized Model

After World War II, Japan enacted a modern constitution that broadly granted the power "to determine the constitutionality of any law, order, regulation, or official act" to the Japanese Supreme

---

[199] Alec Stone-Sweet, "Why Europe Rejected American Judicial Review - and Why It May Not Matter," *Michigan Law Review* 101 (2003): 2744.
[200] Comella, "The European Model of Constitutional Review of Legislation," 466.
[201] Cappelletti, *The Judicial Process in Comparative Perspective*, 137.

Court.[202] Despite being a civil law country, the framers of the Japanese Constitution still assigned the function of constitutional judicial review to the ordinary judiciary instead of a specialized single court. Later on, the Supreme Court of Japan, in one of its decisions, explicitly held that not only the Supreme Court but also all lower courts can exercise the power of constitutional review.[203]

Having adopted the American-style decentralized system of constitutional review also means that a "case and controversy" requirement is necessary to challenge the constitutionality of a statute passed by the Diet. In other words, the Supreme Court of Japan does not accept a suit challenging the constitutionality of a law without any case or controversy. The Supreme Court, in the *National Police Reserve Case* of 1952, held that Article 81 of the Japanese Constitution merely granted to the Supreme Court the power to review the constitutionality of a statute as a court of last resort when exercising judicial power. For this reason, the Court decided to dismiss a suit filed by a Diet member, Mosaburou Suzuki, challenging the constitutionality of the establishment and maintenance of the National Police Reserve. As stated by the Court, the suit did not satisfy the case and controversy requirement.[204]

### 3.3.2 The Appointment and Tenure of Japanese Judges

Since the power of constitutional review is exercised by both Supreme Court Justices and lower court judges, before analyzing the unsuitability of the decentralized review model to the Japanese legal system, it is important to briefly address the appointment process as well as the tenure of Japanese judges. This will partly facilitate the understanding of the origin of Japanese judges' judicial passivism toward constitutional issues.

Supreme Court Justices

The Supreme Court consists of the Chief Justice, who is to be designated by the Cabinet and

---

[202] "The Constitution of Japan" (1947), Article 81.
[203] Saiko Saibansho, Feb. 1, 1950, 4 Saiko Saibansho Keiji Hanreishu [Keishu] 73 (grand bench).
[204] Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2011), 140–41.

appointed by the Emperor,[205] and fourteen Associate Justices to be appointed by the Cabinet.[206] It is customary to appoint six judges, four private attorneys, two prosecutors, two government bureaucrats, and one academic.[207] A Supreme Court Justice has to be over the age of forty and has an intellectual grasp of the law.[208] Although the law allows the appointment of fairly young Justices, who are just over forty years old, it has been a custom for most of them to start holding office at the age of sixty four or sixty five.[209] And since they are supposed to retire at the age of seventy,[210] the time Japanese Justices stay on the bench is relatively short. This reason partially explains why they are reluctant to "develop independent constitutional jurisprudence."[211]

Lower courts judges

In Japan, judges of lower courts are appointed from among those who have passed the National Bar Examination, completed training at the Legal Training and Research Institute, and then passed the final qualifying examination. Moreover, in order to be appointed as a full-fledged judge, a candidate must go through not less than ten years of experience as an assistant judge, public prosecutor, attorney or law professor. Regarding the authority of appointment, the cabinet is constitutionally responsible to appoint lower court judges. The Supreme Court prepares a list of candidates and submits it to the cabinet. In general, after the end of a ten year term, the Supreme Court submits the judges' name to the cabinet for reappointment.[212]

The aforementioned appointment and reappointment process results in two basic characteristics of Japanese lower court judges. First, they become judges at a relatively early age. Second, they are career judges and "members of a largely self-governing elite bureaucracy in which

---

[205] The Constitution of Japan, Article 6, para. 2.
[206] Ibid., Article 79, para. 1.
[207] Matsui, *The Constitution of Japan*, 123–24.
[208] "The Court Act of Japan," Pub. L. No. 59 (1947), Article 5, para. 3.
[209] Matsui, *The Constitution of Japan*, 124.
[210] The Court Act of Japan, Article 50.
[211] Matsui, *The Constitution of Japan*, 124.
[212] J Mark Ramseyer and Eric B. Rasmusen, "Judicial Independence in a Civil Law Regime: The Evidence from Japan," *Journal of Law, Economics, and Organization* 13, no. 2 (1997): 259.

all are mentored and monitored by seniors and peers."[213] These two internal controls help to explain why their autonomy is sharply curbed.[214]

Regarding tenure, and as mentioned, Japanese judges face reappointment every ten years. Holding office for a term of ten years is considered a guarantee of judges' independence given by the Constitution of Japan.[215] However in fact such constitutional provision might endanger the independence of judges when the Supreme Court has the right to refuse to put the judge's name on a reappointment list. In 1971 judge Yasuaki Miyamoto was not reappointed due to his affiliation with the Young Lawyers' Association ("YLA").[216] That "penalty" alarmed other judges who were also members of the YLA and made them fearful of possible denial of their promotion.[217]

### 3.3.3 Passive Approach of the Japanese Supreme Court in Constitutional Review

While the Constitution of Japan clearly and specifically entrusts the judiciary with the power of constitutional review, the Supreme Court of Japan rarely utilizes it. There is no doubt that the Japanese Supreme Court has developed a highly conservative constitutional jurisprudence in its sixty years of history, as it has held only eight statutory provisions unconstitutional in that time. The Supreme Court of Japan has been criticized for hesitating to become engaged in constitutional issues[218] and for using the political question doctrine to evade the framers' intent as expressed in Article 81 of the Constitution of Japan.[219] According to Junichi Satoh, "the Japanese Supreme Court has almost

---

[213] John Owen Haley, "The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust," in *Law in Japan: A Turning Point*, ed. Daniel H. Foote (University of Washington Press, 2011).
[214] David M. O'Brien and Yasuo Ohkoshi, "Stifling Judicial Independence from Within: The Japanese Judiciary," in *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, ed. Peter H. Russell and David M. O'Brien (University of Virginia Press, 2001), 50.
[215] The Constitution of Japan, Article 80.
[216] Established in 1954, the YLA was a leftist group of young legal professionals that took a critical stand on some governmental policies.
[217] Masaki Abe, "The Internal Control of A Bureaucratic Judiciary: The Case of Japan," *Academic Press Limited*, 1995, 309.
[218] Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis*, Third Revised Edition (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), 127.
[219] Article 81 of the Japanese Constitution provides that the "Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

always upheld government acts, particularly where they involve significant political questions such as legislative districting or voting rights."[220]

The Supreme Court of Japan has developed its own constitutional avoidance and has often revoked the political question doctrine to refuse to decide the merits of constitutional disputes, especially those relating to Article 9 of the Constitution.[221] In the *Sunagawa case*, the Japanese Supreme Court held that the challenge to the constitutionality of the Japan-United States Security Treaty and the stationing in Japan of American military forces in violation of Article 9 was a highly political issue and was related directly to the national security of the country.[222] This decision was a typical example that has always been interpreted as the unwillingness of the Supreme Court to get involved in cases that might raise political conflicts.

Later, in another case, the *Naganuma case*,[223] the conservative nature of the Supreme Court of Japan was again exposed. In that case, the presiding judge Shigeo Fukushima declared the Self Defense Force unconstitutional. Strikingly, the chief judge, Kenta Hiraga, had given him some "friendly advice" concerning the avoidance of constitutional ruling. Because of his audacious decision in the *Naganuma case*, the Supreme Court punished Fukushima by assigning him to the Family Court for the rest of his career.

### 3.3.4 The Obstacle of Decentralized Model in Japan

There are several reasons explaining the reluctance of the Supreme Court of Japan to strike

---

[220] Jun-ichi Satoh, "Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight," *Loyola of Los Angeles Law Review* 41, no. 2 (2008): 605.
[221] Po Liang Chen and Jordan T. Wada, "Can the Japanese Supreme Court Overcome the Political Question Hurdle?," *Washington International Law Journal* 26, no. 2 (2017): 349.
[222] Saiko Saibansho [Sup. Ct.] Dec. 16, 1959, 13 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU] 3225 (grand bench).
[223] Saiko Saibansho [Sup. Ct.] Sept. 9, 1982, Showa 52 no. 56, 36 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1679.

down legislation or governmental actions.[224] However, within the context of this thesis, the discussion will primarily aim to evaluate the obstacle of decentralized review model in Japan where a civil law tradition is dominant.

The position of, as well as the attitude of Japanese judges toward constitutional issues can be considered one of the explanations for the failure of constitutional review in Japan. Since the Japanese legal and judicial systems reflects a very strong continental European influence, Japanese judges also share some "typical" characteristics of European civil law judges. They are addressed as "second-class bureaucrats" that generally begin their judicial career immediately after completing the legal training at the Legal Research and Training Institute.[225] As a result, it really is a challenging proposition for a relatively fresh and inexperienced employee of the judiciary to set aside statutes made by the Diet, or declare an executive act unconstitutional. What is more, their task is fraught with pressure from their seniors and balancing the risk of alienating themselves from the framework for career progression and promotion.

The second factor that has made the adoption of the decentralized model in Japan an obstacle is the absence of the principle of *stare decisis*. Not being a common law court, the Supreme Court of Japan is not bound by its own precedents in the same way as its American counterpart. Although precedents play a significant role in constitutional adjudication in Japan, they are utilized in the way that can support a desired conclusion of the Court.[226] Shinegori Matsui observed that "the Supreme Court follows its precedent when it is satisfied with it, but the Supreme Court is willing to modify or overturn precedent when it finds itself dissatisfied with it."[227] The Supreme Court normally does not explain the reasons why overruling a precedent is necessary, except to say that it has changed its point

---

[224] See: Law, "Why Has Judicial Review Failed in Japan?"; Matsui, "Why Is the Japanese Supreme Court so Conservative?"
[225] Law, "Why Has Judicial Review Failed in Japan?," 1439.
[226] Shigenori Matsui, "Constitutional Precedents in Japan: A Comment on the Role of Precedent," *Washington University Law Review* 88, no. 6 (2011): 1680.
[227] Ibid.

of view.

A typical case to be referred to when discussing Japanese judges' tendency for overruling a precedent without any proper explanation is the *Confiscation of the Third Party Property Case* of 1962.[228] Concerning the right to challenge the constitutionality of the government's confiscation of property, the Supreme Court of Japan rendered two contrasting decisions in 1960 and 1962. In its first decision in 1960, the Supreme Court held that defendants (who possessed the property) should not be allowed to invoke the infringement of the rights of a third party (who owned the property) to challenge the constitutionality of government action. However, in 1962 the Supreme Court explicitly overruled this precedent by stating that the defendant had the right to directly initiate a petition in a court to challenge the constitutionality of the government's confiscation without the involvement of the third party owner. Interestingly enough, the Supreme Court was totally silent on reasons that lead it to an overruling decision in the *Confiscation of the Third Party Property Case.*

From the analysis of Japan's case, to give an overview, the diffuse model of constitutional review applied in different legal traditions eventually produced different opposing outcomes and it clearly does not function well in a civil law nation like Japan. Next, this thesis will describe the concentrated constitutional courts of South Korea, and Thailand, to explain their primary reasons for having embraced the centralized constitutional review model. This thesis will also briefly analyze the structural features of each court and several factors that affect the constitutional courts' performance in these civil law countries.

### 3.4 Constitutional Review in South Korea – the Successful Adoption of the Centralized Model with Some Modifications

The Constitutional Court of South Korea, on the whole, proved to be an effective advocate for the rule of law in the country. Scholars have reached an observation that the Court has been an

---

[228] Saiko Saibansho, Nov. 28, 1962, Showa 30 (A) no. 56, 2961 SAIKO SABANSHO KEIJI HANREISHU [KEISHU] 1593 (grand bench) (n.d.).

independent and activist institution since its birth. As Tom Ginsburg demonstrated, "the Court is deciding an increasing number of cases and is clearly a forum for groups seeking to advance social change as well as for individual disputes."[229] Gavin Healy also affirmed that "despite the lack of a tradition of effective constitutional review in Korea, the new Constitutional Court has made great strides in establishing its own institutional identity and securing its legitimacy."[230] The question is what explains the Court's success and activism. This section seeks to answer that question through an examination of the historical background of the current Constitutional Court's establishment, its composition, and the jurisdiction of the Court.

### 3.4.1 Historical Background

The Constitution of South Korea amended in 1987 created the Constitutional Court based on the centralized European model of review. The Court was the founding of the Sixth Republic and became a key part of the constitutional system of the new regime. Concerning the establishment of the Court, a question arises as to what is the rationale for having a separate Constitutional Court instead of assigning constitutional review power to the Supreme Court. A number of factors played a role in determining the desire to have a specialized court to deal with constitutional issues in South Korea.

First, the creation of the Korean Constitutional Court entailed long negotiations and a compromise among political parties. In the lead up to the constitutional amendment in 1987, the political parties in South Korea differed on which entity should have the power of constitutional adjudication. Early in July 1987, the parties agreed on placing the power of constitutional review with the Supreme Court, but they disagreed on which body would have the power to review disputes relating to party dissolution, impeachment and intra-governmental matters. The ruling party argued that it was inappropriate for the Supreme Court to intervene in political matters, and it proposed an independent constitutional committee. On the other hand, the opposition party argued in favor of

---

[229] Ginsburg, *Judicial Review in New Democracies*, 242.
[230] Gavin Healy, "Judicial Activism in the New Constitutional Court of Korea," *Columbia Journal of Asian Law* 14, no. 1 (2000): 214.

granting constitutional power to the Supreme Court. After significant debates, the opposition party proposed a compromise: if a system of constitutional complaint was introduced, it would agree to the proposal of the ruling party. The opposition party believed that a constitutional court with a German style constitutional complaint system would ensure the open access to the Court for those who might lose in the elections.[231] The ruling party accepted the proposal, and as a result of this compromise, the Constitutional Court was established and a system of constitutional complaint was introduced.

Second, the decision to create a separate Constitutional Court was made owing to the expectation of having an institution that was stronger than the previous constitutional review mechanisms and more independent than the Supreme Court. Before the current Constitutional Court, the Republic of Korea has always had some form of constitutional adjudication system as follows: the Constitutional Committee of the First Republic (1948-1960), Fourth Republic (1972-1981) and the Fifth Republic (1981-1988); the Constitutional Court of the Second Republic (1960-1961); and the American-type constitutional review system of the Third Republic (1961-1972). However, all these constitutional adjudication systems were not so active [232] and their performance obviously disappointed the drafters of the Constitution of the Sixth Republic. The poor performance of the previous constitutional adjudication systems had an influence on the concession of the opposition party to the ruling party. The ruling party's idea was that a centralized body to exercise constitutional review might have some incentive to play its role more actively, thus might produce more predictable judgments.[233] And the opposition party eventually also expected that the creation of a separate constitutional court could introduce a more independent and effective institution of constitutional

[231] Ginsburg, *Judicial Review in New Democracies*, 217.
[232] The European type of Constitutional Court of the Second Republic even never had the opportunity to function because of the ensuing May 1961 military coup.
[233] Ginsburg, *Judicial Review in New Democracies*, 216–17.

adjudication.[234] Such expectations of both the ruling party and opposition party actually stemmed from the successful experience of the centralized constitutional review model in Europe.[235]

### 3.4.2 Composition

The Korean Constitutional Court consists of nine Justices qualified to be court judges who serve six-year renewable terms.[236] The Justices are appointed from among those who are forty or more years of age and have held any of the following positions for fifteen or more years: (1) judge, public prosecutor or attorney; (2) person who is qualified as an attorney, and has been engaged in legal affairs in a state agency, a state-owned or public enterprise, a government-invested institution or other corporation; or (3) person who is qualified as attorney, and has held a position equal to or higher than assistant professor of law in an accredited college.[237] All the Justices are appointed by the President of the Republic. However, among the Justices, three shall be appointed from those who are elected by the National Assembly, and three shall be designated by the Chief Justice of the Supreme Court.[238] A hearing by the National Assembly is required for nominees.[239]

The requirements for appointment, as Gavin Healy concerns, on one hand ensure that the constitutional Justices will be experienced and seasoned professionals but exclude greatly suitable candidates that are law professors.[240] Being qualified as judges means that all Justices must have passed the state judicial examination. However, most law professors in Korea do not meet this requirement.[241] It is reported that most of Justices appointed to the Constitutional Court were formerly judges in ordinary courts. The majority seats, who were formerly from ordinary courts, in the Korean

---

[234] Healy, "Judicial Activism in the New Constitutional Court of Korea," 226.
[235] Kyu Yoon Dae, "The Constitutional Court System of Korea: The New Road for Constitutional Adjudication," *Journal of Korean Law* 1, no. 2 (2001): 6.
[236] "The 1987 Constitution of South Korea", art. 111(1); "The Constitutional Court Art of South Korea," Pub. L. No. 12897, art. 3 and art. 7(1).
[237] The Constitutional Court Art of South Korea, art. 5(1).
[238] Ibid, art. 6(1).
[239] Ibid, art. 6(2).
[240] Healy, "Judicial Activism in the New Constitutional Court of Korea," 227.
[241] Chang Soo Yang, "The Judiciary in Contemporary Society: Korea," *Case Western Reserve Journal of International Law* 25, no. 2 (1993): 306.

Constitutional Court may obstruct its independence and activism. For this reason Gavin suggested that "the presence of law professors might give the Court a much greater degree of independence since the professors have pursued their careers outside of the rigid hierarchy of the judicial bureaucracy."[242]

### 3.4.3 Jurisdiction

The Korean Constitutional Court is roughly modelled on the German Federal Constitutional Court. Therefore, the jurisdiction of the Court is basically copied from that of the German one. Under Article 111(1) of the 1987 Constitution, the Constitutional Court has jurisdiction over the following matters: (1) the constitutionality of a law upon the request of the courts; (2) impeachment; (3) dissolution of an unconstitutional political party; (4) competence disputes between State agencies, between State agencies and local government, and between local governments; and constitutional complaint as prescribed by Act. The jurisdiction to make a final review of the constitutionality of administrative decrees, regulations or actions remains with the Supreme Court.[243]

There are, however, a couple of jurisdictional differences between the Korean and German Constitutional Courts. First, unlike the German Court, the Korean Court cannot perform abstract review outside the context of a concrete case at the request of designated government agencies.[244] The jurisdiction to resolve disputes among state agencies of the Korean Court is not considered as abstract review in German form because a request for adjudication is allowed "only when an action or omission by the defendant infringes or in obvious danger of infringing upon the plaintiff's competence granted by the Constitution or laws."[245]

Second, the Korean Court cannot review ordinary court decisions. Under Article 68(1) of the Constitutional Court Act, judgments of the ordinary courts remain beyond the Constitutional Court's jurisdiction. Although adopting the German model of concentrated constitutional review "but unlike

---

[242] Healy, "Judicial Activism in the New Constitutional Court of Korea," 227.
[243] The 1987 Constitution of South Korea, art. 107(2).
[244] Ginsburg, *Judicial Review in New Democracies*, 218.
[245] The Constitutional Court Art of South Korea, art 61(2).

Germany, it has also retained a Supreme Court as the apex of a hierarchical system of ordinary jurisdiction" and "this co-existence of two powerful courts has been a source of friction."[246] Of course, the establishment of the Constitutional Court raised a concern to the Supreme Court about a reduction in its powers. Therefore, keeping the ordinary court decisions out of touch of the Constitutional Court is a way to maintain the power of the Supreme Court as the highest judicial tribunal, avoiding the conflicts in powers between two Courts. However, what if an ordinary court applied a law which was declared unconstitutional by the Constitutional Court? Regarding this issue, the Constitutional Court has strongly asserted its position by striking down a Supreme Court ruling that applied law previously overturned by the Constitutional Court. In 1997 the petitioner required the ordinary court to quash a tax imposed on him based on Article 23(4) of the Income Tax Act on the ground that this Article had been ruled "limitedly unconstitutional" by the Constitutional Court two years ago. The Supreme Court, however, ended up refusing to invalidate the tax, holding that it is not bound by the Constitutional Court's rulings. Upon the complaint of the petitioner, the Constitutional Court declared that the Supreme Court's decision was unconstitutional because it applied the legal provision which the Court had already ruled unconstitutional. So, through this 1997 case, the Constitutional Court had created an exception giving itself the ability to review the Supreme Court decisions that disregard a prior Constitutional Court ruling.[247] The assertion of the Constitutional Court over the Supreme Court's judgments in this regard was considered as self-protection of its autonomy.

Another value that the Korean Court adopted from the German system is the notion of levels of constitutionality. When deciding on the constitutionality of a statute, the Court can render a decision to uphold it or declare it unconstitutional in whole. The Court also can hold the statute unconstitutional in part, in which case the offending provisions are severed and voided; the Court can find the statute to be nonconforming with the Constitution, in which case the Court may require the National Assembly to amend the statute in the near future; and the Court can find the statute constitutional if

[246] Seokmin Lee and Fabian Duessel, "Researching Korean Constitutional Law and The Constitutional Court of Korea," *Journal of Korean Law* 16 (December 2016): 268.
[247] Healy, "Judicial Activism in the New Constitutional Court of Korea," 223.

interpreted in a particular way, or constitutional but applied in an unconstitutional fashion. The advantages of the notion of level of constitutionality can be showed as in Ginsburg's statement: "These various gradations of declarations of constitutionality and unconstitutionality place the Court in dialogue with the legislative branches and executive agencies, and give it some flexibility in terms of how to handle politically sensitive issues."[248] Rather than declaring a law unconstitutional, in some cases, the Court can just send a request for revision to the legislature; or give the enforcement agencies guidance as to how to apply the law to avoid constitutional flaw. This method, as an effective way to keep the Constitutional Court in harmony with political authorities, could contribute to guarantee compliance as well.[249] These advantages have resulted in the tendency of the Court to use the non-conformable finding rather than to declare a law unconstitutional.[250]

It is a widely held view that one of the reasons for the passivism of the previous systems of constitutional adjudication was the lack of a system of direct citizen petition. The previous constitutional adjudication systems must entirely rely on the Supreme Court's referral to exercise constitutional review power. In fact, the Constitutional Committee had no chance to exercise its constitutional reviewing authority during the Fourth and Fifth Republics because none of the eleven cases involving constitutional issues brought before the Supreme Court were referred to the Committee. [251] Therefore, the current Constitutional Court with the constitutional complaint mechanism not only makes it possible for individuals to assert their constitutional rights but also gives the Court great potential for independence and judicial activism.

According to Article 68 of the Constitutional Court Act, there are two avenues for constitutional complaints to approach the Constitutional Court. First, any person whose basic rights as guaranteed by the Constitution have been violated by an exercise or non-exercise of governmental

---

[248] Ginsburg, "The Constitutional Court and Judicialization of Korean Politics," 146.
[249] Ginsburg, *Judicial Review in New Democracies*, 219–20.
[250] Ibid., 220.
[251] Kun Yang, "Judicial Review and Social Change in the Korean Democratizing Process," *The American Journal of Comparative Law* 41, no. 1 (1993): 4.

power may petition the Constitutional Court for relief under Article 68(1). A petition of this type may be filed only if all other remedies have been exhausted. If there is no existing law to afford remedies through ordinary court processes for unconstitutional state action, then a direct petition is possible. Second, if the ordinary court has rejected a party's request to refer question of the constitutionality of statutes to the Constitutional Court, the party may directly file the complaint with the Constitutional Court under Article 68(2). The subject of two types of petition is also distinct. While the former confronts state actions, the latter challenges the constitutionality of legislation. In spite of being a new system in Korea, a large number of constitutional complaints have been brought before the Court. The most likely cause of the high rate of petitions under Article 68 is because now citizens' claims can reach the Constitutional Court without any "agent." As a result, the Court has more chances to perform its authority and become more active.

### 3.5 Constitutional Review in Thailand – the Politicization of the Thai Constitutional Court

The Constitutional Court of the Kingdom of Thailand is a specialized court adjudicating upon constitutional cases to protect the principle of the Constitution as the supreme law of the land and to recognize and safeguard the rights and liberties of the people. After two decades of constitutional jurisdiction since, it has been reported that the Thai Constitutional Court has delivered a few important decisions, which were meaningful in protecting human rights and the fight against corruption.[252] However, it was also accused of being abused by political factions and utilized to interfere with politics. The image of the Court was of a tool used to resolve political conflicts rather than an institution with a fundamental mission of adhering to individual rights and democracy. This section focuses on the historical origin of the Constitutional Court of Thailand, its composition, as well as jurisdiction. This

[252] Khemthong Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict," *Washington International Law Journal* 26, no. 2 (2017): 250.

section also gives some possible explanations for why the Thai Constitutional Court has since got involved in questions that were fundamentally political.

### 3.5.1 Historical Background

The Constitutional Court of Thailand was established for the first time under the 1997 Constitution. According to Tom Ginsburg, the Thai Court "emerged as part of a dramatic transition to democracy designed to break the cycle of coups and political corruption that had plagued Thailand's history since the end of the absolute monarchy in 1932."[253] However, its attempt to curb corruption proved unsuccessful. Thus, it was suspended and replaced by the Constitutional Tribunal following the 2006 military coup. Subsequently the Thai Constitutional Court was founded again by the 2007 Constitution. It was redesigned to be more politically isolated and powerful. The Court remains basically unchanged in its structure and jurisdiction in the latest Constitution of Thailand enacted in 2017.

The creation of the Constitutional Court was the subject of much debate during the drafting process of the 1997 Constitution of Thailand. The most controversial issue involved the design of constitutional review. The proposal to establish a Constitutional Court in Thailand received no consensus at the beginning. The Supreme Court Judges opposed this proposal based on two basic reasons. First, the right to interpret the Constitution was a judicial power that should be exercised by the ordinary judiciary. Second, the proposed appointment of political scientists as the Constitutional Court Justices would reduce the quality of constitutional interpretation activities due to their lack of knowledge and experience in the legal area.[254] What is more, the Supreme Court also feared that the Constitutional Court would invite political influence into the judiciary.[255] However, the Constitution

---

[253] Tom Ginsburg, "Constitutional Courts in East Asia," in *Comparative Constitutional Law in Asia*, ed. Rosalind Dixon and Tom Ginsburg (Edward Elgar Publishing, 2014), 60.
[254] Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart Publishing, 2011), 161–62.
[255] Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict," 249.

Drafting Assembly members persisted with their first proposal. They seemed not to believe that the judiciary was capable of taking over the duty of constitutional interpretation. Besides, they were "of the view that a constitutional court would be more likely to take a broad as opposed to a narrow view of its function based on techniques of legal interpretation, and that there was merit in having a flagship institution with responsibilities only in respect of the Constitution."[256] Eventually, the Constitutional Court of Thailand was created reflecting the Kelsenian model of a centralized institution.

### 3.5.2 Composition

Under the 2017 Constitution, the Thai Constitutional Court has nine members serving for a seven year non-renewable term,[257] appointed by the King upon senatorial advice, and comprising of: three judges elected by the Supreme Court Justices from amongst their own number; two judges elected by the Supreme Administrative Court from among their own number; one judge selected from persons qualified in law holding or having held a position of professor of a university in Thailand; one judge selected from persons qualified in political science or public administration holding or having held a position a position of professor of a university in Thailand; and two judges selected from high ranking civil servants.[258]

The composition of the Court changed significantly between the 1997 Constitution and the 2007 Constitution, with further slight changes being made in the 2017 Constitution. The Constitutional Court under the 1997 Constitution comprised of fifteen judges selected from career judges and experts in law and politics.[259] The 2007 Constitution then reduced the number of the Constitutional Court's judges to nine with the majority being career judges from the Supreme Court and the Supreme

[256] Harding and Leyland, *The Constitutional System of Thailand: A Contextual Analysis*, 162.
[257] "The 2017 Constitution of Thailand", section 200 and 207.
[258] Ibid., section 200.
[259] "The 1997 Constitution of Thailand", section 255 and 256.

Administrative Court.[260] The 2017 Constitution replaced two legal and political experts on the bench with high-ranking civil servants.

Even though the recruitment of Constitutional Court judges involves representation of political branches, there has been strong influence by the judiciary over the composition of the Constitutional Court. Giving the majority of seats in the Court to the judiciary can be seen as a guarantee of having justices selected "on grounds of seniority, experience and merit."[261] However, it is probable that seniority and experience in the judicial field is not an advantage when dealing with constitutional cases since they differ from civil or criminal cases in many respects. Furthermore, it was argued that with the majority of judges being from the judiciary, there was a decline in the diversity of views within the Thai Constitutional Court.[262]

### 3.5.3 Jurisdiction

The Thai Constitutional Court has the power to consider and adjudicate on the constitutionality of a law or bill. It scrutinizes both the content and legislative procedure of a statute, an organic law, or an emergency decree. Its jurisdiction arises either by a reference from ordinary courts in the course of litigation; or by a reference from the National Assembly or the Prime Minister on constitutional review of bills and draft rules of procedure of the legislative branch prior to their promulgation; or by a direct constitutional complaint from individuals. Even though Thailand adopted the constitutional review model from Austria and Germany, its duties and powers are not the same as its counterparts. Unlike Germany, the Thai Constitutional Court has the power to review the constitutionality of an impugned bill before promulgation by the King.

However, as with Germany, since the adoption of the 2007 Constitution, the Thai Court also deals with direct petition from the public – this being its only significant modification in 2007. Before

---

[260] The 2017 Constitution of Thailand, section 204.
[261] Harding and Leyland, *The Constitutional System of Thailand: A Contextual Analysis*, 167.
[262] Bjoern Dressel and Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998-2016," *Journal of Contemporary Asia*, 2018, 9–10.

2007, individuals could only request the Court of Justice, the Administrative Court, or the Military Court, to refer the constitutionality of provisions of laws to be applied to their case for the consideration of the Constitutional Court. They also had indirect access by submitting a complaint to the Ombudsmen or the National Human Rights Commission with those bodies being able to refer the case to the Constitutional Court for a decision. Currently, individuals can have access to the Constitutional Court either indirectly or directly when they consider that their rights and liberties are violated by a legal provision.[263] But, before doing so, all legal remedies must have been exhausted, namely the case must have gone through the courts, the Ombudsmen and the National Human Rights Commission. Complaints to the Constitutional Court must be a last resort remedy. The introduction of the individual right of petition would make it easier for people to access justice whenever they find their rights and liberties infringed.

Additionally, a wide range of powers have been vested in the Court, including: reviewing the prerequisites for the enactment of an Emergency Decree; determining whether members of the House of Representatives, Senators or members of the committee are involved directly or indirectly in the use of the budgetary appropriations; ruling on disputes regarding the powers and duties of the National Assembly, the Council of Ministers or Constitutional organs other than the courts which arise between two or more of such organs; reviewing resolutions or regulations of political parties, consideration of appeals of members of the House of Representatives; ruling on cases concerning the unconstitutional exercise of political rights and liberties by a person or a political party; ruling on the membership or qualifications of members of the National Assembly, Ministers and Election Commissioners; and determining whether a treaty requires prior approval of the National Assembly.[264]

In general, one can reach the conclusion that the Thai Constitutional Court of Thailand has been given broad power. The broad power of the Court can be explained due to its establishment under a balanced political system instead of a dominant party system. This enabled the party, which may

[263] The 2017 Constitution of Thailand, section 213.
[264] Ibid., section 210.

lose control, to pursue its agenda through the Court and successfully control the more divergent policies of its opponents. But, in practice, the Court did not exercise its jurisdiction vigorously.[265] This issue will be addressed in the following sub-section.

### 3.5.4 Politicization of the Thai Constitutional Court

The establishment of the Thai Constitutional Court was expected to be a solution that could help to strengthen democracy and bring the country peace and stability. However, it has upset the public by rendering several controversial decisions, which often "further enflamed controversies rather than ending them."[266] The Court was accused of becoming "an active player whose role was a decisive factor in winning the political struggle."[267] It has annulled two national elections, dissolved major political parties, banned hundreds of senior politicians from office and toppled three prime ministers.

Several examples can be introduced to indicate how the Court intervened in politics and involved itself in highly political controversies. In 2008, the Court declared a Thai-Cambodian treaty unconstitutional because it was signed without consulting the parliament. In the same year, 2008, the Court ruled that Prime Minister Samak had violated the conflict of interest provisions by being paid for his appearance on a TV cookery show and therefore had to step down from the premiership. Prime Minister Somchai was relieved of office after having been found guilty of electoral fraud by the Court in December 2008. Lately, in May 2014, the Court found Prime Minister Yingluck Shinawatra guilty of charges of abusing power over the removal of national security chief Thawil Pliensri in 2011. She was then removed from office.[268]

There are likely some explanations for the political bias exhibited by the Thai Constitutional Court. First, the Thai Constitutional Court was given a broad power to be the final constitutional arbiter

---

[265] Andrew Harding, "The Constitutional Court of Thailand, 1998-2006: A Turbulent Innovation," in *New Courts in Asia*, ed. Andrew Harding and Penelope (Pip) Nicholson (Routledge Law in Asia, 2010), 136.
[266] Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict," 252.
[267] Ibid., 248.
[268] These examples are mentioned in: Dressel and Tonsakulrungruang, "Coloured Judgements?"

on many issues. The wide constitutional power was an important driving factor that was responsible for making the Constitutional Court "become the main locus for determining political issues."[269] Second, the 2007 Constitution of Thailand has not provided any mechanism to ensure the Court's accountability. Conversely, the Constitutional Court, established under the 2007 Constitution of Thailand, "was equipped with the ultimate power to intervene in politics."[270] The third likely cause of the Thai Constitutional Court's interference with the politics is the growing ties between judicial and political elites in Thailand. Some scholars have found that those long-standing ties are an underlying factor for the erosion of the Court's political neutrality. According to Bjorn Dressel and Khemthong Tonsakulrungruang, "formal legal safeguards of judicial independence have not been effective because the judiciary has long been aligned with royalist elites" and "when their position has been challenged, the elites and their yellow shirt supporters have increasingly used the judiciary, particularly the CC [Constitutional Court], to advance their interests."[271]

### 3.6 Conclusion

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. 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

---

[269] Andrew Harding and Peter Leyland, "The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia," *Journal of Comparative Law* 3 (2008): 136.
[270] Tonsakulrungruang, "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict," 264.
[271] Dressel and Tonsakulrungruang, "Coloured Judgements?," 2.

civil law system. Therefore, as will be discussed in chapter IV and V, the adoption of the centralized model appears to be a better choice.

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. Chapter V will delve further into this topic.

This chapter also introduced the Constitutional Court of Thailand 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 draw a recommendation for the potential Constitutional Court of Vietnam, that will be discussed in chapter V. The recommendation will suggest to the potential Court of Vietnam to take a cautious path so that its credibility may be gradually increased.

In the chapter that follows, this thesis will describe the practice of constitutional protection in Vietnam in order to rationalize the need for a constitutional review mechanism in Vietnam. Additionally, the next chapter will outline discussions on constitutional review in Vietnam from the beginning of 21$^{st}$ century until recent times. A general picture of the issue of protecting Vietnam's Constitution will also be drawn.

## Chapter IV: Current System of Constitutional Protection and Discussions on Constitutional Review in Vietnam today

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. However, discussion on the need for constitutional review in Vietnam did not disappear. Instead it has been constant since 2013, and continues to be a debatable topic in Vietnam today. A topic that requires further research in order to produce diversified ideas and conclusions.

It seems that the Vietnamese political and social situation is still an unknown for foreign legal scholars. Therefore, this thesis, especially this chapter, attempts to describe the Vietnamese situation with regard to constitutional review. This chapter proceeds in the following way: section 4.1 provides an overview of the current system of constitutional protection and supervision; section 4.2 outlines discussions on constitutional review in Vietnam from 2001 until recent times in order to find out the potential for creating constitutional review in the country.

### 4.1 Current System of Constitutional Protection and Supervision in Vietnam

#### 4.1.1 Constitutional Protection and Supervisory Authorities

The National Assembly exercises the constitutional protection and supervision – the legislative self-control mechanism

In Vietnam, the constitutional review system in which the ordinary judiciary or a specialized constitutional court is allowed to review the constitutionality of the action of the state's organs does not exist. Instead, Vietnam adopts the political control of the constitutionality of laws and other legal documents. According to Article 70 of the 2013 Constitution of Vietnam, the National Assembly exercises the power of supreme oversight of the observance of the Constitution, laws and resolutions of the National Assembly.[272] Also under Article 70, the National Assembly is the power to annul documents of the President, the Standing Committee of the National Assembly, Government, Prime Minister, Supreme People's Court and Supreme People's Procuracy that are contrary to the Constitution, laws or resolutions of the National Assembly.[273]

The most questionable issue here is who or which organ would be entitled to supervise the constitutionality of the laws enacted by the National Assembly. Since the National Assembly is the highest body of the country, even if a certain law violates the Constitution, the fact is that there is no body in the state apparatus that has the right to supervise and decide on that law's constitutionality. It is only the National Assembly that has the power to annul the laws enacted by itself if it finds the laws unconstitutional. In summary, the National Assembly of Vietnam exercises legislative self-control.

Other state organs entitled to supervise and deal with legal documents that contravene the Constitution

The supreme supervisory authority belongs to the National Assembly. However, under the Law on Oversight Activities of the National Assembly and People's Councils enacted in 2015, the oversight power is also granted to the Standing Committee of the National Assembly, the Ethnic Council and other Committees of the National Assembly.[274] Among those, only the Standing Committee of the National Assembly has the power to suspend the implementation of sub-law documents introduced by the Government, Prime Minister, Supreme People's Court or Supreme

[272] The 2013 Constitution of Vietnam, Article 70.2.
[273] Ibid., Article 70.10.
[274] "The Law on Oversight Activities of the National Assembly and People's Councils [Luật Hoạt Động Giám Sát Của Quốc Hội và Hội Đồng Nhân Dân]," Pub. L. No. 87/2015/QH13 (2015), art. 4.

People's Procuracy that contravene the Constitution and refer those documents to the National Assembly for a decision on their annulment.[275]

The 2013 Constitution of Vietnam also enables the Prime Minister to exercise some constitutional supervisory power. The Prime Minister may suspend the implementation, or annul the documents, of Ministers, Heads of ministerial-level agencies, People's Committees, Chairpersons of the People's Committees of provinces or centrally run cities that contravene the Constitution.[276]

In summary, in Vietnam, the right to exercise the supreme supervision over legal documents as well as the right to annul legal documents that are contrary to the Constitution is given to the National Assembly. In addition, other government agencies, such as the Standing Committee of the National Assembly, the Ethnic Council, the Committees of the National Assembly, and the Prime Minister also have the power to oversee the constitutionality of documents issued by governmental authorities. However, the judicial oversight on their constitutionality is completely absent.

Examining the local and ministry legislations that violate national laws and constitution – a mission of the Department for Inspection of Legal Documents

It is a fact that in Vietnam the ministries as well as local authorities tend to legislate on all matters. Together with this fact, the number of legal documents issued by them that are in conflict with higher law and arguably in conflict with constitutional norms continues to increase. As a mechanism for coping with these conflicts, in 2003, the government decided to form a new department within the Ministry of Justice – the Department for Inspection of Legal Documents.

The primary task of the General Department for Inspection of Legal Documents is to search for legal documents that conflict with higher laws, including the Constitution. The Department has the responsibility to check legal documents issued by the ministries, ministerial-level agencies and local authorities.[277] Once it finds any unlawful content, it may refer the documents back to the issuing

---

[275] The 2013 Constitution of Vietnam, Article 74.
[276] Ibid., Article 98.4.
[277] "Decision of the Minister of Ministry of Justice on Defining the Functions, Tasks, Powers, and Organizational Structure of the Department for Inspection of Legal Documents [Quyết Định Của Bộ

agencies for reconsideration.[278]

Since 2003, the Department has worked very effectively in that it has discovered a large number of unlawful documents. In 2018, the Department released a report stating that 5,639 legal documents violating laws were uncovered for 2017.[279] The Department also seeks to force the ministries, ministerial-level agencies and local governments to withdraw conflicting legislation. In 2016, it advised the Ministry of Transportation to annul a regulation that forced people to change their valid motorbike drivers licenses made from cardboard to new ones made from PET material. The reason given by the Department was that the Ministry of Transportation's regulation conflicted with the current Road Traffic Law.[280] In the same year, the Department inspected two legal documents issued by Quang Ninh Provincial People's Committee concerning the management of tourist boats on Ha Long bay and Bai Tu Long bay. The Department clearly indicated that the provisons in those documents, on operating conditions of tourist boats and on the authority to grant permits for tourist boats to enter and leave the ports, are contrary to the Law on Inland Waterway Transport. According to the Law on Inland Waterway Transport, the competence to prescribe those matters has been assigned to the Minister of Ministry of Transport, but not to local governments. After the inspection, the Department requested the Quang Ninh province government to abolish the two unlawful documents mentioned above and to report the results to the Ministry of Justice.[281]

Notably, other than examining the legality of law-making at both the local and ministry level, the Department for Inspection of Legal Documents is also in charge of inspecting the constitutionality

---

Trưởng Bộ Tư Pháp Quy Định Chức Năng, Nhiệm vụ, Quyền Hạn và Cơ Cấu Tổ Chức Của Cục Kiểm Tra Văn Bản Quy Phạm Pháp Luật]," Pub. L. No. 656/QD-BTP (2018).

[278] Ibid.

[279] "The Discovery of More Than 5.600 Unlawful Documents: The Concern of 'Whistling' Agency [Phát Hiện Hơn 5.600 Văn Bản Trái Pháp Luật: Trăn Trở Của Cơ Quan 'Tuýt Còi']," Dân Trí, August 8, 2018, https://dantri.com.vn/xa-hoi/phat-hien-hon-5600-van-ban-trai-phap-luat-tran-tro-cua-co-quan-tuyt-coi-20180808153351913.htm.

[280] "'No Legal Basis' for Forcing People to Change Their Valid Drive Licences [Buộc Người Dân Đổi Giấy Phép Lái Xe Còn Thời Hạn Là 'Không Có Cơ Sở Pháp Lý']," Dân Trí, November 30, 2016, https://dantri.com.vn/xa-hoi/buoc-nguoi-dan-doi-giay-phep-lai-xe-con-thoi-han-la-khong-co-co-so-phap-ly-20161130132636087.htm.

[281] "The Ministry of Justice 'Whistles' Two Unlawful Decisions of Quang Ninh [Bộ Tư Pháp 'Tuýt Còi' 2 Quyết Định Trái Luật Của Quảng Ninh]," Dân Trí, March 15, 2016, https://dantri.com.vn/xa-hoi/bo-tu-phap-tuyt-coi-2-quyet-dinh-trai-luat-cua-quang-ninh-20160315091814886.htm.

of those documents. As being discussed in the following sub section of the thesis, the Department found that the "one person, one motorcycle" regulation of the Ministry of Public Security violated the citizens' right to own property as guaranteed in article 58 of the Constitution and article 221 of the Civil Code. On the basis of the Department's conclusion, the Ministry of Justice had presented a report to the National Assembly on conflict between the Ministry of Public Security's regulation and national law and the potential issue of constitutionality. Finally, under pressure from the National Assembly and the public, the regulation that limited motorbike registration to one per person was canceled.

The Department for Inspection of Legal Documents has an important role in ferreting out local and ministerial legislation that violates higher laws and the Constitution. However, the only course of action available to it for dealing with unlawful (or unconstitutional) documents is reporting the issues to the National Assembly or the Prime Minister and suggesting to the authoring agency that those documents be annulled.

### 4.1.2 Constitutional Protection in Reality

As Mark Sidel observed, in his book published in 2009, "the Assembly and its Standing Committee have never undertaken, nor have they been permitted to undertake, those constitutional tasks" [282] and "no effective constitutional review, enforcement or protection under the 1992 Constitution despite its formal terms." [283] Mark Sidel's observations still hold true today, as a description of constitutional protection in Vietnam. Vietnamese scholars have generally agreed that the existing system of constitutional protection is largely dormant. They frankly pointed out the ineffective implementation of the provisions of the constitution due to the political control of constitutionality in Vietnam.[284] For that reason, it is impossible to cite even just one single case in which the National Assembly of Vietnam has decided on the constitutionality of a legal document.

---

[282] Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart Publishing, 2009), 187.
[283] Ibid., 188.
[284] Bui Ngoc Son, "The Discourse of Constitutional Review in Vietnam," *Journal of Comparative Law* 9 (2014): 200.

### 4.2 Outline of Discussions on Constitutional Review in Vietnam

Since the first constitution issued in 1946 until the end of the 20th century, constitutional review was not discussed in Vietnam because it was considered a "bourgeois idea." However, the situation has changed since the beginning of the 21st century. As the amendment of the Constitution took place in 2001, some discussions on constitutional review also emerged. However, the dialogue on constitutional review blossomed significantly in Vietnam after the Tenth Congress of the Vietnamese Communist Party in 2006 strongly affirmed to establish a system of constitutional adjudication of the actions of legislature, executive and judiciary. The year 2013 marked a significant step forward in the dialogue of constitutional review in Vietnam when a provision on constitutional council was for the first time included in the draft of the revised constitution. Ultimately, the proposal for constitutional council was rejected. Yet, it can also be seen as a milestone marking the evolution of the process of finding a suitable and feasible solution to establish a constitutional review mechanism in Vietnam. This section will give an overview of the discussions of constitutional review and enforcement in Vietnam in the 2001 constitutional amendment process as well as the years after the enactment of the 2001 constitution revision. Discussions surrounding the proposal of the establishment of constitutional council in the constitutional amendment in 2013 will also be examined to clarify the reasons why the proposal was rejected. Lastly, this section will provide some discussion on constitutional review in Vietnam currently.

#### 4.2.1 Discussion on Constitutional Review in the Constitutional Amendment Debates in 2001

As a response to the inefficiency of the existing system of constitutional protection and enforcement as stipulated in the 1992 Constitution, the debates on constitutional review emerged in the 2001 constitutional amendment process. Despite that the Constitutional Amendment Commission tried to lead the amendment discussion to less sensitive issues, officials and legal scholars still raised constitutional review throughout the amendment process. To illustrate this, in September 2001,

officials from the Fatherland Front in Ho Chi Minh City called for "the establishment of a Constitutional Defense Commission, or a constitutional court, or the addition of appropriate functions of the National Assembly's Law Committee" to handle issues of constitutional review and enforcement.[285] Also in 2001, senior legal scholar Nguyen Van Thao in his article in the Communist Review – the formal journal of the Communist Party - pointed out the dormancy of the existing system of constitutional protection. He suggested the creation of either an independent institution of constitutional review or a constitutional commission in order to "adjudicate unconstitutional documents."[286] Scholar Nguyen Van Thao affirmed that an open debate on the significance of dealing with constitutional violations was now necessary.

Unsurprisingly, such arguments and proposals by the Fatherland Front, and legal scholar Nguyen Van Thao were not supported by the Communist Party nor considered by the Constitutional Amendment Commission. The main reason for the refusal was that it was too sensitive at that time to directly raise issues concerning potential constitutional violations of the Party and State.[287] Although that initial effort did not result in a positive outcome, it was a signal of rising consciousness about constitutionalism in Vietnam. According to Mark Sidel, "these appeals for a constitutional review and enforcement structure reflected a changed vision of the role of the Constitution, as well as a more activist perspective that saw the Party and government as at least partly subject to law, rather than law being subject to policy."[288]

---

[285] Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge: Cambridge University Press, 2008), 53.
[286] Nguyen Van Thao, "Drafting and Amending the Constitution and the Practice of Constitutional Protection [Soạn Thảo, Sửa Đổi Hiến Pháp và Thực Hiện Bảo vệ Hiến Pháp]," *Communist Review [Tạp Chí Cộng Sản]* 33 (2001).
[287] Mark Sidel, "Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam," *Singapore Journal of International and Comparative Law* 6 (2002): 42.
[288] Sidel, *Law and Society in Vietnam*, 53.

### 4.2.2 Discussion on Constitutional Review after the Enactment of the 2001 Constitutional Revision

Constitutional review in scholarly forums

As mentioned above, the intellectual discourse on the constitutional protection system surrounding the constitutional amendment in 2001 did not result in any change in the final revision of the Constitution. In the years after the constitutional amendments came into effect in early 2002, Vietnamese legal scholars were not discouraged but continued to raise the issue of constitutional review.[289] Since the 2001 amendment affirmed for the first time that Vietnam is a socialist rule-of-law state, the scholars relied on this constitutional principle to argue that it is impossible to successfully build a socialist rule-of-law state without having a constitutional review system. In addition, because constitutional review was still a relatively new issue in Vietnam, the works of legal scholars have played a significant role in providing basic information and knowledge on different constitutional models throughout the world.

Notably, in April 2004, Pham Duy Nghia, a law professor at Hanoi National University, published a short but straightforward and enthusiastic article in Tuoi Tre newspaper, one of the most popular newspapers in southern Vietnam. Professor Nghia wrote the article when he, as a commentator, attended the Regional Seminar of Asian Constitutional Court Judges held in Bangkok, Thailand. In the article, he brought out three main arguments as follows. First, he explained why a constitutional review is needed. According to Professor Nghia, constitutional review is a necessary part of the process of civil society and rule of law state construction. He believed that a constitutional review system would function to limit the public authorities, forcing them to comply with the will of the people. Second, Professor Nghia pointed out that numerous "neighboring countries have imported the

[289] These are some well-known works on constitutional review by Vietnamese scholars in that period of time: Nguyen Duc Lam, "Systems of Constitutional Review: Comparative Perspective [Cơ Chế Giám Sát Bảo Hiến: Góc Nhìn Tham Khảo]," *Journal of Legislative Studies [Tạp Chí Nghiên Cứu Lập Pháp]* 10 (October 2003): 36; Vu Hong Anh, "Constitutional Review [Giám Sát Hiến Pháp]," *Journal of Legislative Studies [Tạp Chí Nghiên Cứu Lập Pháp]* 12 (December 2003): 36; Bui Ngoc Son, *Constitutional Review in Vietnam [Bảo Hiến ở Việt Nam]* (Hanoi: Judiciary Publish House [Nhà xuất bản Tư pháp], 2006).

mechanisms of societies ruled by law while still maintaining their Eastern values." In order to support that point, he wrote: "Following the Japanese, the people of Korea, Thailand, Malaysia, Indonesia, and the Philippines have all established constitutional courts, a mechanism for protecting the constitution, resisting illegal actions and unconstitutional actions by the government and legislature. The people of Cambodia have also established a constitutional council based on the French model." Third, Professor Pham Duy Nghia has frankly pointed out the problems that Vietnam faced with including the conservatism of the intellectual class, the bureaucracy of the officials, the complacency of the peasants, and the impossibility of the National Assembly in implementing its supreme supervisory function. After his review, at the end of the commentary, Pham Duy Nghia called for "study the experience of neighboring countries in order to move step by step toward mechanisms for appropriate constitutional protection."[290]

Constitutional review in political forums

As a response to the intellectual discourse, the matter of constitutional protection reform gradually became the formal concern of the Communist Party and the state. In 2004, President of State Tran Duc Luong, Chair of the Party Judicial Reform Committee, responsible for drafting a national Judicial Reform Strategy, announced that the Committee was prepared to recommend "study of the establishment of a Constitutional Court."[291] In June 2005, the Communist Party's Politburo issued the *Resolution on Building and Perfecting Vietnam's Legal System to the Year 2020*. In this Resolution, the Party had set one of the tasks in this period that is: "perfecting the law regarding the supreme supervision of the National Assembly, and a system of protection for laws and the Constitution" in accordance with the requirements of building of the Socialist Rule of Law State.[292]

---

[290] Pham Duy Nghia, "A Supervisory Mechanism for the Servants of the People [Một Phương cách Giám sát Đầy tớ Nhân dân]," TUOI TRE ONLINE, April 5, 2004, https://tuoitre.vn/news-27325.htm.
[291] Sidel, *The Constitution of Vietnam*, 194.
[292] Party Politburo [Bộ Chính trị], "Resolution on Building and Perfecting Vietnam's Legal System to the Year 2020 [Nghị Quyết về Chiến Lược Xây Dựng và Hoàn Thiện Hệ Thống Pháp Luật Việt Nam Đến Năm 2020]," May 24, 2005, section II, 1.3.

In 2006, the Communist Party of Vietnam, at its Tenth Congress, affirmed the mission to "establish, improve a system of checking and supervising the constitutionality of civil authorities' decisions" and "establish a system of constitutional adjudication (*phán quyết*) of the actions of legislation, executive and judiciary."[293] Giving a comment on the document of Party's Tenth Congress, Bui Ngoc Son, an assistant professor at the Chinese University of Hongkong, believes that the word "*phán quyết*" used in that context implies the Party's deference to judicial review. The reason given by Bui Ngoc Son is that the word "*phán quyết*" in Vietnamese is normally used to indicate an action of the courts.[294] The Party and State initiative of establishing a constitutional protection system continued to be affirmed when the party unit within the National Assembly Standing Committee, in 2008, set up a "board for study of the establishment of system of constitutional adjudication of the actions of legislation, executive and judiciary" consisting of distinguished legal scholars and some senior politicians.

Alternative options of the form of constitutional review

In March 2009, the National Assembly Office organized an international conference on constitutional protection whose attendants consisted of distinguished Vietnamese legal scholars in constitutional law, politicians, legal practitioners, and some foreign experts. The attendants unanimously reaffirmed the dormancy of the system of constitutional protection in Vietnam and agreed on the need to reform it. Most of the presentations in the conference focused on finding possible solutions for the question of which form constitutional review in Vietnam should take.

The first option expressed by some attendants in the conference was to grant constitutional review power to the Supreme People's Court.[295] The advocates of this option argued that if the

---

[293] The Vietnamese Communist Party [Đảng Cộng Sản Việt Nam], "Documents of the 10th National Party Congress [Văn Kiện Đại Hội Đại Biểu Đảng Toàn Quốc Lần Thứ X]" (National Political Publishing House [Nhà xuất bản Chính trị Quốc gia], 2006), 126–27.
[294] Son, "The Discourse of Constitutional Review in Vietnam," 202.
[295] Nguyen Hai Ninh, "The Creation of a Mechanism for Adjudicating the Constitutionality in the Legislative, Executive, and Judicial Actions [Thiết Lập Cơ Chế Phán Quyết Những Vi Phạm Hiến Pháp Trong Hoạt Động Lập Pháp, Hành Pháp và Tư Pháp ở Việt Nam]," in *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, ed. National Assembly Office (Time Publishing House [Nhà Xuất bản Thời đại], 2009), 311.

Supreme Court practices judicial review, then there will be no need to establish an independent institution other than the three branches of state power and that is in accordance with the administrative reform. Another reason brought out by the proponents of this form is that if the constitutional review lies within the Supreme Court, it might be perceived as helping to strengthen the power of the judiciary, contributing to a balance between legislature, executive and judiciary. However, opposed to this view, Bui Ngoc Son argued that the decentralized model of review inspired by the American model is not suited to Vietnam. As Son examined, Vietnam lacks three conditions needed to adopt the decentralized judicial review model: professional talented judges in constitutional law; high level of consciousness of people over constitution; and the tradition of precedent.[296] Attending the international conference in Ho Chi Minh City, John Gillespie later in his article in the book *Legal Reform in China and Vietnam* indicated that "few commentators seem [to] want the Supreme Court to review the Constitution. They question the willingness and capacity of judges in the existing judicial system to assert themselves against governmental officials, much less against party officials."[297]

The second option was to establish a constitutional commission under the National Assembly. [298] This viewpoint held that a constitutional commission is more suitable to the current realities of Vietnam than a constitutional court because Vietnam has adopted the principle of unity of power in which the National Assembly has the power to supervise the courts in a non-reciprocal manner. The main idea behind the proposal of establishing a constitutional commission was that the National Assembly would continue to perform the function of constitutional protection, but at a higher level of competence. In terms of its jurisdiction, the proponents of the constitutional commission suggested

---

[296] Bui Ngoc Son, "Foreground of Constitutional Review in Vietnam[Tiền Cảnh Chế Độ Bảo Hiến ở Việt Nam]," in *Proceedings of the International Conference on Constitutional Protection[Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, ed. National Assembly Office (Time Publishing House [Nhà Xuất bản Thời đại ], 2009), 59.

[297] John Gillespie, "The Juridification of State Regulation in Vietnam," in *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes*, ed. John Gillespie and Albert H. Y. Chen (Routledge, 2010), 89.

[298] Nguyen Thi Hoi, "Primary Idea on an Institution of Constitutional Protection in Vietnam [Ý Tưởng Ban Đầu về Cơ Quan Bảo Hiến ở Việt Nam]," in *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]* (Time Publishing House [Nhà Xuất bản Thời đại], 2009), 176.

that the commission should be granted the authority of review the constitutionality of proposed laws before they are enacted by the legislature, known as a *priori* review. In order to ensure the effectiveness of the commission, its decisions must be respected by all governmental bodies and cannot be appealed. With regard to the membership of the commission, it was suggested that its members should not be National Assembly's deputies or Ministers at the same time.

The third standpoint, expressed by a majority of the delegates at the conference, leant toward a constitutional court as an independent structure. Proponents of the establishment of an independent constitutional court shared a common view that Vietnam and the civil law countries in Europe, which adopted the centralized constitutional review model, have several similarities.[299] As Mark Sidel observed, "in organizational terms, a number of senior legal reformers support such an option [an independent constitutional court] because they want strong constitutional review and enforcement, and because they harbor strong concerns about the effectiveness of a constitutional court if it is part of either the existing judiciary or legislature."[300] Remarkably, not only legal scholars but also some senior politicians advocated the creation of a special constitutional court in Vietnam. For instance, one could find the support of Nguyen Van Yeu, former National Assembly Vice Chair, through his article in the *Communist Review* published in 2005. He wrote: "We should study whether we can establish a constitutional court (or constitutional protection commission) with the responsibility for protecting the Constitution through jurisdiction to adjudicate and issue judgments on constitutional violations in legal

---

[299] Son, "Foreground of Constitutional Review in Vietnam[Tiền Cảnh Chế Độ Bảo Hiến ở Việt Nam]," 59; Thai Vinh Thang, "The Need of Constitutional Review and a Suitable Constitutional Review Model for Vietnam [Nhu Cầu Bảo Hiến và Mô Hình Cơ Quan Bảo Hiến Phù Hợp Với Việt Nam]," in *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, ed. National Assembly Office (Time Publishing House [Nhà Xuất bản Thời đại], 2009), 147–48; Bui Xuan Duc, "Renovating the Constitutional Protection Mechanism in Vietnam: From Supervision by the National Assembly to Adjudication by a Constitutional Court [Đổi Mới Mô Hình Bảo Hiến ở Việt Nam: Từ Giám Sát Bởi Quốc Hội Chuyển Sang Tài Phán Bằng Toà Án Hiến Pháp]," in *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, ed. National Assembly Office (Time Publishing House [Nhà Xuất bản Thời đại], 2009), 189.
[300] Sidel, *Law and Society in Vietnam*, 70.

documents, to adjudicate unconstitutional decisions and acts of agencies and individuals holding authority in state institutions and carry out the task of interpreting the Constitution and the laws."[301]

### 4.2.3 Proposal to Establish a Constitutional Council in the Latest Constitutional Amendment Process

The latest constitutional amendment in Vietnam took place in the years 2012 and 2013. Notably, that was the first time in Vietnamese constituent history when a provision of the constitutional council was included in a draft revised constitution. Although the advocates for constitutional review could not make their way to the final stage of the constitutional amendment process, the draft provision had attracted the attention and created intense debates amongst legal scholars, politicians, and the people.

Provision of the constitutional council in the draft revised constitution which was released for public discussion (Article 120)

Despite the dominant trend toward the establishment of a specialized constitutional court, the constitutional makers proposed the establishment of a constitutional council, which they believe is more suitable to the Vietnamese political system. Article 120 of the draft revised constitution consisted of three sections defining the functions, membership, terms, and other issues concerning the constitutional council.

In terms of its functions, the constitutional council was proposed to practice constitutional review only as an "advisory committee." Section one of Article 120 provided that the constitutional council has the authority to review the constitutionality of the laws and resolutions enacted by the National Assembly as well as the legal documents issued by all central institutions including the President of State, the National Assembly's Standing Committee, the Government, the Prime Minister,

---

[301] Nguyen Van Yeu, "Building the Socialist Rule of Law State of Vietnam during the Period of Industrializing and Modernizing the Country [Xây Dựng Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Thời Kỳ Công Nghiệp Hoá, Hiện Đại Hoá Đất Nước ]," *Communist Review [Tạp Chí Cộng Sản]* 3 (November 9, 2005): 7. This is mentioned in Sidel, *The Constitution of Vietnam*, 204–5.

the Ministers, the Supreme Court, and the Supreme Procuracy. The constitutional council can also review the constitutionality of international treaties prior to the approval of the National Assembly or the President of State. However, after reviewing the constitutionality of those documents, the constitutional council has no power to annul anything identified as unconstitutional. Instead, it was proposed to merely allow it to recommend that the challenged institutions or authorities revise or eliminate the laws which it finds unconstitutional. The constitutional council proposed in the draft revised constitution has no power to interpret the Constitution or adjudicate constitutional cases.

Regarding membership, section two of the Article defined that the council shall consist of the President, Vice-President and other members. The duties and authorities, the term, and the exact number of the members will be regulated by a law, stated Article 120.

Criticisms on the proposed constitutional council

The regulation on the constitutional council in the draft revision of the 1992 Constitution caused controversies in the first place and was subjected to criticisms by legal scholars, intellectuals, members of the social-political organizations, other commentators, and the people. The critics focused on the sketchy structure of Article 120 and particularly on the limited authority of the council. One of the limitations with this proposal was that it did not authorize the council with any adjudicative power. Critics argued that a constitutional council with a consulting function is a supplement rather than a replacement for the established political system of constitutional protection. The opponents emphasized that the proposed constitutional council fails to introduce a powerful constitutional council and actually just makes the state apparatus more cumbersome.[302]

To illustrate, the Ministry of Justice authored a report on the comments on the draft revised constitution given by the provincial Justice Departments across the country. Several specific

[302] "On the Authority of the Constitutional Council [Về Thẩm Quyền Của Hội Đồng Hiến Pháp]," Báo điện tử Đại biểu Nhân dân, August 26, 2013, https://www.daibieunhandan.vn/ve-tham-quyen-cua-hoi-dong-hien-phap-290449.

recommendations concerning the establishment of a constitutional council could be found in the report. The report argued that the proposed constitutional council is plainly an advisory body of the National Assembly. Without decisive jurisdiction over laws and other legal documents that are not in accordance with the Constitution, continued the report's comments, it is impossible for the council to be able to guarantee the supremacy of the Constitution. What is more, it was reported that some other comments were also concerned about the feasibility of the constitutional council because it required experienced professionals in various fields. Therefore, many Justice Departments throughout the country had proposed to establish a Constitutional Court that was provided with adjudicative power rather than just advisory function. Accordingly, the Constitutional Court shall have the power to decide on the constitutionality of laws in order to effectively protect the supremacy of the Constitution.[303]

There was an avalanche of criticisms on the weak nature of the proposed constitutional council. However, most scholars, who were proponents of the Kelsenian constitutional review model, reluctantly accepted the proposal of a constitutional council. The reason being that they considered the creation of constitutional council as a temporary solution or a transitional stage that would subsequently lead to a specialized constitutional court in the future. So, the proponents of constitutional review actually accepted the proposal of constitutional council, as a compromise by accepting its form, but called for it to have adjudicative power and independent position. According to Nguyen Van Phuc, Vice-Chair of the Editing Board of the revised constitution, "scholars have demonstrated that in a long-run, the model of a constitutional court is more appropriate than the model of a constitutional council. Therefore, if the institution of constitutional council is chosen, it should be regarded as a transitional stage."[304]

---

[303] "The Draft Revision of the 1992 Constitution: A View of the Ministry of Justice [Dự Thảo Sửa Đổi Hiến Pháp 1992: Góc Nhìn Từ Cơ Quan Tư Pháp]," Hà Nội Mới, March 23, 2013, http://hanoimoi.com.vn/Tin-tuc/Chinh-tri/581080/du-thao-sua-doi-hien-phap-1992-goc-nhin-tu-co-quan-tu-phap.

[304] "The Constitutional Council: A Politically Safe Choice? [Hội đồng Hiến pháp - Lựa chọn Chính trị An toàn?]," Vietnamnet, May 3, 2013, https://vietnamnet.vn/vn/thoi-su/hoi-dong-hien-phap-lua-chon-chinh-tri-an-toan-119577.html.

Reasons for rejection of the proposal of constitutional council

After a period of public debate, the political leadership gave the final decision on controversial issues including the proposed constitutional council. The issue of creating a constitutional council was one of the biggest concerns of the Central Committee of the Communist Party's meeting from 30 September to 9 October 2013. In the meeting, the Committee agreed to reject the proposal of constitutional council. Following the Party's mandate, the Constitutional Amendment Commission prepared the fourth draft of revised constitution explicitly removing the provision for a constitutional council. The proposal to establish a Constitutional Council was rejected for the following three main reasons.[305]

First, the opponents of the constitutional council argued that constitutional review simply cannot work in a one party dominated state. Their argument was that as constitutional review is one of the checks and balances in the separation of powers, it plays no function in a country which practices unity of power. Indeed, without separation of powers, believed the opponents, executive and legislative actions are not subject to review by the judiciary. However, saying constitutional review is unsuited to Vietnam simply because of its socialist jurisprudence is both simplistic and unilateral in nature. Although Vietnam has adopted unity of power, the Constitution delegates state power to state agencies which coordinate with and control one another in the exercise of legislative, executive, and judicial powers.[306] Furthermore, the National Assembly represents the majority, which thereby places the legitimate interests of minorities at risk. Constitutional review is a needed mechanism in the protection of those minorities from potential mistakes made by the majority. This thesis will discuss more deeply whether constitutional review conflicts with the principle of unity of power in the following Chapter.

---

[305] "On the Provision on the Constitutional Council in the Draft Amendments to the 1992 Constitution [Về quy định Hội đồng Hiến pháp trong Dự thảo Sửa đổi Hiến pháp 1992]." This document reported in detail legislators' discussions on the proposal of the Constitutional Council, and was available at the website of the Vietnamese National Assembly.

[306] The 2013 Constitution of Vietnam, art. 2.

Second, the proposal to establish a constitutional council was rejected on the ground that its proposed functions overlap with those of National Assembly's Standing Committee and special committees. This is also the most common argument put forward by scholars opposing the proposed constitutional council, whilst calling for creation of an independent constitutional court. Indeed, it is somewhat wasteful establishing a new council to do exactly the same functions as those which are currently exercised by other committees of the National Assembly. Thus, further research on jurisdictions of a constitutional review mechanism for Vietnam is required.

Third, rejecters of the proposal to establish a constitutional council denied the need to create a special body of constitutional protection by arguing that the flawless nature of the Vietnamese legislature negated any such perceived need. Rejecters maintained that constitutional violation by enacted laws is already negated as law-making in Vietnam is conducted under the leadership of the Communist Party and according to strict procedures. This is somewhat a subjective and superficial argument. No one could ever say that they have never erred. Majority rule does not equate to rightness and perfection. And if the Vietnamese legislature always has been flawless, and reflected the general will of the people, then the public would not have raised constitutional issues regarding respect for their fundamental rights, as seen in the *Motorbike case* and the *Household Registration case.*

#### 4.2.4 Current Debate on Constitutional Review

As mentioned previously, the establishment of a constitutional review mechanism was raised and actively discussed during the constitutional revision process in 2013. The purpose of those constitutional debates was to call for the establishment of an impartial institution that can determine the constitutionality of legislation. However, after the 2013 Constitution was enacted without any breakthrough change in regard to a constitutional review mechanism, and discussion of the matter subsided for a while. In March 2017, the Ministry of Justice brought it back to the agenda by organizing a workshop with the theme of "perfecting the constitutional protection mechanism in accordance with the spirit of the 2013 Constitution" whose participants included notable legal scholars

and researchers from the Ministry of Justice. The workshop aimed to once again renew interest in the topic of constitutional review, because four years after the enactment of the new Constitution, from 2013 to 2017, constitutional protection by a the political control mechanism still remained dormant.

At that workshop, the legal scholars once again criticized the dormancy of the existing political mechanism of constitutional protection and called for the creation of a new special institution of constitutional review. Professor Tran Van Do, former Chief Judge of the Central Military Court who is famously known as a notable legal scholar in Vietnam, stated that: "the maintenance of current constitutional protection mechanism is unreasonable and ineffective."[307] The irrationality of the current constitutional protection mechanism, pointed out Professor Do, was shown in the ignorance of constitutional makers over the Party's standpoint. Indeed, the constitutional makers intentionally discounted the Party's endorsement which distinctly affirmed the mission to "establish a system of constitutional adjudication of the actions of legislation, executive and judiciary."[308] Agreeing with Tran Van Do's opinion, most of the delegates attending the seminar believed that the Party had implicitly given the court the right to decide on constitutional violations because only the judiciary has the adjudicative power to make judgments on a legal issue. However, in reality the 2013 Constitution of Vietnam still does not allow for an institution that has adjudicative power over constitutional issues.

In addition, workshop's participants highlighted the fact that the constitutional protection mechanism does not align with the constitutional principle of organizing state power as acknowledged in Article 2 of the 2013 Constitution. A remarkable new point of the 2013 Constitution compared to previous Constitutions is that for the first time the Constitution recognizes coordination and mutual

---

[307] Tran Van Do, "The Responsibility of Constitutional Protection of the People's Courts and the People's Procuracies in Accordance with the Spirit of the 2013 Constitution and the Pefecting Direction [Trách Nhiệm Bảo Hiến Của Toà Án Nhân Dân và Viện Kiểm Sát Nhân Dân Theo Tinh Thần Hiến Pháp 2013 và Hướng Hoàn Thiện] (Presentation in the Workshop on 'Perfecting the Constitutional Protection Mechanism in Accordance with the Spirit of the 2013 Constitution')" (The Ministry of Justice of Vietnam, March 2017).

[308] The Vietnamese Communist Party [Đảng Cộng Sản Việt Nam], "Documents of the 10th National Party Congress [Văn Kiện Đại Hội Đại Biểu Đảng Toàn Quốc Lần Thứ X]," 126–27.

control among state agencies in the exercise of legislative, executive and judicial powers. Therefore, the discussants argued that once mutual control between state agencies was recognized, there would be no reason for refusal to grant the constitutional supervision power to the courts, which exercise the judicial power. In short, the participants of the workshop agreed that the legislative self-control mechanism as stipulated in the 2013 Constitution is inconsistent with the notion of the rule of law.

After pointing out the shortcomings of the current legislature's constitutional protection mechanism, the attendants repeatedly underlined the need to create the independent constitutional review institution as a means of bolstering the rule of law state, to protect human rights, and to realize the principle of controlling the power of the state. They argued that Article 119 of the 2013 Constitution opens the door for a special mechanism of constitutional protection and supervision because it reconfirms that "entirely people have the duty to protect the Constitution" and provides that the "mechanism of constitutional protection shall be regulated by a law." Regarding the form that constitutional review should take, Professor Tran Van Do affirmed that "the constitutional review function has to be entrusted to a court."[309] He supported the creation of a constitutional court that would have the following jurisdictions: (1) deciding on the constitutionality of legal documents; (2) ruling on human rights violations; (3) and resolving conflicts between national and local authorities.[310] Another idea put forward at the workshop was to create a constitutional commission directly under the Standing Committee of the National Assembly. This proposed institution would have advisory power only.[311]

---

[309] Do, "The Responsibility of Constitutional Protection of the People's Courts and the People's Procuracies in Accordance with the Spirit of the 2013 Constitution and the Pefecting Direction [Trách Nhiệm Bảo Hiến Của Toà Án Nhân Dân và Viện Kiểm Sát Nhân Dân Theo Tinh Thần Hiến Pháp 2013 và Hướng Hoàn Thiện] (Presentation in the Workshop on 'Perfecting the Constitutional Protection Mechanism in Accordance with the Spirit of the 2013 Constitution.')"

[310] Ibid.

[311] Tran Ngoc Duong, "The Responsibility of Constiutional Protection of the National Assembly in Accordance with the Spirit of the 2013 Constitution and the Orientation for Institutional Improvement [Trách Nhiệm Bảo Hiến Của Quốc Hội Theo Tinh Thần Của Hiến Pháp Năm 2013 và Hướng Hoàn Thiện Thể Chế] (Presentation in the Workshop on 'Perfecting the Constitutional Protection Mechanism in Accordance with the Spirit of the 2013 Constitution')" (The Ministry of Justice of Vietnam, March 2017).

The aforementioned workshop held by the Ministry of Justice did not lead to an official proposal on the need to establish constitutional review in Vietnam, yet it addressed the fact that a mechanism of constitutional review still remains a significant constitutional issue. Therefore, research and discussion on this topic are expected to shape future debates on constitutional revision in the future.

### 4.3 Conclusion

In order to assess the potential for creating constitutional review in Vietnam, as well as to offer appropriate suggestions regarding the institutional design of a constitutional review mechanism, it is necessary to firstly understand the specific conditions in the country. For that reason, this chapter has provided an overview of the current system of constitutional protection and supervision in Vietnam; and has outlined discussions on constitutional review in Vietnam from 2001 until the present time.

In response to the inaction of the political control system of constitutionality, some discussion on constitutional review started emerging at the beginning of the 21st century, when the amendment of the 1992 Constitution took place in Vietnam. The dialogue of constitutional review then began to flourish in Vietnam after the Tenth Congress of the Vietnamese Communist Party in 2006 which strongly affirmed its attention to establish a system of constitutional adjudication of the actions of legislature, executive and judiciary. In 2013, a provision on the constitutional council was for the first time included in the draft of the revised constitution. However, the proposal of the constitutional council was eventually rejected. 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. On the contrary, it opens the door for more diverse research directions. This thesis, in the following chapter, will express a view on the need for and the potential for establishment of constitutional review in Vietnam.

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 constitutiontal

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. The next chapter will offer some thoughts on which form constitutional review Vietnam should have, as well as give some realistic suggestions in terms of its institutional design.

## Chapter V: A Constitutional Court for Vietnam: Potential of the Establishment, Institutional Design, and Possible Difficulties

It has been twenty years since Vietnam affirmed its goal of building a socialist rule of law state, a constitutional review system has not yet been formed there. During the past two decades, there have been several debates, both in scholarly and political forums, about the need for a constitutional review mechanism in Vietnam. Likewise, potential constitutional review models that might be suitable to Vietnamese circumstances have been discussed. The proposal to set up a constitutional council in the latest constitutional amendment process in 2013 was rejected. However, that did not discourage Vietnamese legal scholars, instead motivating them to continue carrying out research on the potential creation of constitutional review in the future. Serious thought needs to be given to how a constitutional review institution would be not only created but also operated without threatening the political stability of Vietnam.

Another issue of note is that it is not fully possible to engineer a successful constitutional review system. Many factors, such as how the constitutional judges would conceive of and go about their roles, cannot be fully predicted in advance. Yet, it is possible to avoid engineering failure and there is clear merit in a "lessons learned" approach that gleans cautionary guidance from the experiences of other countries. Therefore, in this chapter, the thesis seeks to address the following four key issues: (1) subsection 5.1 will analyze which theories can be applied as explanations for the need to establish constitutional review in Vietnam; (2) subsection 5.2 will discuss whether constitutional review conflicts with unity of power, the National Assembly's sovereignty, and constitutional supremacy; (3) subsection 5.3 will give suggestions on which constitutional review model should be adopted by Vietnam; and (4) subsection 5.4 will examine the possible issues to be considered with the proposal to establish a constitution court in Vietnam.

### 5.1 Possible Theories of Constitutional Review Adoption in Vietnam

As mentioned in chapter IV, the Communist Party of Vietnam in 2006 affirmed a mission to establish a system of constitutional adjudication of the actions of legislation, executive, and judiciary. Subsequently Vietnamese scholars have discussed the need to reform the current constitutional protection system as well as possible constitutional review design options.[312] However, the proposal for a constitutional council given in 2013 was rejected. The reasons for rejection focused on the unsuitability of constitutional review in the Vietnamese political context, as well as the high possibility of 'flawlessness of legislation' that would make constitutional review unnecessary. This dilemma would still raise great confusion as to whether there is a real need for the creation of constitutional review in Vietnam. Hence, in this subsection, this thesis aims to discuss possible theories that can explain the necessity of the adoption of constitutional review in Vietnam.

Scholars have classified different theories to explain the adoption of constitutional review as an instrument to protect the rule of law and human rights; a coordination and commitment method; a political insurance method, and a product of transnational influence.[313] For the case of Vietnam, the necessity of constitutional review adoption can be connected with the growing awareness of rights; the commitment to build "the socialist rule of law state;" the commitment to respect constitutional norms; and 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, yet the domestic political interests, to some extent, may feature it.

#### 5.1.1 The Growing Awareness of Rights

The explosion of human rights in the contemporary world has raised concern for the creation of effective instruments to protect the rights. Adequate protection of fundamental rights now lies at

[312] See chapter IV of this thesis, pages: 106-117.
[313] See chapter I of this thesis, pages: 11-22.

the heart of what people expect from a well-functioning state. Vietnam is not an exception. Rights-based popular demand is increasing in Vietnam after several decades of implementing the Renovation policy. The practice of the market economy, the opening-up to the world, and the development of the Internet and social media have resulted in the growing awareness of fundamental rights particularly associated with social-economic rights.

Human rights are clearly embedded in Vietnam's Constitution as well as in numerous other policies. Although there is always a gap between legislation and implementation; yet certainly, with a huge contribution from NGOs, the Vietnamese government has made some effort to raise citizens' awareness of their rights. For instance, in September 2017, the Prime Minister approved a project to integrate human rights content into the curriculum of the national education system. The goal of the project is that by 2025, all educational institutions in the national education system must offer a subject on human rights. What is more, the media was engaged in an educational role. Journalists were trained to educate the public about human rights and to encourage them to exercise their rights.[314]

The growing rights-awareness, observes Bui Ngoc Son, "has resulted in the demand for governmental accountability and rights protection mechanism" in Vietnam.[315] With increased awareness of their rights, there needs to be a system through which people can claim those rights. Such a need will spur the development of constitutional review. In return, constitutional review, a system of protecting individual rights as well as ensuring law and order in the society, will lead to the political stability.

The awareness of individual rights among the people can be seen clearly through the *Motorcycle registration case* of 2005 and the *Household registration case* of 2006. This subsection

---

[314] The World Bank, "Growing the Space for Human Rights Awareness in Vietnam" (The World Bank, March 1, 2018), http://documents.worldbank.org/curated/en/920881520428642836/Growing-the-space-for-human-rights-awareness-in-Vietnam.
[315] Son, "The Discourse of Constitutional Review in Vietnam," 214.

will discuss these two typical cases in order to examine how public opinion in Vietnam raised its voice to demand the protection and enforcement of constitutional rights.

The Motorcycle registration case

In 2003, in order to deal with the raise of chaotic and unsafe traffic conditions, the Hanoi People's Council issued a resolution enforcing a legal provision in the national police force's regulations on the registration of vehicles. Under those regulations, implemented by local rules, each person may register only one motorcycle or moped. The policy "one person one motorcycle" was firstly applied to seven urban districts of Hanoi. There was a fierce opposition to this policy amongst local people. However, this opposition was insufficient to bring an end to the policy's effect.

Attempts to enforce the policy only became troublesome when the Ministry of Justice and the Law Committee of the National Assembly entered the fray. In August 2005, The Ministry of Justice argued that the police regulations were a violation of the national regulations on administrative sanctions and on transport safety. The Law Committee of the National Assembly then took the fight further claiming that the motorbike regulation was a restriction on citizens' right to own property guaranteed in Article 58 of the 1992 Constitution and Article 221 of the Civil Code.[316] In the face of the political pressure, one day before the Minister of Justice had been scheduled to present a report to the National Assembly on conflicts between local and national law and potential issues of constitutionality, the Ministry of Public Security issued a directive annulling the "one person, one motorcycle" policy.[317] Consequently, the Hanoi People's Committee had no choice but to release a decision abrogating its suspension of motorcycle registration in seven urban districts, with immediate effect.[318]

---

[316] According to Article 58 of the 1992 Constitution, "The citizen enjoys the right of ownership with regard to his lawful income, savings, housing, goods and chattels, means of production, funds and other possessions in enterprises or other economic organization." Article 221 of the Civil Code stipulated that ownership rights were not to be limited with respect to number or value.
[317] Son, "The Discourse of Constitutional Review in Vietnam," 214.
[318] Ibid., 86.

The motorcycle case is a typical case regularly mentioned by legal scholars in debates on constitutional review. There are two basic reasons for it to become a striking case. First, it marked the emergence of constitutional claims in Vietnam. The Constitution of Vietnam has always been defined as the fundamental law of the country since 1946. Yet, frankly speaking, by the first couple of years of the 21st century it still remained largely unused, especially in terms of protecting human rights. However, the popular consciousness as well as claim of a particular constitutional social-economic right was first observed in this case. As Mark Sidel stated, the motorcycle case "sparked Vietnam's first mass public assertion of constitutional rights in the reform era."[319]

Second, the motorcycle case activated the social and then the political debates on the ineffectiveness of the current mechanism of constitutional rights protection. Indeed, the case was closely related to the initial reemergence of the discourse of constitutional review in Vietnam around the years 2004 and 2005.[320] In the same year of the *Motorbike case*, the matter of constitutional protection gradually became a significant concern of legal scholars and politicians.[321]

The Household registration case[322]

The Vietnamese household registration system was formally introduced in the 1950s, prompted by the massive southward migration of nearly one million people after Vietnam was divided into North and South. So the initial purpose of creating the system was to impose tighter control over migration flows and to ensure that people are domiciled strictly in their registered locations.[323]

---

[319] Sidel, *Law and Society in Vietnam*, 74–75.
[320] Son, "The Discourse of Constitutional Review in Vietnam," 215; Nguyen Thi Phuong, "The Aim of Constitutional Protection in Building the Socialist Rule of Law State in Vietnam[Mục Đích Của Bảo Hiến Trong Điều Kiện Xây Dựng Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa ở Việt Nam]," in *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, ed. National Assembly Office (Time Publishing House [Nhà Xuất bản Thời đại], 2009), 87.
[321] See section 4.2 chapter IV of this thesis, pages: 105-120.
[322] For the detailed discussion of the case, see: Huong Thi Nguyen, "Constitutional Rights and Dialogic Process in Socialist Vietnam: Protecting Rural-to-Urban Migrants' Rights without a Constitutional Court," in *Social Difference and Constitutionalism in Pan-Asia*, ed. Susan H. Williams (Cambridge: Cambridge University Press, 2014), 109–33.
[323] Ibid.

Subsequent to the reunification of Vietnam in 1975, the household registration system remained an important tool of control over the population. Other than that, it served as the backbone of the centralized State's regional planning and population-redistribution programs. During Vietnam's subsidy period, the household registration system was what regulated access to daily necessities such as food and other commodities[324] as well as to social services such as education and health care. The Renovation reform that was initiated in 1986 to create a socialist-oriented market economy resulted in the abolishment of the subsidy system. However, household registration still continued to be used for the purpose of identification and to restrict migration from rural to urban areas. That means that a person could only find employment within the province in which they were registered.

However, Vietnam's economic transition from a centrally planned to a market system following the Renovation reform brought about a flood of rural migrants into the cities. The growth of non-state economic sectors has opened up the labor market to everyone no matter what type of residency they have, thereby breaking the link between one's residential status and access to employment. So, it seemed impossible for the household registration system to continue to function as a tool to control the flow of migration. Yet, the system still influenced people's lives, especially the migrants' ones, via the link between residential status and the rights that they enjoy.

The migrants living in big cities, such as Hanoi and Ho Chi Minh City, wished to gain a permanent residential status household registration, were required to meet strict conditions. In order to apply for a permanent household registration, they must have legal accommodation (legal house ownership, housing lease, or consent of the household head to permanently live in his or her residence) and/or be employed or mobilized by competent state organs. All other migrants who did not meet those requirements were only eligible to register temporary residence.[325] The problem with this system

---

[324] Without a household registration, one could not get coupons to buy rice and other daily essentials.
[325] The Government of Vietnam, "Decree on Amending Some Provisions of the Decree 51/CP of May 10th, 1997 on Household Registration and Management [Nghị Định về Việc Sửa Đổi, Bổ Sung Một Số Điều Của Nghị Định Số 51/CP Ngày 10 Tháng 5 Năm 1997 Của Chính Phủ về Đăng Ký và Quản Lý Hộ Khẩu]," Pub. L. No. 108/2005/ND-CP (2005), art. 12.

is that, without a permanent residential status in the city where they actually live, the migrants have no ability to access public services such as schooling and medical care.

The household registration policy served the purpose of government in restricting urban-ward migration. Yet it has made the migrants' lives difficult. As a result, the debate on the constitutionality of this policy was raised during the drafting process of the 2006 Law on Residence. The public has invoked their constitutional rights to counter several provisions regarding the household registration system enshrined in the 2006 draft Law on Residence.[326] The argument was that the household registration system violates citizens' right to freedom of movement and other socio-economic rights, namely the rights to housing, to work, to health care service and the right of children to education. The former Minister of Justice Nguyen Dinh Loc, in an interview in 2006, clearly made the point that the issue of household registration is contrary to the spirit of the Constitution, contrary to the text of the Constitution and that population management by household registration creates abnormalities and inequalities amongst people.[327] He frankly stated as a criticism that "we uphold the Constitution, consider the Constitution as the supreme law of the country but we do not respect its provisions."[328]

Interestingly enough, at the end of the interview, the former Minister of Justice Nguyen Dinh Loc suggested establishing a constitutional review institution which would provide a forum for the citizens to challenge unconstitutional laws. He stated: "we have not given the people the power to challenge [the constitutionality of] a legal provision. When there is a constitutional court, a legal document – decree or law – that is contrary to the Constitution will be challenged by the people before the court. The constitutional court would consider whether the legal document would violate the

[326] The draft of Law on Residence asserted the right to freedom of residence of the citizens but still required permanent household registration as a condition to enjoy the rights and services provided by local authorities.
[327] "Household Registration Has Completed Its Historical Mission [Hộ Khẩu Đã Hoàn Thành Sứ Mệnh Lịch Sử]," Dân Trí, March 13, 2006, https://dantri.com.vn/xa-hoi/ho-khau-da-hoan-thanh-su-menh-lich-su-1142273988.htm.
[328] Ibid.

Constitution or not. If the court declares the document unconstitutional, it will be invalid. However, we have not yet conferred this power to the people. The people can only outcry to protest."[329]

Despite the call for the abolishment of the household registration system during the drafting process, the Law on Residence adopted on November 29, 2016 still maintained the system, albeit with simplified conditions. However, eleven years after the enactment of the 2006 Law on Residence, on October 30, 2017, the Prime Minister signed Resolution 112/NQ-CP which finally eliminated the system as a means of population management. According to the resolution, the household registration system will be replaced by the personal identification numbers. However, until now, although the Resolution 112 has come into effect, Vietnamese citizens' lives are still closely associated with the household registration booklet. It is expected that after the completion of the national database project, the Ministry of Public Security will propose a roadmap to remove the household registration booklet from people's lives.[330] In the meantime, the household registration system still plays the role of a barrier that prevents migrants from accessing fundamental rights and public services.

The *Motorbike case* and the *Household registration case* illustrated but two of the many examples where the legal documents conflicted with constitutional norms. There would be concern about these chosen examples, which focus mainly on economic and social rights, while discussing the need and potential for a constitutional review system in Vietnam. The concern originates from the nature of constitutional judges being reluctant to deal with cases related to economic and social rights.[331] Thus, there are some explanations for consideration of the two cases here.

---

[329] Ibid.

[330] "When the Household Registration Booklet Will Be Eliminated? [Bao Giờ Mới Bắt Đầu Bỏ Sổ Hộ Khẩu?]," Dân Trí, November 6, 2017, https://dantri.com.vn/xa-hoi/bao-gio-moi-bat-dau-bo-so-ho-khau-20171105195948469.htm.

[331] The issue of courts' reluctance to define economic and social rights has been discussed for several decades. This topic falls out of the context of this thesis. For reference, see: Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2009); Christian Courtis and International Commission of Jurists (1952- ), "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability" (Geneva: International Commission of Jurists, 2008); X. Contiades and A. Fotiadou, "Social

First, the issue over competency and legitimacy for economic and social rights adjudication is not included in the context of this thesis. The discussion of these two cases in this thesis is merely to prove two points: (1) Vietnamese people are nowadays more aware of their rights than they used to be previously; (2) constitutional rights essentially play a role in the Vietnamese debates on law and policy, even without the existence of an effective constitutional enforcement mechanism.

Second, the Vietnamese specific political situation has shown that while discussion on political rights is still highly sensitive, dialogue on economic and social rights is "more tolerable to the [Vietnamese Communist] Party."[332] It is a fact that many Western liberal democracies aim to stress civil and political rights as being an essential component of democratic regimes. However, they often do not treat economic and social rights at the same level as civil and political rights. To the contrary, the protection of rights in socialist states leans toward economic and social rights.[333] Since the Vietnamese Communist Party can live with and tolerate economic and social rights-based demands, Vietnamese legal scholars attempt to focus on discourse of these rights. As a result, the discussion on infringements of economic and social rights can be used to argue for the creation of a constitutional review system in Vietnam.

### 5.1.2 The Commitment to Build "the Socialist Rule of Law State"

The rule of law has been called the most important political ideal today.[334] Although it is still a debatable concept, most scholars agree that the rule of law is distinct from the "rule of men" offering mechanisms that restrain behavior in politics. In other words, the rule of law provides a constraint and legitimacy to political power as well as a framework for gaining public interest. To a certain extent, the rule of law means that the government must implement all of its activities within the bounds of

---

Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation," *International Journal of Constitutional Law* 10, no. 3 (July 1, 2012): 660–86.

[332] Son, "The Discourse of Constitutional Review in Vietnam," 214.

[333] M. Nowak, "Civil and Political Rights," in *Human Rights: Concept and Standarts*, ed. Janusz Symonides (Unesco Publishing, 2000), 70.

[334] Tamanaha, *On the Rule of Law*, 1.

existing laws.[335] In the rule of law, the constitution establishes the "limits of a government"[336] in order to control the state authorities' power. A state should not be recognized as having the rule of law if the government infringes upon the constitution without being processed.

The law that controls public authority first, directly and primarily is the Constitution. The Constitution is conceived as a chain playing a function of preventing the abuse of power. Therefore, in the rule of law all public power entities must comply with constitutional regulations. The nature of the rule of law contains an implication that constitutional review is indispensable for a nation that upholds the rule of law. Limits on governmental power and guarantees of individual rights would be meaningless without some institutional means of curbing the power of the majority.

In the Vietnamese context, there is no doubt that the commitment to building up the "socialist rule of law state" has left room for the rise of discussion on constitutional review. The Vietnamese concept of a "socialist rule of law state" was firstly introduced at the mid-term national representative session after the 7th National Party Congress in January 1994. The term of "socialist rule of law state" was later used in the documents of the 8th National Party Congress in June 1996.[337] Implementing the Party's standpoint, the "socialist rule of law state" for the first time was placed in the amended constitution adopted in 2001 under Article 2: "The Socialist Republic of Vietnam is a socialist rule of law state of the people, by the people, for the people."[338] In the Political Report of Central Committee of the Party in the XI Congress of the Vietnamese Communist Party in 2011, the concept of "socialist rule of law state" was underlined again, which served as the directing principle for the later constitutional revision.[339]

---

[335] Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009), 210.
[336] Tamanaha, *On the Rule of Law*, 2004, 56.
[337] The Vietnamese Communist Party [Đảng Cộng Sản Việt Nam], "Documents of the 8th National Party Congress [Văn Kiện Đại Hội Đại Biểu Đảng Toàn Quốc Lần Thứ VIII]" (National Political Publishing House [Nhà xuất bản Chính trị Quốc gia], 1996), 61.
[338] The 1992 Constitution of Vietnam, amended in 2001, art. 2.
[339] See: Ban chấp hành trung ương Đảng, "Political Report of the 10th Central Executive Committee of the Communist Party of Vietnam at the 11th National Congress [Báo Cáo Chính Trị Của Ban Chấp Hành Trung

Even though the characteristics of the socialist rule of law are still in a process of constant dialogue and debate today, most Vietnamese scholars and politicians agree that this concept implies distinction between the model of the rule of law in a socialist country and that in capitalist countries. The socialist rule of law not only manifests in the universal values of the rule of law in the Western sense but also includes the specific characters yielded from a socialist regime.[340] The model in Vietnam strives to create and contain the basic requirements of the "formal rule of law." What is more, Vietnamese Constitution also includes a substantive element as a prerequisite for maintaining the socialist rule of law and the guarantee of human rights.

Yet, apart from meeting the requirements of the rule of law in general, the socialist rule of law of Vietnam also has its own characteristics. As a socialist state, Vietnam cannot abolish the particular features of a socialist regime. Therefore, most scholars often argue that the socialist rule of law of Vietnam must uphold the unity of state power as well as the leading role of the Vietnamese Communist Party.[341] One of the central tenants of building the socialist rule of law state, stressed scholars, is that state powers are unified and decentralized to state bodies, which coordinate with one another in the exercise of legislative, executive, and judicial powers. It can be understood that unity of power is the foundation, whilst division and coordination are the way to achieve the common goal of the state. Thus, scholars explained that in a "socialist rule of law state," a supervision mechanism among state authorities is still inevitably put in place, in order to prevent the abuse of power.[342]

---

Ương Đảng Khoá X Tại Đại Hội Đại Biểu Toàn Quốc Lần Thứ XI Của Đảng," 2015, https://tulieuvankien.dangcongsan.vn/ban-chap-hanh-trung-uong-dang/dai-hoi-dang/lan-thu-xi/bao-cao-chinh-tri-cua-ban-chap-hanh-trung-uong-dang-khoa-x-tai-dai-hoi-dai-bieu-toan-quoc-lan-thu-xi-cua-dang-1526, section XI.

[340] Dao Tri Uc, ed., *Organization and Operation of the Vietnamese Socialist Rule of Law [Mô Hình Tổ Chức và Hoạt Động Của Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Việt Nam]* (Judiciary Publish House [Nhà xuất bản Tư pháp], 2007), 229–315; Yeu, "Building the Socialist Rule of Law State of Vietnam during the Period of Industrializing and Modernizing the Country [Xây Dựng Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Thời Kỳ Công Nghiệp Hoá, Hiện Đại Hoá Đất Nước ]."

[341] Uc, *Organization and Operation of the Vietnamese Socialist Rule of Law [Mô Hình Tổ Chức và Hoạt Động Của Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Việt Nam]*.

[342] Ibid., 284-311.

Regarding the leading role of the Communist Party of Vietnam as being integral to the "socialist rule of law", scholars have traditionally focused on the aim of the Party, that is to serve people's interests. Scholars emphasized the people's support as the main cause leading to all of the Party's achievements. So, the Party has always relied on the people's support to preserve its leading role. For that reason, maintaining the Party's reputation is key. In the "socialist rule of law" of Vietnam, the Communist Party being subject to the supervision of the people is a constitutional regulation. Such a mechanism is an important guarantee for the Party's leadership to achieve its desired goals, and to avoid reputational damage.[343]

Since Vietnam has undertaken to build a socialist rule of law state that includes the essential elements of the Western theory of the rule of law, a constitutional review system is quite a necessary vehicle for implementing that commitment. As addressed in the earlier section of this thesis, the political forum of constitutional review mostly focuses on underlining that the mission of construction and development of the socialist rule of law state in Vietnam requires a mechanism to handle unconstitutional acts of government authorities. It can be seen that, when even senior politicians in the state apparatus, especially in the National Assembly, realize the link between the creation of the constitutional review with the building of the socialist rule of law state,[344] then the possible creation of constitutional review in Vietnam is gradually gaining more traction.

### 5.1.3 The Commitment to Respect Constitutional Norms

Bui Ngoc Son, in his article "The discourse of constitutional review in Vietnam", believed that the need for constitutional review in Vietnam has no connection with the coordination and commitment theory of constitutional review adoption. Indeed, the coordination theory would be irrelevant to Vietnam which has adopted the principle of unity of power instead of the separation of powers, and which is a unitary rather than a federalist state. All the possible conflicts between different

[343] Ibid., 311-15.
[344] See chapter IV of this thesis, page 112.

governmental bodies, or between central government and local government should be resolved by the Communist Party of Vietnam or by the central government. So, it does make sense for Professor Son to reject the coordination theory as the stimulus for the need of constitutional review in Vietnam.

However, when it comes to rejection of the commitment theory, Professor Son's argument seems somewhat inaccurate. As he stated, "the Vietnamese economy has not yet been progressive enough to generate the need for securing the continuing development of judicial review." Over the past 30 years, the economic growth induced by the Renovation policy, launched in 1986, has been remarkable.[345] Foreign direct investment in Vietnam increased by 9.1% in the 2018 fiscal year to reach $19.1 billion per annum. This marked six straight years of increased foreign capital flowing into one of Southeast Asia's fastest-growing economies.[346] The transformation of Vietnam from one of the world's poorest nations into a lower middle-income country is clear evidence of economic growth. The desire to maintain this level of economic growth is understandable. And an effective judicial system promoting respect for the Constitution and protecting individual rights is one of the fundamental factors in creating the ideal investment environment for domestic and foreign enterprises.

In order to clarify the connection between the commitment theory and the need for a constitutional review system in Vietnam, it is helpful to have a deep look at the signals Vietnam has shown toward its commitment to respect its Constitution. Those signals have been revealed through the Party's support for establishing a constitutional review system, as well as several conferences and workshops on constitutional review held by government's institutions.

First, playing the role of captain of constitutional discussions, the Communist Party of Vietnam made the commitment to building a system of constitutional review clear in important documents. In June 2005, in the Resolution on Building and Perfecting Vietnam's Legal System to

---

[345] "The World Bank's Overview in Vietnam," World Bank, https://www.worldbank.org/en/country/vietnam/overview.

[346] "Vietnam Reaps Sixth Straight Record Year in Foreign Investment," Nikkei Asia, January 10, 2019, https://asia.nikkei.com/Economy/Trade-war/Vietnam-reaps-sixth-straight-record-year-in-foreign-investment.

the year 2020 issued by the Party's Political Bureau, the Party recognized that "perfecting the law regarding the supreme provision of the National Assembly, and a system of protection for laws and the Constitution" was an important principle in the next stage of legal reform in concordance with the requirements of building of the socialist rule of law state.[347] In 2006, at its Tenth Congress, the Party resolved to "establish a system of constitutional adjudication for the actions of legislature, executive and judiciary" in Vietnam.[348]

Second, inspired by the Party's incentive, several conferences and workshops on the theme of constitutional review were held by the government institutions. Some of these major conferences and workshops that provided views of the Vietnamese domestic constitutional protection issues as well as constitutional review experiences from other countries are listed here. In March 2005, the Legislative Drafting Board under the Standing Committee of National Assembly and the Party's Internal Affairs Commission organized a conference on the theme of "the system of constitutional protection in Vietnam" whose attendants consisted of senior National Assembly officials, deputies and legal scholars. The conference came to conclude that some further research needed to be conducted in order to produce "an effective system of constitutional protection in the process of constructing a socialist state ruled by law in Vietnam."[349] In March 2009, a number of Vietnamese legal scholars of constitutional law, politicians, legal practitioners, and foreign experts gathered in the international conference on constitutional protection held by the National Assembly. The participants focused on analyzing theoretical aspects of constitutional review in the specific legal and political context of Vietnam. The alternative models of constitutional review were also discussed there. Remarkably, the proposal of establishing a constitutional council in the latest constitutional amendment process, in 2013, trigged numerous conferences, workshops, and seminars on the potential institution of constitutional review in Vietnam.

---

[347] This was mentioned in the subsection 4.2.2 chapter IV of this thesis, pages: 107-112.
[348] Ibid.
[349] This is mentioned in Sidel, *Law and Society in Vietnam*, 63–64.

Briefly, the practice of the Renovation policy has opened up a significant opportunity for Vietnam to interact with the world, as well as fuel the country's desire to attract foreign investment. As discussed in Chapter I of this thesis, the theory of constitutional review adoption as a commitment method suggests that a limited government through constitutional review might help to secure an environment for property, contracts, and market transactions, and will thus attract the attention of foreign investors. Creating an institution that deals exclusively with constitutional violations is a great way to reinforce the serious commitment of Vietnam to respect the rigidity of the Constitution. Subsequently, the adoption of such an institution will provide a sure basis for Vietnam to gain acceptance or legitimacy on the international stage, and will thus spur the country's economic growth.

### 5.1.4 The Impact of the Globalization of Constitutional Review

Another theory suggests the potential of constitutional review adoption in Vietnam through the influence of foreign legal systems. In the past few decades there has been a clear trend around the world in favor of constitutional review. To some extent, the call for constitutional review in Vietnam has been driven by this global movement as well. As stated by Bui Ngoc Son, "the global spread of constitutional review does arouse the Vietnamese awareness of its potential creation in the country."[350]

Among the four mechanisms of the transnational diffusion theory revealed in Chapter I of this thesis, the l*earning* mechanism is the one that can be used to explain the potential establishment of constitutional review in Vietnam. Learning can be facilitated by different factors such as geographic and cultural proximity, the similarity of legal systems, or the success of existed constitutional review models. Vietnam has already started its learning process in terms of constitutional review subsequent to the constitutional revision process of 2001 and 2002. Direct contact with foreign constitutional courts has increased: in early 2004, a delegation including Ministry of Justice's officials and lawyers visited the French Conseil Constitutionel; in the summer of 2004, Nguye Van Yeu, the Vice Chairman of the National Assembly hosted a delegation from the Thai Constitutional Court led by its President;

---

[350] Son, "The Discourse of Constitutional Review in Vietnam," 218.

and in 2005, a senior delegation headed by the Minister of Justice visited the United States of America in order to explore topics of constitutional review and judicial reform.[351] What is more, in the scholarly forum of discussion on constitutional review, legal scholars have often contributed detailed references to different constitutional review models in the world and experiences of resisting unconstitutional actions by the government and legislature in neighboring countries.[352]

### 5.1.5 Political Interests

It may be argued that the political monopoly of the Communist Party in Vietnam would make the creation of constitutional review unnecessary, simply because the Party has no demand for political insurance. As the political insurance theory suggests, political forces only need a constitutional review mechanism when their continued grip on power is not assured. In other words, the uncertainty of the future political configuration increases the incentive for setting up a system of constitutional review as an insurance system. In the context of Vietnam, the Communist Party would see no potential risk to their hold on political power, and therefore sees no reason to invest in a system of constitutional review. Likewise, political insurance theory would not establish the need for inaugurating constitutional review in Vietnam.

So, what incentive is there for the Communist Party of Vietnam to establish constitutional review? What explanation could be there for the Party to willingly limit its own political power by

---

[351] Sidel, *Law and Society in Vietnam*, 56–57.

[352] See, for example: Lam, "Systems of Constitutional Review: Comparative Perspective [Cơ Chế Giám Sát Bảo Hiến: Góc Nhìn Tham Khảo]"; Son, *Constitutional Review in Vietnam [Bảo Hiến ở Việt Nam]*; Vo Tri Hao, "The American Model of Constitutional Review [Mô Hình Tài Phán Hiến Pháp Hoa Kỳ]," *Journal of Legislative Studies [Tạp Chí Nghiên Cứu Lập Pháp]* 3 (2008); John Gillespie, "Constitutional Review in Indonesia: View from Comparative Perspective [Bảo Hiến ở Indonesia: Nhìn Từ Góc Độ So Sánh]," in *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, ed. National Assembly Office (Time Publishing House [Nhà Xuất bản Thời đại], 2009), 373–401; Nguyen Nhu Phat, ed., *Constitutional Review: Some Fundamental Theoretical Issues, International Experiences, and Possible Application in Vietnam [Tài Phán Hiến Pháp: Một Số Vấn Đề Lý Luận Cơ Bản, Kinh Nghiệm Quốc Tế và Khả Năng Áp Dụng Cho Việt Nam]* (Social Science Publishing House [Nhà xuất bản Khoa học Xã hội], 2011); Nguyen Thi Anh Van, "What Can We See in the Institutional Reformation of the Thai Constitutional Court [Thấy Gì Từ Những Đổi Mới Của Cơ Quan Bảo Hiến ở Thái Lan]," *Law Magazine of Hanoi Law University*, 2011, 55–61.

constitutional review? How can we rationalize the reasons why the Party recommended the search for constitutional review in its political documents? And why it has initiated several conversations on the topic of constitutional review, through the mass media as well as through the forum of the National Assembly? There needs to be reasons for the Party to support discussions on constitutional review. Particularly if the establishment of such a mechanism of constitutional protection in the future is actually a possibility. The reasons can be various but must not be separated from political interests.

One might assume that nothing can menace the staying power of the Communist Party in Vietnam, where the formation of other political parties is forbidden. However, in reality reinforcing its power is always a great concern of the Party. In that context, this thesis sides with Bui Ngoc Son's argument, that is "the creation of constitutional review can strengthen the party leadership in several ways."[353] Indeed, providing the people with a mechanism to claim their fundamental rights is one way to respect the Constitution and to realize the commitment of building the "socialist rule of law state." If a constitutional review mechanism works well in Vietnam, it will contribute to enhanced social and political stability, international legitimacy, and economic growth, followed by the intensification of the Party's prestige. With the aim of achieving this result, the institutional design and function of the potential Constitutional Court of Vietnam will be discussed later in this chapter. Briefly, instituting a system of constitutional review can bring with it some significant political benefits that are worth the consideration of the Communist Party of Vietnam.

To sum up, there are various theories suggesting the fundamental reasons for the potential creation of constitutional review in Vietnam. The necessity of such a system is largely associated with the growing awareness of rights; the commitment to build "the socialist rule of law state;" the commitment to respect constitutional norms in order to gain international legitimacy, and to attract foreign investment; the influence of foreign legal systems; and the desire to enhance the leadership of

---

[353] Son, "The Discourse of Constitutional Review in Vietnam," 219.

the Vietnamese Communist Party. Explanation for the potential adoption of constitutional review in Vietnam could be motivated by a mixture of all the reasons described above.

However, in my opinion, the growing awareness of rights among people provides the strongest justification. Along with economic development, the Vietnamese people's awareness of social and legal issues has also been raised greatly. Democracy, equality, and human rights are no longer "foreign concepts," and once 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 peoples' 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 of Vietnam.

### 5.2 The Constitutional Principles in Relation with Constitutional Review in the Vietnamese Context

#### 5.2.1 The Principle of Unity of Power and the Principle of National Assembly's Sovereignty

The idea of creating a constitutional review mechanism seems to conflict with fundamental assumptions of socialist jurisprudence. Socialist jurisprudence rejects the doctrine of separation of powers, but allocates the state functions to three governmental authorities, the legislature, the executive, and the judiciary. According to Article 2.3 of the 2013 Constitution of Vietnam, "the state power is unified and delegated to state agencies which coordinate with and control one another in the exercise of legislative, executive and judicial powers."[354] Being largely entrenched in the principle of unifying power, the apparent result is that "the legislature is conceived to be the supreme expression

[354] The 2013 Constitution of Vietnam, Article 2.3.

of the will of the people and beyond the reach of judicial restraint."[355] In 1988, Ludwikowski noted as follow:

> The supremacy of the legislative bodies was recognized as the fundamental premise of the socialist legal theory. As Lenin claimed, "the representation of the people is a nullity if it does not have full power." It was assumed that the legislative body was responsible for maintaining the constitutionality of State actions and that constitutional review could not be exercised by extra-parliamentary bodies.[356]

In socialist countries, the unity of power is the result of the absolute sovereignty of the representative body of the people. This is always assumed to be the main explanation for why the review of constitutionality was not institutionalized in almost all socialist nations. Those who oppose the proposal to establish constitutional review often raise the following questions: why the legislature's acts might be reviewed; whether the examination of their constitutionality is contrary to democratic theory or not; and is checking the legislature's acts a control of the general will of the people? This is really a popular and controversial issue tied to the notion that constitutional review is against the majority and representative democracy. However, interestingly enough, this issue is not a unique character of socialist legal systems. It should be noted that even in old democracies, such as the United States and the United Kingdom, the institution of constitutional review is somewhat considered to be counter-majoritarian because it permits unelected judges to overrule actions taken by political branches of government.[357] As Goldsworthy stated, "the most powerful and popular argument against the judicial enforcement of constitutional rights maintains that it is undemocratic for unelected judges to invalidate laws enacted by a democratically elected legislature."[358] Fundamental to the idea of counter-majoritarian difficulty is the assumption that the political branches are majoritarian. The

---

[355] John N. Hazard, William Elliott Butler, and Peter B. Maggs, *The Soviet Legal System: The Law in the 1980's*, First Edition (New York: Oceana Publications, 1984), 320.
[356] Rhett Ludwikowski, "Judicial Review in the Socialist Legal System: Current Developments," *International & Comparative Law Quarterly* 37, no. 1 (1988): 90.
[357] Bickel, *The Least Dangerous Branch*, 16–18.
[358] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010), 204.

actions of government are legitimate because of their democratic pedigree, and democratic legitimacy requires "majority rule."

Even in the world's most liberal democratic regimes, constitutional review is assumed to go against democracy, yet it is undeniable that constitutional review is still necessary to complement democracy. Take the United Kingdom as an example, where the old democracy did not have a mechanism of constitutional review for very long time. However, in order to better protect the human rights, the United Kingdom eventually decided to adopt some form of constitutional review.[359] The British Supreme Court and high courts now can decide questions of constitutional significance.

Explanation for the adoption of some form of constitutional review in the mature democracies is that representative democracy cannot be completely insusceptible to defects. Representatives do not always uphold or speak out exactly the will of the power's owners. The majority still can make mistakes, even leading to dictatorship. In such a case, the interests of the minority are threatened. András Sajó, in his book *Limiting Government: an Introduction to Constitutionalism,* has clearly pointed out that "citizens are threatened not only by the insecurity and almightiness of government but by the tyranny of the majority or by small groups that refuse to recognize the rights of others"[360] and "if the will of the majority prevails, there is still a danger that it will oppress the minority."[361] The democracy – even "mature democracies" - must protect itself against the tyranny of majority rule through constitutional review which is expected to be a forum restricting the parliamentary majority's dictatorship.[362] Thus, constitutional review is mainly needed to curb the risk of governmental authorities abusing public power or to prevent mistakes of the majority in order to protect the legitimate interests of minorities. In other words, constitutional review is a protector of minority rights from majoritarian over-reaching.

---

[359] Hirschl, *Towards Juristocracy*, 2.
[360] András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 29.
[361] Ibid., 55.
[362] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 132.

Vietnam has adopted representative democracy. According to Article 69 of the 2013 Constitution, "the National Assembly is the highest representative body of the People and the highest state power body of the Socialist Republic of Vietnam" and "the National Assembly shall exercise constitutional and legislative powers, decide on important issues for the country, and conduct supreme oversight of the activities of the State."[363] The National Assembly exercises its legislative function as a consequence of its representative character. However, representative character or majority rule does not equate to rightness and perfection. It is also an institution that needs to be restrained. It is needed to acknowledge that the laws enacted by the National Assembly do not always reflect the general will of the people. This seems even more accurate to the Vietnamese National Assembly as it meets only twice a year. It is therefore too optimistic to say that the majority rules of such a National Assembly are always correct. Hence, constitutional review is necessary to control the uncertainty of the majority as well as to protect the interest of the minority.

Furthermore, some socialist constitutions had historically provided for a constitutional court, such as the Yugoslavian Constitution of 1963, the Czechoslovakia Constitution of 1968, and the Polish Constitution of 1982.[364] Those examples indicate that there is no absolute contradiction between the principle of unifying power and constitutional review. A single organ vested with the power to review and to determine the constitutionality of normative acts can still be adopted in countries that uphold the principle of power unification.

### 5.2.2 The Principle of Constitutional Supremacy

The constitution is "the social contract" or the higher law that reflects the people's sovereignty. John Rawls, the eminent political philosopher of liberal democracy, in his book "*Political liberalism*" made the very precise distinction between higher law and ordinary legislation. Rawls viewed that constitutional essentials, the expression of the people's constituent power, are to be

[363] The 2013 Constitution of Vietnam, art. 69.
[364] Ludwikowski, "Judicial Review in the Socialist Legal System," 89–108.

considered higher law and to be distinguished from the creations "of Congress and of the electorate."[365] All constitutional violations of state agencies, including the legislature, are contrary to the people's sovereignty. Thus, reviewing the constitutionality of the laws enacted by the legislature is not a denial of the people's will but rather the protection of common will. With this in mind, it is not the law or the legislative body that is supreme and unreviewable but the constitution.

Although in Vietnam there is no distinction between constituent power and ordinary legislative power, the notion of higher law distinguished from ordinary law does exist. The Vietnamese Constitution contains within it a principled expression of its "higher law" status. It defines itself as the fundamental and supreme law of the country. Article 119 of the 2013 Constitution of Vietnam clearly states that the Constitution is the highest law and requires the conformation of all other legal documents, and all constitutional violations to be dealt with.[366]

The principle of hierarchy of laws, which determines how the laws rank in authority, actually has impact in Vietnam. The legal norm with lower legal force is subordinate and should be in an accordance with the norm with the higher legal force. Among the entire legal system, the Constitution is a preliminary normative document, thus all the laws and other legal acts should be consistent with it. In order to guarantee and supervise the respecting of the hierarchy of laws and the supremacy of constitutional norms, the creation of an institution of constitutional justice is necessary. To give an overview, the principle of the hierarchy of laws provides a basis for establishing in Vietnam a mechanism to overrule legal norms that conflict with their higher effect norms.

### 5.3 Institutional Design of Constitutional Review for Vietnam

The previous discussions in this Chapter have confirmed the idea that Vietnam needs a system of constitutional review. Likewise possible explanations for the potential of such a system have been

---

[365] John Rawls, *Political Liberalism* (Columbia University Press, 2005), 231.
[366] The 2013 Constitution of Vietnam, art. 119.

discussed. This subsection now moves toward finding a possible model of constitutional review that is most suitable in the Vietnamese context.

Alternative options for the form of constitutional review have been a significant issue in the constitutional discourse in Vietnam. Basically, three options exist: granting constitutional review power to the Supreme People's Court; establishing a constitutional council under the National Assembly; and instituting an independent constitutional court. This thesis is in favor of the proposal to establish a constitutional court which is separate from the ordinary judiciary and which has the final say on the interpretation of the constitution. In other words, the adoption of the centralized model of constitutional review seems to be the most sensible option for Vietnam.

This section will focus on two main points. First, it will analyze why a constitutional court is expected to be the best model for Vietnam instead of the other alternative options, the Supreme Court and a constitutional council of the National Assembly. Second, it will suggest the possible composition, jurisdictions, and decisions' effect of the potential Constitutional Court of Vietnam.

### 5.3.1 Appropriate Constitutional Review Mechanism: Proceed to the Establishment of an Independent Constitutional Court

Over the past centuries there has been a dramatic increase in the spread of centralized constitutional review worldwide. The reasons for that trend in many countries around the world[367] is also applicable as an explanation why Vietnam should adopt an independent constitutional court system. However, there are other reasons, which are unique to Vietnam's legal and political context. Those reasons will be revealed through an examination of why the Supreme Court and a constitutional council under the National Assembly are not appropriate choices for Vietnam.

#### a) Unsuitability of the Supreme Court of Vietnam to constitutional review power

[367] See chapter III of this thesis, pages: 75-77.

This thesis firstly takes a look at why granting the power of constitutional review to the Supreme Court of Vietnam is not a favorable option. Several scholars in Vietnam have agreed on reasons explaining the unsuitability of the Supreme Court to hold constitutional review power. Bui Ngoc Son, in his article, has synthesized all the reasons drawn from his observations of constitutional review discussions in Vietnam.[368] Those reasons can be divided into two different categories: institutional and functional. Put it in the Vietnamese political context, this thesis completely agrees with most of functional reasons, whilst raising doubts about the institutional reasons introduced by Professor Bui Ngoc Son.

The institutional reasons are driven by the principle of unity of power and the hierarchical structure of the Vietnamese legal system. The principle of unity of power places the National Assembly at the top of the Vietnamese political system. Since the National Assembly is the highest state power body of the country, all other organs, including the Supreme Court, are subject to its oversight. Given this situation, it is contradictory and unrealistic to impose the power of reviewing the National Assembly's laws on the Supreme Court. However, this thesis finds that the establishment of an independent constitutional court, theoretically, cannot be free from conflict with the principle of the unity of power. Therefore, this institutional reason seems unconvincing while suggesting the adoption of centralized constitutional review in Vietnam.

What is more, Professor Son argued that the hierarchical legal order of the Vietnamese legal system would make the practice of constitutional review by the Supreme Court impossible. According to him, among the entire legal system of Vietnam the Constitution holds the highest level of legal validity, followed by the statutory acts, and then other legal documents by the executive and judicial bodies. Within this hierarchical structure, it would be quite an odd thing if the Supreme Court rendered a decision to strike down a law enacted by the National Assembly, argued Bui Ngoc Son. However, this seems to be a weak argument because if a specialized constitutional court is established, its

[368] See: Son, "The Discourse of Constitutional Review in Vietnam," 204–5.

decisions still fall into the hierarchical legal order of the Vietnamese legal system. There is no basis to argue that the constitutional court's decisions will have equal or higher legal validity than the statues enacted by the National Assembly.

Aside from institutional reasons, scholars emphasized functional reasons that show the inability of the Supreme Court to exercise constitutional review. Functional reasons are associated with (1) popular distrust toward the ordinary court system and ordinary judges, and (2) overloaded court dockets in the ordinary court system. Firstly, Bui Ngoc Son affirmed that there is significant frustration among Vietnamese people with the country's corrupt judicial system. Indeed, Vietnam is still facing the problem of not being able to control the spread of corruption, including in the judicial sector. The fact that judges are open to corruption is commonly known in Vietnam, and is often raised within the National Assembly whenever the opportunity to question the Chief Justice of the Supreme Court arises. And actually it might be impossible to expect Vietnamese ordinary court judges to make fair judgments when their tenure, remuneration, and appointment, are not guaranteed. The weakness of the ordinary court system can give rise to the lack of people's trust in judges to protect their fundamental rights. As a result, this popular mistrust in the current court system reduces any appetite for a constitutional review mechanism to be placed within it.

Concerning the sources of peoples distrust toward ordinary court Judges, this thesis presents a further ground related to the professional incapacity of Vietnamese ordinary court judges to deal with constitutional matters. The current judicial system of Vietnam is based on the ideologies of the civil law system; hence Vietnamese judges share common characteristics with civil law judges. As discussed in chapter III of this thesis, civil law judges normally have no interpretive power and only apply the law as it is written. As constitutional issues are innately complex, and require the ability to be highly interpretive, doubt is thrown on any form of constitutional review involving Vietnamese ordinary court judges.

Second, the reason of overloaded court dockets in the ordinary court system in general, and in the Supreme Court in particular was stressed. This argument makes perfect sense as a massive caseload has already overwhelmed the Vietnamese Supreme Court.[369] Hence, the addition of constitutional adjudicative power to the role of the Supreme Court, would further exacerbate the caseload situation. As a result, it is unrealistic to expect the Supreme Court to function in constitutional adjudication effectively.

Except for the institutional and functional reasons discussed above, Professor Son advanced the Vietnamese constitutional culture as a justification for not giving the Supreme Court constitutional review power. As he stated, "the Constitution [of Vietnam] is conceived as a 'sacred document' like an 'altar' which must be respected" and "to speaking out the meaning of the Constitution is, therefore, to elaborate the fundamental moral principles of the polity and this is not an ordinary task, which can be assigned to the ordinary courts."[370] It cannot be denied that constitutional culture might have some influences on the practice of constitutional review. However, to say that ordinary courts cannot interpret the Constitution because it is a 'sacred document' is not quite appropriate. The Constitution of the United States is well-known for representing itself as a cultural icon,[371] yet the Supreme Court has the absolute power to interpret its text. Likewise, Japan is another example.

**b) Shortcomings of the proposal to establish a constitutional council under the National Assembly**

Aside from the granting of constitutional review power to the Supreme Court, another option is to create a constitutional council under the National Assembly. The proposal of the constitutional council was even included in the draft revised constitution in the 2013 constitutional amendment. The viewpoint of this option holds that it will help to avoid conflicts between constitutional review and the

---

[369] For example, according to the Annual Report of the Supreme People's Court of 2018, the rate of resolving cases in the courts across the country was only 52.06%.
[370] Son, "The Discourse of Constitutional Review in Vietnam," 205.
[371] Michael M Epstein, "The U.S. Constitution as Icon: Re-Imagining the Sacred Secular in the Age of User-Controlled Media," *Southwestern Law Review* 45 (2015).

principle of the National Assembly's sovereignty**.** However, it is not a preferred alternative system due to the weaknesses that it is inherently encumbered with. Given that the constitutional council is plainly an advisory body of the National Assembly without adjudicative power, this will result in the conflict of authority with other committees of the National Assembly, such as the Law Committee and the Judicial Committee. And if the constitutional council is authorized with adjudicative power, jurisdictional confusion between the National Assembly and the judiciary will certainly appear. It is also doubtful whether the National Assembly will willingly take itself into trials dealing with the constitutionality of its laws and other documents. This suspicion is grounded in the reality that the National Assembly has absolutely failed to exercise its existing constitutional protection method, the legislative self-control mechanism.

The establishment of a constitutional court in Vietnam can be a better solution. One that has the possibility of fixing the shortcomings of the proposal to establish a constitutional council under the National Assembly. The potential Constitutional Court with adjudicative power is able to deal with constitutional issues more effectively than a body in the political system with mere advisory power. Also, the potential Constitutional Court with jurisdictions as suggested in the following subsection can avoid creating authoritative overlap between a constitutional council and other committees of the National Assembly. Thus, even just a weak constitutional court still can perform better to protect individual rights and freedoms.

### 5.3.2 Composition, Jurisdiction, and Decisions' Effect of the Potential Constitutional Court

Continuing the discussion on the potential Constitutional Court for Vietnam, this subsection turns from the broader considerations above to more specific practical questions concerning how such a court might function. The subsection follows up on three key design issues: composition, jurisdiction, and decisions' effect.

#### a) Composition

The possible composition could become the challenging question surrounding the creation of a constitutional court for Vietnam. The system of nomination and appointment of constitutional judges must provide balance in order to protect them from being swayed by improper political influences. It also must guarantee a broad spectrum of knowledge, and a high level of expertise and qualifications from those who are elected to become constitutional judges. In regard to the above requirements, the following issues need to be addressed.

Fixed term or permanent appointment?

Whether constitutional judges are appointed for a fixed-term or permanently is a significant question. On a comparative basis, it is common for constitutional court judges to be appointed for either a single fixed-term or a renewable fixed-term. For example, German constitutional court judges are appointed for non-renewable term of twelve years; while Korean constitutional justices serve for six-year renewable terms; and their colleagues in Thailand serve for nine year non-renewable terms.

On a practical basis, fixed terms can alleviate the concern of introducing senile judges who do not adhere to society's values, as seen in the Supreme Court of the United States during the Lochner era. However, fixed terms, if not staggered, can lead to significant jurisprudential shifts in the court upon renewal of its membership. Fixed terms can also lead to the possibility of constitutional court being packed by the government through judicial appointment, as seen in Hungary. The assertiveness of the Hungarian Constitutional Court, during the first decade of its establishment, became a significant concern for the Hungarian government. Therefore, the government, immediately after the landslide victory of the centre-right Fidesz party in the 2010 parliamentary elections, refused to renew activist judges of the Court for a second term, instead of rejecting or openly criticizing them.[372]

[372] Kim Lane Scheppele, "Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe," *University of Pennsylvania Law Review* 154, no. 6 (June 1, 2006): 1786.

Drawing on the experience of the existing constitutional courts, this thesis suggests that judges of the potential Constitutional Court of Vietnam should hold office for *a nine year non-renewable term*. It is impossible to introduce a perfect solution in regard to judges' term. A fixed-term might still represent a challenge to the independence of the Court; however it, instead of permanent appointment, can avoid the possible conservativeness and irresponsibility of the Court's main characters. It is even more difficult to justify either renewable or non-renewable terms as being less problematic. In the case of Vietnam, a non-renewable term would shield constitutional judges from the possible influence or pressure that comes with periodic accountability to a reappointment process.

What is more, nine years is considered as the reasonable length of appointment which is necessary for constitutional judges to develop experience and introduce their perspectives in the constitutional field. Before 2014, Vietnamese ordinary court judges were appointed for five-year terms. They could not renew terms automatically or even with an abridged procedure, but had to face a complex reappointment process. This regulation had been criticized for being unable to provide judges requisite job security, therefore undermining their independence. As a result, since the current Law on the organization of the people's courts of Vietnam was enacted, in 2014, the term of Vietnamese judges has been extended to ten years. The experience of ordinary judges' term of office draws lessons for the institutional design of the potential Constitutional Court of Vietnam, with regard to the length of the constitutional judges' term. The non-renewable nine year term, as proposed in this thesis, is just a suggested option, being not too short and also not too long. It is simply expected to be a reasonable period of time for constitutional judges to advance their own ideologies and assert their independence.

Inclusion of academics

Since the prior career patterns of constitutional judges are identified as an important determinant of judicial decision-making, inclusion of academics is considered essential in the process of establishing a constitutional court for Vietnam. The inclusion of academics in the composition of

the potential Court will produce judges with adequate expertise to deal with complex constitutional issues, without having been influenced by the existing corrupt court system. As a result, constitutional judges with prior careers as professors of law will likely enhance the role of this body. On the other hand, the actual experiences as constitutional judges of law professors will also play a significant role in their research and teaching activities, thus contributing greatly to the academic community. The suggestion of including academics in the membership of the potential Vietnamese Constitutional Court can be justified through the views of scholars about the lack of law professors in the composition of the Korean and Thai Constitutional Courts, as well as the advantages of having them in the German Court.

In South Korea, most justices in the Constitutional Court are formerly ordinary judges. The Constitutional Court Act lays down a requirement that the nomination and appointment of constitutional court justices is limited to those who have passed the state judicial examination. Thus, in general mere ordinary judges can meet this requirement. It also excludes candidates that are law professors. On one hand, the requirement of being qualified as a judge for appointment is to provide the Court with judicial professionals. However, on the other hand, this system has been criticized for limiting the chance of academics to serve on the Court. Gavin Healy, who has practiced law in South Korea for years, raises concerns that this kind of hierarchical system might exacerbate the conservatism and passiveness of the judiciary. He also suggests that the presence of law professors might give the court a greater degree of esteem and legitimacy and independence.[373]

Similarly, the majority of seats in the Thai Constitutional Court are from the judiciary with five out of nine members elected by the Supreme Court and the Supreme Administrative Court. It is believed that the Thai nomination and appointment process would provide judges with a high level of judicial experience. However, Andrew Harding and Peter Leyland pointed out that the seniority and

[373] Healy, "Judicial Activism in the New Constitutional Court of Korea," 226–27.

experience in the judicial field is possibly not an advantage when dealing with constitutional cases since constitutional cases and civil or criminal cases differ in many respects.[374]

In contrast, the professional background of German Constitutional Court's justices is slightly different to their colleagues in Korea and Thailand. As discussed in chapter II of this thesis, The German Federal Constitutional Court consists of two Senates, with each Senate having eight justices. Three out of eight justices of each Senate must be chosen from judges of the supreme federal courts.[375] The other Justices of the Court may come from different professions. According to practice, "eight out of the sixteen Justices were law professors before their appointment to the Court."[376] It is believed that professors of law recruited as Justices have "strongly internalized the norm of judicial independence."[377] Their perceived level of judicial independence is sufficiently high that they are not barred from continuing to serve as professors of law whilst members of the judiciary. Justices appointed from the political sphere enjoy no such luxury, and are specifically bared from simultaneously practicing their previous occupation.[378] Briefly, the inclusion of academics in the composition of the German Federal Constitutional Court introduces to the bench highly independent Justices. This is a lesson that Vietnam should follow when considering the composition of the potential Constitutional Court.

**b) Jurisdiction**

The jurisdiction of the constitutional review institution was a topic debated in the latest constitutional amendment process in 2013, when a provision of the constitutional council was included

---

[374] Harding and Leyland, *The Constitutional System of Thailand: A Contextual Analysis*, 167.
[375] See chapter II of this thesis, page 67.
[376] Jenny Gesley, "How Judges Are Selected in Germany | In Custodia Legis: Law Librarians of Congress," *In Custodia Legis* (blog), May 3, 2016, https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/
[377] Sebastian Sternberg, Susumu Shikano, and Ulrich Sieberer, "Ideology, Law and Professional Background. Explaining Dissenting Opinions in the German Federal Constitutional Court" (European Consortium of Political Research 2016 General Conference, Prague, n.d.), available at: https://ecpr.eu/Filestore/PaperProposal/7bccbff2-9a61-40fa-b9e8-c762fee4041a.pdf.
[378] See chapter II of this thesis, page 67.

in the draft revised constitution. The proposed constitutional council had the authority to practice constitutional review plainly as an advisory body of the National Assembly. This proposal caused controversies in the first place and has been vastly criticized. The critics mostly focused on the week power of the council that would make it impossible for the council to effectively protect the supremacy of the Constitution. In addition, the critics indicated that the advisory function of the proposed constitutional council would overlap with that of the existing committees of the National Assembly. As the discussion on the proposed constitutional council continued, proponents of constitutional review kept calling for the establishment of an independent constitutional review body with adjudicative power. In order to overcome the weakness of the previous proposal of constitutional council, this thesis suggests the establishment of a constitutional court as an adjudicative institution rather than merely an advisory body.

Other than the adjudicative power, the following issues regarding the court's jurisdiction appear particularly pressing. These are: the power to review legislation, the power to review ordinary court decisions, and constitutional complaint.

**Power to review legislation**

As discussed in Chapter II and Chapter III of this thesis, the range and nature of the powers conferred on constitutional courts worldwide varies, but virtually all constitutional courts share the core power to invalidate legislation deemed incompatible with the constitution. Also, the most crucial power of the potential Constitutional Court of Vietnam is certainly the competence to review legislation. The Court can practice reviewing legislation through both abstract and concrete review.

***Abstract review***

The potential Constitutional Court of Vietnam should have the power to carry out abstract review of the constitutionality of all legal documents, including laws passed by the National Assembly, and by-laws adopted by other government bodies. It is a fact that Vietnamese society is administered

by a huge number of sub-law documents enacted by the government, the Prime Minister, the President, the ministers, the Supreme Court, the Supreme Procuracy, and local government legislatures and executives. What if the constitutional court's jurisdiction is restricted to solely reviewing the constitutionality of the laws enacted by the National Assembly? The answer is that the jurisdictional limitation may result in finely breaching the Constitution by those who have the authority to promulgate by-law documents.

Moving on now to consider whether the reviews should be exercised by the potential constitutional court of Vietnam prior or subsequent to the enacting of the legislation? Recently in Vietnam, before draft laws are submitted to the National Assembly for comments and approval, they are subject to review by the committees of the National Assembly, among them the Law Committee and the Judicial Committee play the most significant role. The review before submission includes examination of a draft law's constitutionality. Therefore, drafted laws before promulgation should not be subject to constitutional review by the potential constitutional court of Vietnam. And the parties can only apply for abstract review of an enacted law, even it has not been in force yet. The designated authorities can challenge the constitutionality of the law even before it does any harm. The applicants do not have to demonstrate the injury in fact caused by the violation of their own constitutional right. The only exception to prior review should be the review of the constitutionality of international treaties prior to the approvals of the National Assembly or the President of State.

Another issue regarding abstract constitutional review is the list of the subjects who are authorized to formally initiate this type of review. The subjects actually vary from country to country. On one hand, there are some restrictive systems such as that of Germany where only the federal government, state governments, and a group of parliamentarians can challenge the laws. On the other hand, there are systems such as those of Hungary or Indonesia that even give the right to initiate abstract review to each individual citizen regardless of their specific legal interest in the case in question. In the case of Vietnam, this thesis favors the restrictive system of accessibility to abstract constitutional review. That is because broad jurisdiction may lead to overload for a new court. So, the

right to initiate abstract review in the potential constitutional court of Vietnam should only be granted to the President of the State, the government, the Prime Minister, the ministries, provincial governments, and one fifth of the National Assembly's members.

***Concrete review***

Jurisdiction of the potential constitutional court of Vietnam can arise by a reference from ordinary courts in a course of litigation. An ordinary court must refer constitutional questions raised in any case, that it is hearing, to the constitutional court for a decision if it concludes that the validity of the law its decision depends upon is unconstitutional. In concrete review, the following constitutional proceeding may be suggested:

While dealing with an actual case, an ordinary court will have to refer constitutional questions to the constitutional court if the following conditions are met: (1) the referring court is convinced that the relevant law is unconstitutional, and (2) the decision of the referring court must depend on the validity of the legal provisions in question. Before referring constitutional issues to the constitutional court, the ordinary court has to postpone the original proceeding. After the decision of the constitutional court is issued, the original proceeding is resumed and conducted in compliance with it. If the constitutional court declares the provisions in question unconstitutional, the referring court must refuse to apply them.

**Power to review ordinary court decisions**

Concerning weather the potential constitutional court would be granted the power to review ordinary court decisions, Vietnam is advised to take into account lessons gained from the Korean Constitutional Court. Despite being modeled from the German Constitutional Court, the Korean Court has no power to review ordinary court decisions. The core idea of keeping the ordinary court decisions out of reach of the Constitutional Court is to avoid possible conflicts between the Constitutional Court and the Supreme Court.

Yet, in some exceptional cases, the Korean Constitutional Court has given itself the ability to review and strike down the decisions of the Supreme Court that applied a legal provision which the Constitutional Court had already ruled unconstitutional. This is necessary in order to protect the autonomy of the Constitutional Court. Hence, this thesis suggests that the potential constitutional court of Vietnam should take the same approach as its Korean counterpart to secure compliance with its rulings and to safeguard its reputation.

**Constitutional complaint**

One significant question related to the jurisdiction of the potential Constitutional Court is should Vietnam adopt a constitutional complaint mechanism that enables individuals to challenge the conformity of legal documents with constitutionally protected rights. There is no doubt that the creation of a constitutional complaint mechanism plays an important role in strengthening and safeguarding fundamental rights of citizens. It proved to be an effective advocate for the rule of law and the protection of individual rights in Germany and Korea. In these countries, the mechanism has made it so much easier for individuals' claims to reach the constitutional courts as well as given opportunities for the courts to become activist institutions. Therefore, with the aim of better protecting human rights and of maintaining social and political stability, the inclusion of a constitutional complaint mechanism is necessary.

However, in the context of Vietnam, it is better that the constitutional complaint system is not included in the early years of the potential Constitutional Court's establishment. This recommendation stems from the concern that the inclusion of a constitutional complaint mechanism may give rise to an overloaded court docket, and thus reduce the performance quality of judges.

A lesson can be learned from the Hungarian experience. The Hungarian Constitutional Court was first established in 1989 with very broad jurisdictions. Before the Hungary's 2011 constitutional reform, the *actio popularis*, the process of initiating abstract review of laws and administrative acts after their promulgation, was available to anyone regardless of their specific legal interest in the case

in question. Anyone, even non-citizens, had the right to launch an *actio popularis*. However, constitutional review initiated through the *actio popularis* led to an overwhelming number of constitutional cases in the Hungarian Constitutional Court.[379] After its victory in the election of 2010, the Fidesz political party began consolidating the powers of the Hungarian government for its own use by initially amending the constitution. Those amendments removed a number of checks and balances, and limited the power of the Constitutional Court. In such a specific political situation, together with the result of the unmanageable workload of the Constitutional Court, restriction on the right to launch *actio popularis* was discussed.[380] Eventually, the Hungarian *actio popularis* was abolished after the 1st January, 2012.

**c) Decisions' Effect**

Concerning the effect of the potential Constitutional Court of Vietnam's decisions, it is necessary to place them into two different categories: those ruling on the constitutionality of the laws enacted by the National Assembly, and the others deciding on the constitutionality of by-laws.

First, when taking the effect of the Court's rulings on the constitutionality of the laws enacted by the National Assembly into consideration, it is important to place it in relation to the principle of power unification that Vietnam is upholding. It is undoubtedly true that the practice of constitutional review in one-party dominated state will be much more challenging than in countries with uncertainty in their political environment. For that reason, this thesis aims to find some specific solutions in terms of the effect of the potential Court's decisions on the constitutionality of legislation, that will allow constitutional review to effectively operate in Vietnam, the one-party dominated state.

Basically, while practicing constitutional review of legislation, most constitutional courts, such as those in Germany, Korea, and Thailand, have the power to directly rule on the annulment of

---

[379] Schnutz Rudolf Durr, "Comparative Overview of European Systems of Constitutional Justice," *Vienna Journal on International Constitutional Law* 5 (2011): 159.
[380] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd ed. (Springer, 2014), 15.

an unconstitutional law. If those constitutional courts declare that provisions of statutes breach the Constitution, then those provisions have no binding legal force. It is certainly trouble-free for a court to strike down legislation and declare it void in countries which adopt the separation of power. However, in Vietnam, if the potential Constitutional Court can issue a decision to immediately abolish an unconstitutional law, then the principle of unity of power will not be guaranteed, the National Assembly will no longer be the highest organ of state power. What is more, suppose that the potential Court of Vietnam is empowered to invalidate the National Assembly legislation, it may serve as an effective check on politics, but, in so doing, it may also trigger counterproductive political backlashes.

So, what would be the solution for Vietnam in this context? The pragmatic response would be to reduce the power of the potential Court in the form of constitutional arrangements. In other words, instead of being given the power to declare the National Assembly legislation null and void, 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. This solution on the effect of the Court's decisions may help the Court to reduce the potential pressures it will face, instead of maximizing them.

Actually, as discussed in Chapter III of this thesis, there has been an alternative remedial measure that constitutional court judges in German and Korea ordered for constitutional violations in order to minimize the tension between constitutional courts and the legislature. Such a remedial measure appears in the form of the suspended declaration of invalidity. In fact, despite having absolute power to declare a legal norm null and void, there is a special inclination amongst the constitutional court judges in Germany and Korea towards rending admonitory decisions rather than directly annulling an unconstitutional law. The admonitory decisions fundamentally contain instructions as to how to revise a law, which is declared unconstitutional and invalid, in conformity with the constitution as well as guidance as to how to apply the law to avoid constitutional issues. In issuing such an admonitory decision, the Courts suspends its invalidity ruling for a specified period pending legislative remedy. The admonitory decisions can help to place the Courts in dialogue with the

legislature and executive and to give the Courts some flexibility in terms of how to handle politically sensitive issues.

Indeed, as compared with immediate invalidation, the suspended declaration of invalidity may bring more chances to reduce the tension between the constitutional review power and the legislature, resulting from the exercise of constitutional review. However, it is still very much an order of the Court, imposing a solution on its terms. This type of power is still portrayed as a strong form of constitutional review and may place the Court, especially a newly established one, at risk of being attacked by politicians. Therefore, this thesis suggests a form of external restraint that allows the effect of potential Court's decisions to be declaratory only. It means that the potential Court's decision is not necessarily or automatically the legally authoritative one, and the National Assembly is entitled to insist on continuing enforceability and validity of a law reckoned unconstitutional by the Court.

In the Vietnamese political context it is believed that that form of external restraint can bring some potential benefits to the Court. It will surely contribute to lower the risk of political attacks. And because of that, the Court's judges will be more relaxed in expressing their ideology rather than always having to decide constitutional cases in an overly cautious and measured way. Also, that form of external restraint can benefit the potential Court in the way that will not require the Court to solely rely on judicial self-restraint in order to secure its status and independence. Another thing worthy of mention is that although such purely declaratory decisions have no legal effect on the validity of the National Assembly's law deemed unconstitutional by the Court, it may create some political and social pressure on the National Assembly to amend or abolish it. Last but not at least, the form of purely declaratory decisions may be considered as a temporary expedient during the formative years of the Court rather than necessarily a permanent institutional feature.

Second, regarding declarations on the unconstitutionality of by-laws, which are not enacted by the highest organ of the country, the form of the suspended declaration of invalidity learnt from the German and Korean Constitutional Courts can be adopted in Vietnam. Before announcing a ruling on

the unconstitutionality of a by-law document, the Court must give the organ, that has issued the unconstitutional document, an opportunity to annul or amend the document itself. In this way, the Court can avoid declaring it unconstitutional and allow state agencies to undertake the necessary actions to fix their mistake. In case the organ, that has issued the unconstitutional document, ignores the Court's warning, the Court must then declare that by-law document unconstitutional. Then Court can set a period of six months, from the issuing date of the Court's decision, for the issued 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.

### 5.4 Possible Issues with the Potential Constitutional Court of Vietnam

The potential Constitutional Court of Vietnam is expected to play an important role in upholding the rule of law. However, the mere establishment of the Court cannot solely ensure that it will be able to meet that expectation. Experiences from the constitutional courts around the world have shown that some constitutional review systems have been successful whereas others have not. Some of them become powerless structures when facing the power of the executive and the legislative government, some fail to win the respect of the public because they become "hidden politicians" who deny the will of the citizens.

The outcome of the potential Constitutional Court in reality would lie 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. However, it is surely not meaningless to address some possible difficulties with establishing a constitutional court beforehand. Therefore, this section considers the key possible issues that may arise as the Court starts performing its function.

They include the possibility of creating tensions between the potential Constitutional Court and the ordinary judiciary, as well as how the Court should manage equilibrium in its performance.

### 5.4.1 Tension between the Potential Constitutional Court and the Ordinary Judiciary

The very existence of a constitutional court tends to raise the potential tension between the two court systems: constitutional and ordinary. That is because the role of being the ultimate arbiter of constitutional meaning easily leads the constitutional court into territory considered the domain of the ordinary courts. Tom Ginsburg observed that "the presence of tensions among the highest courts [Constitutional Court and Supreme Court] is systemic in nature."

In order to avoid the rise of tension between these two court systems, the first European experiments with concentrated constitutional control by a constitutional court, in the early twentieth century, restricted it to abstract review of the constitutionality of laws. This restriction on the jurisdiction of constitutional court maintained a relatively clear division of responsibilities between the constitutional court and the ordinary courts. However, a simple delineation of jurisdiction between the constitutional court and the ordinary courts is usually difficult to forge, especially after the jurisdiction of the former has been broadened. Systems of concrete review and constitutional complaint heighten jurisdictional tension by expanding the jurisdictional territory of the constitutional court and inviting the court to become involved in the adjudication of cases before ordinary courts.

The accessibility to the constitutional court and the scope of its jurisdiction are elements that mainly affect not only whether, but also how, skirmishes between apex courts occur. It is probably more common for inter-court rivalries to take place when the constitutional court is more accessible to the ordinary courts and the public. Therefore, concrete review and constitutional complaint are more likely to result in inter-court disagreement than in abstract review. First, concrete review creates a direct link between the constitutional court and ordinary courts through referrals made by the latter to the former. On one hand, ordinary courts have the exclusive power to decide whether to make a reference to the constitutional court. On the other hand, the procedure of concrete review leads to the

constitutional court impacting upon the adjudication of particular cases by ordinary courts. Second, the procedure of constitutional complaint also lessens the notion of jurisdictional monopoly between two court systems. Since the procedure of constitutional complaint allows citizens to directly petition the constitutional court, it inevitably increases the court's cases docket and thus raises the possibilities of skirmishes between constitutional court and ordinary courts.

With the aim of moderating the possible intense interaction between the potential Constitutional Court of Vietnam and the ordinary courts, the accessibility to the former and its jurisdiction must be narrowed as suggested in the previous subsection of this Chapter. As shown in that subsection, the ordinary courts' decisions are kept out of reach of the potential Constitutional Court of Vietnam, and the constitutional complaint mechanism is excluded during its first years of establishment. Those jurisdictional limitations are proposed in order to reduce possible inter-court conflicts.

Yet one thing to bear in mind is that conflicts between constitutional courts and ordinary courts are inherent in many court dual systems. The establishment of constitutional courts has been opposed by supreme courts very early on in several countries. For instance, in Thailand, the proposal to establish a Constitutional Court met with strong resistance from the Supreme Court of Thailand. The Thai Supreme Court Judges argued that the constitutional interpretive power should be granted to the ordinary judiciary and the appointment of political scientists to become the Constitutional Court Justices might reduce the quality of constitutional interpretation activities. In Germany, despite the cautious path that the German Federal Constitutional Court has taken, significant antagonism is still found. The German Federal Constitutional Court is often said to perform as a "super appeal court."[381] Another example of skirmishes between constitutional courts and ordinary courts can be found in Italy, where there is no individual access to the Constitutional Court. The Court today has an

[381] Christian Gomille, "The Federal Constitutional Court of Germany - a 'Super-Appellate Court' in Civil Law Cases?," *Ritsumeikan Law Review*, no. 31 (2014): 161.

enduringly difficult relationship with the Court of Cassation, Council of State and other ordinary courts, which are resistant to adhering to its judgments.[382]

In conclusion, even the most sensitively designed constitutional court for Vietnam may well generate inter-court rivalries. Consequently, it is important to emphasize coordination between the two court systems. Any open inter-court conflict will be so costly to both the potential Constitutional Court and the ordinary judiciary that they should instead choose to engage in practical negotiation in most scenarios. In case of conflict, the potential Court will appear as a weaker actor because of its later arrival compared to the ordinary judiciary. Hence, as learnt from Lech Garlicki's suggestion, the potential Constitutional Court had better seek smooth dialogue and persuasion, and approach matters in a spirit of comity, instead of entering into fight with ordinary courts.[383]

### 5.4.2 Managing Equilibrium in the Court's Performance

How the potential Court will function to drive positive change in Vietnam has much to do with its ability to manage equilibrium in its performance. But it is always hard to predict the way the Court's judges will advance their own ideologies. How the potential Constitutional Court of Vietnam will balance checking and provoking the legislature and the executive is unknown before it is formed. Two possibilities may occur if the Court fails in managing equilibrium in its performance: it may 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.

The most plausible outcome is that the potential Constitutional Court of Vietnam might turn into an activist Court that would intervene in core political matters, thus possibly leading it to be counteracted. As far as it is known, a constitutional court's activism is dangerous to the institution of

---

[382] Tania Groppi, "The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review," *Indian Journal of Constitutional Law* 4, no. 1 (2010): 1.
[383] Garlicki, "Constitutional Courts Versus Supreme Courts," 68.

constitutional jurisdiction itself. It was the striking down of the New Deal legislation that trigged President Franklin Roosevelt's "court-packing plan" in the United States in 1930s. What is more, The Hungarian and Russian Constitutional Courts of the 1990s are commonly viewed as having acted too assertively, having overplayed their hands, leading to a curtailment of their powers.[384]

In Southeast Asia, the Thai Constitutional Court has emerged as an increasingly important element in Thailand's political landscape. That raises concerns about the role of the Court, legitimate or not, in the Thai political system.[385] As discussed in Chapter III of this thesis, the Constitution of Thailand gives the Court relatively broad jurisdiction and solid safeguards for its independence expecting it to help strengthen democracy and bring the country peace and stability. However, it intervened in politics in ways unprecedented, becoming a critical political player in Thailand. The Thai Constitutional Court has dissolved major political parties, banned their senior executives from politics, toppled two prime ministers, and directly challenged major government policies.[386] The Thai Court has caused controversies among the public due to its inclination to engage with questions of political significance rather than those related to human rights and the fight against corruption.

A vital message for the potential Constitutional Court of Vietnam drawn from the experiences of the Hungarian, Russian, and Thai Constitutional Courts is to embrace 'constitutional incrementalism' rather than dramatic change, especially in its early years. The proposed jurisdiction of the potential Court with both abstract and concrete review may increase the ability of the Court to shape legislative outcomes and consequently make it become an institution with more political influence. Therefore, the best approach for the Court is to lean toward judicial restraint and avoid deciding on highly difficult political disputes, which are best left to the arena of politics. In such a

---

[384] See chapter I of this thesis, pages: 55-56.
[385] Bjoern Dressel, "Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand," *The Pacific Review* 23, no. 5 (2010): 671–91.
[386] Ibid.

way, the Court can eliminate the possibility of triggering political attacks that threaten to undermine its independence.

The second probability is that the potential Vietnamese Constitutional Court may become an institution that is too passive in assuming toward the government's favor rather than protecting the rights of innocents. There is always a risk that the Court may be lead to self-destruction if it mostly ignores essential constitutional matters. In order to maintain its neutrality, the Court may exercise judicial restraint by refraining from deciding some constitutional issues. However, an extreme level of practicing judicial restraint may result in the Court's passivism, and the Court will become an irrelevant 'faint shadow' in the Vietnamese political landscape.

Amongst the constitutional review courts in South East and East Asia, the Japanese Supreme Court is often criticized for its passivism in constitutional matters. There is no doubt that the Japanese Supreme Court has exercised its constitutional review power in an extremely careful and cautious way. It has consistently used the political question theory in order to avoid deciding on the merits of constitutional disputes.[387]

It is highly recommended that the potential Constitutional Court of Vietnam takes a slow and cautious path, particularly in its early years. Yet, it is also important for the potential Court to not resist deciding cases, which are exactly the sorts of cases that the Court is created to deal with. For example, the potential Court must perform its function rather than parry constitutional questions when, assuming, there is a debate related to constitutional rights that sparks public attention. The growing awareness of rights amongst ordinary people in Vietnam will surely demand that the potential Court plays its central role in the constitutional area. The resistance to deciding cases, which relate to constitutional rights, will no doubt upset the public and raise a question of why the Court was established, followed by the reputational damage.

---

[387] See chapter III of this thesis, pages: 81-82.

### 5.5 Conclusion

Chapter V has analyzed four key issues that have addressed in the beginning of this chapter in order to support the idea of establishing a constitutional court for Vietnam. There are several theories which can be applied as explanations for the need to establish constitutional review in Vietnam. Among them, the growing awareness of rights plays the most important role in justifying the necessity of a constitutional review system for the country. That means that chapter V has made clear the need for establishment of constitutional review. Other than the need for constitutional review, there is also the potential of creation of such a review system in Vietnam because there is no absolute contradiction between the principle of unifying power and constitutional review. What is more, the principle of the hierarchy of laws is another factor supporting the establishment of constitutional review in Vietnam.

In the Vietnamese context, the centralized model of constitutional review appears to be the most suitable option. However, the adoption of this constitutional review model needs to be carefully taken into consideration. Despite adopting the centralized constitutional review in principle, it is necessary to develop unique characteristics for constitutional review in Vietnam so that it will be able to work in the specific political, legal, and social environment of the country. How the potential constitutional court of Vietnam will function is also a significant concern of this chapter. There are some possible issues to be considered with the proposal to establish a constitution court in Vietnam, such as tension between the potential Constitutional Court and the ordinary judiciary, and how the Court will manage equilibrium in its performance. The issues stressed in this chapter will lead to the introduction of recommendations in the conclusion of this thesis.

## Conclusion: Recommendations for Nurturing the Rule of Law and Protecting Human Rights in Vietnam through the Establishment of a Constitutional Court

The proposal for establishing a constitutional review system in Vietnam existed in the draft of the Constitution of Vietnam prior to its promulgation in 2013. It was, however, rejected in the final version. Yet, 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. This fact has posed a new challenge for Vietnamese constitutional law scholars, and at the same time opened up new research directions. Taking this challenge and opportunity alike, this thesis has examined the question of how to foster the rule of law and protect human rights in Vietnam through the establishment of a constitutional review mechanism. Each chapter in this thesis has included a conclusion, which does not need to be repeated again here. Likewise, recommendations on the form of constitutional review for Vietnam, as well as on specific issues of institutional design, such as composition, jurisdiction, and decisions' effect, have been offered in chapter V of this thesis and will not be analyzed in detail in this conclusion. Instead, this conclusion will merely summarize in brief those recommendations, then focus on suggesting the adoption of proportionality doctrine that may help balance the potential Constitutional Court's performance.

*Recommendations on the form of constitutional review for Vietnam*

The results of this research have shown that the Supreme Court and a constitutional council under the National Assembly are unsuitable in the Vietnamese context. Therefore, this thesis suggests the creation of an independent constitutional court as the most realistic option. This thesis has found that the 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. Instituting a specialized court to deal with constitutional matters, instead of granting the constitutional review power to the Supreme Court, also might 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.

*Recommendations on the possible composition, jurisdiction, and decisions' effect of the potential Constitutional Court of Vietnam*

This study is being undertaken to design a constitutional review mechanism for Vietnam. Recommendations on the possible composition, jurisdiction, and decisions' effect of the potential Constitutional Court of Vietnam are given here. It is recommended that a weak form of constitutional review is established initially. The establishment of a constitutional court with broad jurisdictions and strong power is not a workable option for two basic reasons. First, the presence of a powerful constitutional jurisdiction would be met with strong opposition in Vietnam. So, such a proposal would again be rejected, thus lead to the continuing delay of its creation. Second, given that if a constitutional court with broad jurisdictions is established, then it would likely face a flood of litigations and/or political rebound. Hence, this thesis seeks to produce more realistic recommendations to enhance the probability of having an effective constitutional review mechanism for Vietnam.

First, regarding the possible composition of the potential Constitutional Court of Vietnam, the findings of this study suggest that its judges should hold office for a nine year non-renewable term. This fixed and non-renewable term is expected to elevate judges' responsibility, as well as to free judges from the possible pressure that comes with a reappointment process. Additionally, this thesis suggests the possibility of including law professors in the membership of the potential Constitutional Court of Vietnam. The composition of the potential Court includes law professors in order to bring

together the wider possible span of experience and knowledge and to avoid influence from the existing corrupted court system.

Second, in terms of jurisdiction, the results of this research support the idea that the potential Constitutional Court of Vietnam should practice both abstract and concrete review. The potential constitutional court of Vietnam should have the power to carry out abstract review of the constitutionality of all legal documents, including laws passed by the National Assembly, and by-laws adopted by other government bodies. However, drafted laws, before promulgation, should not be subject to constitutional review by the potential Court. Furthermore, the ability of the Court to practice concrete review can arise by a reference from ordinary courts in a course of litigation. Yet, the evidence from this study suggests that the potential Court should not have the power to review ordinary court decisions in order to avoid possible conflicts between the Constitutional Court and the ordinary judiciary.

The results of this thesis also indicate that it is necessary to exclude the constitutional complaint system from the potential Court's jurisdiction in the early years of its establishment. The idea of excluding the system during the early years of the new Court stems from the aim of preventing a flood of litigation. This, in turn, can help the Court manage its docket and performance in a cautious and steady way. It is believed that by not being drowned under a pile of work when the system is freshly established, Vietnamese constitutional judges can perform their duties more satisfactory. And when reasons for excluding constitutional complaint are no longer relevant, such a mechanism might be adopted in constitutional adjudication in Vietnam. The absence of a constitutional complaint mechanism should not be permanent.

Third, in regard to the effect of the decisions of the potential Constitutional Court of Vietnam, this thesis suggests two different regulations for decisions ruling on the constitutionality of the laws enacted by the National Assembly, and decisions deciding on the constitutionality of by-laws. For the former, the findings of this study recommend the adoption of a weak form of constitutional review. The Court should be able to declare a National Assembly's statute unconstitutional but cannot abolish

it. This form of external restraint can lower the risk of political attacks. However, this form of purely declaratory decisions should merely be considered a temporary expedient during the formative years of the Court rather than necessarily a permanent institutional feature. For the latter, this thesis recommends adopting the form of the suspended declaration of invalidity. By adopting and applying this form, the potential Court will give the organ, that has issued the unconstitutional document, an opportunity to annul or amend the document itself within a fixed time. The unconstitutional by-law document will only be invalidated when that organ ignores the Court's order within the stipulated period of time.

*Recommendation on the adoption of proportionality doctrine for the balance in the performance of the potential Constitutional Court*

How judges interprete the constitution will reflect the way they manage the equilibrium in their performance, eventually either enhancing or damaging the court's credibility. Regarding how judges of the potential Constitutional Court of Vietnam should balance their performance, this thesis suggests the adoption of the theory of proportionality as a method of constitutional interpretation. Even though the theory of proportionality is not the main topic to be discussed in this thesis, it still deserves to be introduced as an option for judges of the potential Court to consider when they practice constitutional interpretation after the Court is established.

Chapter II of this thesis has introduced the theory of proportionality as a remarkable method applied by the German Federal Constitutional Court. As discussed in chapter II, the principle of proportionality is the idea that infringements on individual freedom by the legislature and the government may be justified if they are done solely for legitimate purposes and to a proportional extent. In other words, judges can use proportionality theory in order to reconcile tensions between human rights and public good. For example, the rule issued by the Vietnamese government putting people in lockdown for a couple of weeks in April 2020 to prevent the spread of a deadly virus might be considered an infringement on the freedom of movement, but can be justified as a proportional measure designed to protect the people's well-being.

The current Constitution of Vietnam gives a constitutional basis for the possible adoption and exercise of the concept of proportionality. According to Article 14 of the Constitution of Vietnam, "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."[388] As can be seen from the words, this general limitation clause allows specific limitations on rights, but merely in cases where such limitations are justifiable. And in using proportionality, judges of the potential Constitutional Court of Vietnam will consider not only whether a right has been violated, but also whether that violation is justifiable for the reason allowed in the limitation clause.

There would be some suspicion about the possibility of applying the principle of proportionality in Vietnam since it was originally developed in Germany, an advanced democracy. However, Aharon Barak, in his book *Proportionality – Constitutional Rights and Their Limitations,* shows that the concept of proportionality nowadays has been accepted by many nations, despite their differences in legal tradition or political context. From Germany, it has migrated to almost every part of the world, for example, Canada, Ireland, England, New Zealand, Australia, South Africa, Central and Eastern Europe, Asia and South America. The proportional limitation of human rights has not only been developed in mature democratic regimes but has also been used in transitional democracies.[389] Evidences showed in Aharon Barak's book indicate that the adoption and application of the proportionality concept in Vietnam is possible.

There is an essential explanation why this thesis suggests the adoption of the theory of proportionality as a constitutional interpretation method to be exercised by judges of the potential Constitutional Court of Vietnam. The reason is that in applying the proportionality doctrine, the Court can also manage the equilibrium of its performance. Determining which value, either individual rights or common goods, shall prevail in a given case is not a mechanical exercise. It is, instead, a difficult

---

[388] The 2013 Constitution of Vietnam, art. 14.
[389] Barak, *Proportionality*, 175–210.

judicial task involving complex considerations. The general limitation clause only provides the constitutional basis, and judges of the potential Constitutional Court will be relied upon to interpret it and to define significant vague terms such as "in case of necessity for reasons of national defense, national security, social order and safety, social morality, and community well-being." Therefore, by applying proportional measure while interpreting the constitution, the potential Court will be able to effectively protect its institutional reputation, avoiding both political attack and public distrust. This thesis can only give a basic recommendation on the adoption of the theory of proportionality. A better understanding of the proportionality doctrine needs developing, especially after the Constitutional Court is created in Vietnam.

**Bibliography**


19 Entscheidungen des Bundesverfassungsgerichs [BVerfGE] 342 (Bundesverfassungsgerich [BVerfG] [German Federal Constitutional Court] December 15, 1965).

Allen v. Wright, 468 U.S. 737 (1984).

Anh Van, Nguyen Thi. "What Can We See in the Institutional Reformation of the Thai Constitutional Court [Thấy Gì Từ Những Đổi Mới Của Cơ Quan Bảo Hiến ở Thái Lan]." *Law Magazine of Hanoi Law University*, 2011.

"Attacking-the-Last-Line-of-Defense-June2018.Pdf." Accessed September 8, 2020. https://www.helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf.

Ban chấp hành trung ương Đảng. "Political Report of the 10th Central Executive Committee of the Communist Party of Vietnam at the 11th National Congress [Báo Cáo Chính Trị Của Ban Chấp Hành Trung Ương Đảng Khoá X Tại Đại Hội Đại Biểu Toàn Quốc Lần Thứ XI Của Đảng," 2015. https://tulieuvankien.dangcongsan.vn/ban-chap-hanh-trung-uong-dang/dai-hoi-dang/lan-thu-xi/bao-cao-chinh-tri-cua-ban-chap-hanh-trung-uong-dang-khoa-x-tai-dai-hoi-dai-bieu-toan-quoc-lan-thu-xi-cua-dang-1526.

Bank, The World. "Growing the Space for Human Rights Awareness in Vietnam." The World Bank, March 1, 2018. http://documents.worldbank.org/curated/en/920881520428642836/Growing-the-space-for-human-rights-awareness-in-Vietnam.

Barak, Aharon. "Proportional Effect: The Israeli Experience." *University of Toronto Law Journal* 57, no. 2 (2007).

———. "Proportionalioty (2)." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and Andras Sajo. Oxford University Press, 2012.

———. *Proportionality: Constitutional Rights and Their Limitations*. Cambridge University Press, 2012.

Basic Law for the Federal Republic of Germany (1949).

Beyme, Klaus Von. *America As a Model: The Impact of American Democracy in the World*. New York: Palgrave Macmillan, 1987.

———. "The German Constitutional Court in an Uneasy Triangle between Parliament, Government and the Political Laender." In *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Countries Europe in the Comparative Perspective*, edited by Wojciech Sadurski. Kluwer Law International, 2002.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 2nd edition. New Haven: Yale University Press, 1986.

Brown v. Board of Education, 347 U.S. 483 (1954).

Brunner, Georg. "Development of a Constitutional Judiciary in Eastern Europe." *Review of Central and East European Law* 18, no. 6 (1992): 535.

Bush v. Gore, 531 U.S. 98 (2000).

Cappelletti, Mauro. "Judicial Review in Comparative Perspective." *California Law Review* 58, no. 5 (October 1970): 1017–53.

———. *Judicial Review in the Contemporary World*. 1st ed. Indianapolis: Bobbs-Merrill, 1971.

———. *The Judicial Process in Comparative Perspective*. New York: Oxford University Press, 1989.

Cappelletti, Mauro, and William Cohen. *Comparative Constitutional Law: Cases and Materials*. Bobbs-Merrill, 1979.

Chen, Albert H. Y. "The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives," 2013.

Chen, Po Liang, and Jordan T. Wada. "Can the Japanese Supreme Court Overcome the Political Question Hurdle?" *Washington International Law Journal* 26, no. 2 (2017): 349.

Comella, Victor Ferreres. *Constitutional Courts and Democratic Values: A European Perspective*. New Haven: Yale University Press, 2009.

———. "The European Model of Constitutional Review of Legislation: Toward Decentralization?" *International Journal of Constitutional Law* 2, no. 3 (2004): 461–91.

———. "The Rise of Specialized Constitutional Courts." In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Edward Elgar Publishing, 2011.

Contiades, X., and A. Fotiadou. "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation." *International Journal of Constitutional Law* 10, no. 3 (July 1, 2012): 660–86. https://doi.org/10.1093/icon/mor080.

Cope, Kevin. "Global Constitutionalism Meets Local Politics: The Making of the World's Youngest Constitution." In *Social and Political Foundations of Constitutions*, edited by Denis J. Galligan and Mila Versteeg. New York: Cambridge University Press, 2013.

Courtis, Christian, and International Commission of Jurists (1952- ). "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability." Geneva: International Commission of Jurists, 2008.

Dae, Kyu Yoon. "The Constitutional Court System of Korea: The New Road for Constitutional Adjudication." *Journal of Korean Law* 1, no. 2 (2001).

Decision of the Minister of Ministry of Justice on Defining the Functions, Tasks, Powers, and Organizational Structure of the Department for Inspection of Legal Documents [Quyết định của Bộ trưởng Bộ Tư pháp Quy định chức năng, nhiệm vụ, quyền hạn và cơ cấu tổ chức của cục kiểm tra văn bản quy phạm pháp luật], Pub. L. No. 656/QD-BTP (2018).

Dionisopoulos, P. Allan. "Judicial Review and Civil Rights in Japan: The First Decade with an Alien Doctrine." *The Western Political Quarterly* 13, no. 2 (June 1960): 269–87. https://doi.org/10.2307/444650.

Do, Tran Van. "The Responsibility of Constitutional Protection of the People's Courts and the People's Procuracies in Accordance with the Spirit of the 2013 Constitution and the Pefecting Direction [Trách Nhiệm Bảo Hiến Của Toà Án Nhân Dân và Viện Kiểm Sát Nhân Dân Theo Tinh Thần Hiến Pháp 2013 và Hướng Hoàn Thiện] (Presentation in the Workshop on 'Perfecting the Constitutional Protection Mechanism in Accordance with the Spirit of the 2013 Constitution')." The Ministry of Justice of Vietnam, March 2017.

Dressel, Bjoern. "Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand." *The Pacific Review* 23, no. 5 (2010): 671–91.

Dressel, Bjoern, and Khemthong Tonsakulrungruang. "Coloured Judgements? The Work of the Thai Constitutional Court, 1998-2016." *Journal of Contemporary Asia*, 2018.

Duc, Bui Xuan. "Renovating the Constitutional Protection Mechanism in Vietnam: From Supervision by the National Assembly to Adjudication by a Constitutional Court [Đổi Mới Mô Hình Bảo Hiến ở Việt Nam: Từ Giám Sát Bởi Quốc Hội Chuyển Sang Tài Phán Bằng Toà Án Hiến Pháp]." In *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, edited by National Assembly Office. Time Publishing House [Nhà Xuất bản Thời đại], 2009.

Duong, Tran Ngoc. "The Responsibility of Constiutional Protection of the National Assembly in Accordance with the Spirit of the 2013 Constitution and the Orientation for Institutional Improvement [Trách Nhiệm Bảo Hiến Của Quốc Hội Theo Tinh Thần Của Hiến Pháp Năm 2013 và Hướng Hoàn Thiện Thể Chế] (Presentation in the Workshop on 'Perfecting the Constitutional Protection Mechanism in Accordance with the Spirit of the 2013 Constitution')." The Ministry of Justice of Vietnam, March 2017.

Durr, Schnutz Rudolf. "Comparative Overview of European Systems of Constitutional Justice." *Vienna Journal on International Constitutional Law* 5 (2011): 159.

Dworkin, Ronald. *A Bill of Rights for Britain*. Chatto & Windus, 1990.

———. *Taking Rights Seriously*. Harvard University Press, 1978.

Emiliou, Nicholas. *The Principle of Proportionality in European Law: A Comparative Study*. Kluwer Law International, 1995.

Epstein, Michael M. "The U.S. Constitution as Icon: Re-Imagining the Sacred Secular in the Age of User-Controlled Media." *Southwestern Law Review* 45 (2015).

Fallon Jr, Richard H. *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*. 2nd ed. Cambridge University Press, 2013.

———. "'The Rule of Law' as a Concept in Constitutional Discourse." *Columbia Law Review* 97, no. 1 (1997): 1–56.

Ferejohn, John E. "Constitutional Review in the Global Context." *New York University Journal of Legislation and Public Policy* 6 (2002): 49.

Finkel, Jodi S. *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*. 1st edition. University of Notre Dame Press, 2008.

Fleming, James E., and Linda C. McClain. "Liberty." In *The Oxford Handbook of the U.S. Constitution*, edited by Mark Tushnet, Mark A. Graber, and Sanford Levinson. Oxford University Press, 2015.

Fontana, David. "Docket Control and the Success of Constitutional Courts." In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Rochester, New York: Edward Elgar Publishing Limited, 2011.

Freedom House. *Freedom in the World 2018: The Annual Survey of Political Rights & Civil Liberties*, 2019. https://freedomhouse.org/sites/default/files/2020-02/FreedomintheWorld2018COMPLETEBOOK.pdf.

Friedman, Barry. "The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner." *New York University Law Review* 76, no. 5 (November 2001).

———. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. Farrar, Straus and Giroux, 2009.

Gardbaum, Stephen. "Are Strong Constitutional Courts Always a Good Thing for New Democracies?" *Columbia Journal of Transnational Law* 53 (January 1, 2015): 285–320.

Garlicki, Lech. "Constitutional Courts Versus Supreme Courts." *International Journal of Constitutional Law* 5, no. 1 (2007).

Gesley, Jenny. "How Judges Are Selected in Germany | In Custodia Legis: Law Librarians of Congress." *In Custodia Legis* (blog), May 3, 2016. https://blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/

Gibbons, William Conrad. *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, Part II: 1961-1964*. Princeton University Press, 1986.

Gillespie, John. "Constitutional Review in Indonesia: View from Comparative Perspective [Bảo Hiến ở Indonesia: Nhìn Từ Góc Độ So Sánh]." In *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, edited by National Assembly Office. Time Publishing House [Nhà Xuất bản Thời đại], 2009.

———. “The Juridification of State Regulation in Vietnam.” In *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes*, edited by John Gillespie and Albert H. Y. Chen. Routledge, 2010.

Ginsburg, Tom. “Constitutional Courts in East Asia: Understanding Variation.” *Journal of Comparative Law* 80, no. 3 (2008).

———. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge University Press, 2003.

———. “The Constitutional Court and Judicialization of Korean Politics.” In *New Courts in Asia*, edited by Andrew Harding and Penelope (Pip) Nicholson. Routledge Law in Asia, 2011.

———. “The Global Spread of Constitutional Review.” In *The Oxford Handbook of Law and Politics*. Oxford University Press, 2008.

Ginsburg, Tom, and Mila Versteeg. “Why Do Countries Adopt Constitutional Review?” *The Journal of Law, Economics, and Organization* 30, no. 3 (August 2014): 587–622.

Goderis, Benedikt, and Mila Versteeg. “The Transnational Origins of Constitutions: Evidence From a New Global Data Set on Constitutional Rights,” February 2013.

Goldsworthy, Jeffrey. *Parliamentary Sovereignty: Contemporary Debates*. Cambridge University Press, 2010.

Gomille, Christian. “The Federal Constitutional Court of Germany - a ‘Super-Appellate Court’ in Civil Law Cases?” *Ritsumeikan Law Review*, no. 31 (2014).

Goodman, Carl F. *The Rule of Law in Japan: A Comparative Analysis*. Third Revised Edition. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012.

Grimm, Dieter. “Proportionality in Canadian and German Constitutional Jurisprudence.” *University of Toronto Law Journal* 57, no. 2 (2007): 383–97.

Groppi, Tania. “The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review.” *Indian Journal of Constitutional Law* 4, no. 1 (2010).

Grote, Ranier. “Rule of Law, Rechtsstaat and Etat de Droit.” In *Constitutionalism, Universalism and Democracy - A Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law (Studien Und Materialien Zur Verfassungsgerichtsbarkeit)*, edited by Christian Starck. Baden-Baden: Nomos Publishers, 1999.

Guichard, Justine. “Transitioning by Amendment: The 1987 Revision of Constitutional Norms and Institutions.” In *Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice*, edited by Justine Guichard, 23–46. The Sciences Po Series in International Relations and Political Economy. New York: Palgrave Macmillan US, 2016.

Hao, Vo Tri. “The American Model of Constitutional Review [Mô Hình Tài Phán Hiến Pháp Hoa Kỳ].” *Journal of Legislative Studies [Tạp Chí Nghiên Cứu Lập Pháp]* 3 (2008).

Harding, Andrew. “The Constitutional Court of Thailand, 1998-2006: A Turbulent Innovation.” In *New Courts in Asia*, edited by Andrew Harding and Penelope (Pip) Nicholson. Routledge Law in Asia, 2010.

Harding, Andrew, and Peter Leyland. “The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia.” *Journal of Comparative Law* 3 (2008): 118.

———. *The Constitutional System of Thailand: A Contextual Analysis*. Hart Publishing, 2011.

Hardy, Andrew. “Rules and Resources: Negotiating the Household Registration System in Vietnam under Reform.” *Sojourn: Journal of Social Issues in Southeast Asia* 16, no. 2 (2001): 187–212.

Hazard, John N., William Elliott Butler, and Peter B. Maggs. *The Soviet Legal System: The Law in the 1980’s*. First Edition. New York: Oceana Publications, 1984.

Healy, Gavin. “Judicial Activism in the New Constitutional Court of Korea.” *Columbia Journal of Asian Law* 14, no. 1 (2000): 213.

Hendrianto. “Institutional Choice and the New Indonesian Constitutional Court.” In *New Courts in Asia*, edited by Andrew Harding and Penelope (Pip) Nicholson. Routledge Law in Asia, 2011.

Heun, Werner. *The Constitution of Germany: A Contextual Analysis*. Hart Publishing, 2011.

Hirschl, Ran. “The Judicialization of Mega-Politics and the Rise of Political Courts.” *Annual Review of Political Science* 11 (2008).

———. “The Political Origins of the New Constitutionalism.” *Indiana Journal of Global Legal Studies* 11, no. 1 (2004).

———. “The Strategic Foundations of Constitutions.” In *Social and Political Foundations of Constitutions*, edited by Denis J. Galligan and Mila Versteeg, 157–81. Cambridge: Cambridge University Press, 2013.

———. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge London: Harvard University Press, 2007.

Hoi, Nguyen Thi. “Primary Idea on an Institution of Constitutional Protection in Vietnam [Ý Tưởng Ban Đầu về Cơ Quan Bảo Hiến ở Việt Nam].” In *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*. Time Publishing House [Nhà Xuất bản Thời đại], 2009.

Hong Anh, Vu. “Constitutional Review [Giám Sát Hiến Pháp].” *Journal of Legislative Studies [Tạp Chí Nghiên Cứu Lập Pháp]* 12 (December 2003).

Dân Trí. "Household Registration Has Completed Its Historical Mission [Hộ Khẩu Đã Hoàn Thành Sứ Mệnh Lịch Sử]," March 13, 2006. https://dantri.com.vn/xa-hoi/ho-khau-da-hoan-thanh-su-menh-lich-su-1142273988.htm.

Howard, A. E. Dick. "The Burger Court: A Judicial Nonet Plays the Enigma Variations." *Law and Contemporary Problems* 43, no. 3 (1980): 7–28.

Human Rights Watch. "World Report 2018: Rights Trends in Vietnam," January 5, 2018. https://www.hrw.org/world-report/2018/country-chapters/vietnam.

Hungarian Helsinki Committee. "Attacking the Last Line of Defense: Judicial Independence in Hungary in Jeopardy," June 15, 2018. https://www.helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf.

Jackson, Vicki C. "Constitutional Law in an Age of Proportionality." *The Yale Law Journal* 124, no. 8 (2015): 3094–3196.

Kelsen, Hans. "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution." *The Journal of Politics* 4, no. 2 (1942): 183–200.

Kommers, Donald P. "Autonomy Versus Accountability: The German Judiciary." In *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, edited by Peter H. Russell and David O'Brien. University of Virginia Press, 2001.

———. "German Constitutionalism: A Prolegomenon." *Emory Law Journal* 40 (1991).

———. "Germany: Balancing Rights and Duties." In *Interpreting Constitutions – A Comparative Study*, edited by Jeffrey Goldsworthy. Oxford University Press, 2007.

———. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd ed. Duke University Press, 1997.

Lam, Nguyen Duc. "Systems of Constitutional Review: Comparative Perspective [Cơ Chế Giám Sát Bảo Hiến: Góc Nhìn Tham Khảo]." *Journal of Legislative Studies [Tạp Chí Nghiên Cứu Lập Pháp]* 10 (October 2003).

Law, David S. "Why Has Judicial Review Failed in Japan?" *Washington University Law Review* 88, no. 6 (2011): 1425–66.

Lee, Seokmin, and Fabian Duessel. "Researching Korean Constitutional Law and The Constitutional Court of Korea." *Journal of Korean Law* 16 (December 2016): 265.

Leuchtenburg, William E. *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. Oxford University Press, 1996.

Ludwikowski, Rhett. "Judicial Review in the Socialist Legal System: Current Developments." *International & Comparative Law Quarterly* 37, no. 1 (1988): 89–108.

Marbury v. Madison, 5 U.S. 137 (1803).

Matsui, Shigenori. "Constitutional Precedents in Japan: A Comment on the Role of Precedent." *Washington University Law Review* 88, no. 6 (2011): 1669–80.

———. *The Constitution of Japan: A Contextual Analysis*. Oxford and Portland, Oregon: Hart Publishing, 2011.

———. "Why Is the Japanese Supreme Court so Conservative?" *Washington University Law Review* 88, no. 6 (2011): 1375–1423.

McCloskey, Robert G. *The American Supreme Court*. 5th ed. Chicago and London: University of Chicago Press, 2010.

McCulloch v. Maryland, 17 U.S. 316 (1819).

Merryman, John, and Rogelio Pérez-Perdomo. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. 3rd ed. Stanford, California: Stanford University Press, 2007.

Michelman, Frank I. "The Interplay of Constitutional and Ordinary Jurisdiction." In *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Edward Elgar Publishing, 2011.

Moustafa, Tamir. *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. 1st edition. New York: Cambridge University Press, 2007.

Ninh, Nguyen Hai. "The Creation of a Mechanism for Adjudicating the Constitutionality in the Legislative, Executive, and Judicial Actions [Thiết Lập Cơ Chế Phán Quyết Những Vi Phạm Hiến Pháp Trong Hoạt Động Lập Pháp, Hành Pháp và Tư Pháp ở Việt Nam]." In *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, edited by National Assembly Office. Time Publishing House [Nhà Xuất bản Thời đại], 2009.

Nixon v. United States, 506 U.S. 224 (1993).

Dân Trí. "'No Legal Basis' for Forcing People to Change Their Valid Drive Licences [Buộc Người Dân Đổi Giấy Phép Lái Xe Còn Thời Hạn Là 'Không Có Cơ Sở Pháp Lý']," November 30, 2016. https://dantri.com.vn/xa-hoi/buoc-nguoi-dan-doi-giay-phep-lai-xe-con-thoi-han-la-khong-co-co-so-phap-ly-20161130132636087.htm.

Nowak, M. "Civil and Political Rights." In *Human Rights: Concept and Standarts*, edited by Janusz Symonides. Unesco Publishing, 2000.

Báo điện tử Đại biểu Nhân dân. "On the Authority of the Constitutional Council [Về Thẩm Quyền Của Hội Đồng Hiến Pháp]," August 26, 2013. https://www.daibieunhandan.vn/ve-tham-quyen-cua-hoi-dong-hien-phap-290449.

Pannier, Russell. "An Analysis of the Theory of Original Intent." *William Mitchell Law Review* 18, no. 3 (1992).

Party Politburo [Bộ Chính trị]. "Resolution on Building and Perfecting Vietnam's Legal System to the Year 2020 [Nghị Quyết về Chiến Lược Xây Dựng và Hoàn Thiện Hệ Thống Pháp Luật Việt Nam Đến Năm 2020]," May 24, 2005.

Patrick, John J., Richard M. Pious, and Donald A. Ritchie. *The Oxford Guide to the United States Government*. Oxford University Press, 2001.

ResearchGate. "(PDF) Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016." https://www.researchgate.net/publication/325761243_Coloured_Judgements_The_Work_of_the_Thai_Constitutional_Court_1998-2016.

Pham Duy Nghia. "A Supervisory Mechanism for the Servants of the People [Một Phương cách Giám sát Đầy tớ Nhân dân]." TUOI TRE ONLINE, April 5, 2004. https://tuoitre.vn/news-27325.htm.

Phat, Nguyen Nhu, ed. *Constitutional Review: Some Fundamental Theoretical Issues, International Experiences, and Possible Application in Vietnam [Tài Phán Hiến Pháp: Một Số Vấn Đề Lý Luận Cơ Bản, Kinh Nghiệm Quốc Tế và Khả Năng Áp Dụng Cho Việt Nam]*. Social Science Publishing House [Nhà xuất bản Khoa học Xã hội], 2011.

Phuong, Nguyen Thi. "The Aim of Constitutional Protection in Building the Socialist Rule of Law State in Vietnam[Mục Đích Của Bảo Hiến Trong Điều Kiện Xây Dựng Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa ở Việt Nam]." In *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, edited by National Assembly Office. Time Publishing House [Nhà Xuất bản Thời đại], 2009.

Plessy v. Ferguson, 163 U.S. 537 (1896).

Powell, H. Jefferson. "The Original Understanding of Original Intent." *Harvard Law Review* 98, no. 5 (1985): 885–948.

Quirk, Patrick. "An Australian Looks at German Proportionality." *University of Notre Dame Australia Law Review* 1 (1999): 39.

Rawls, John. *Political Liberalism*. Columbia University Press, 2005.

Raz, Joseph. "The Rule of Law and Its Virtue." In *The Authority of Law: Essays on Law and Morality*. Oxford University Press, 2009.

Roe v. Wade, 410 U.S. 113 (1973).

Sadurski, Wojciech. *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. 2nd ed. Springer, 2014.

Saiko Saibansho, Feb. 1, 1950, 4 SAIKO SABANSHO KEIJI HANREISHU [KEISHU] 73 (grand bench).

Saiko Saibansho, Nov. 28, 1962, Showa 30 (A) no. 56, 2961 SAIKO SABANSHO KEIJI HANREISHU [KEISHU] 1593 (grand bench).

Saiko Saibansho [Sup. Ct.] Dec. 16, 1959, 13 SAIKO SAIBANSHO KEIJI HANREISHU [KEISHU] 3225 (grand bench).

Saiko Saibansho [Sup. Ct.] Sept. 9, 1982, Showa 52 no. 56, 36 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1679.

Sajó, András. *Limiting Government: An Introduction to Constitutionalism*. Central European University Press, 1999.

Satoh, Jun-ichi. "Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight." *Loyola of Los Angeles Law Review* 41, no. 2 (2008): 603.

Scheppele, Kim Lane. "Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe." *University of Pennsylvania Law Review* 154, no. 6 (June 1, 2006): 1757. https://doi.org/10.2307/40041352.

Schlesinger v. Holtzman, 414 U.S. 1321 (1973).

Schlink, Bernhard. "Proportionalioty (1)." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and Andras Sajo. Oxford University Press, 2012. https://doi.org/10.1093/oxfordhb/9780199578610.001.0001.

Schmitz, Georg. "The Constitutional Court of the Republic of Austria 1918–1920." *Ratio Juris* 16, no. 2 (2003): 240–65.

Schoen, Rodric B. "A Strange Silence: Vietnam and the Supreme Court." *Washburn Law Journal* 33 (1994 1993): 275.

Schwartmann, Rolf. "The Role of the Basic Law in Major Social Conflicts." In *The German Constitution Turns 60: Basic Law and Commonwealth Constitution German and Australian Perspectives*, edited by Jurgen Brohmer, New Edition. Frankfurt am Main: Peter Lang Pub Inc, 2011.

Seibert-Fohr, Anja. "Constitutional Guarantees of Judicial Independence in Germany." In *Recent Trends in German and European Constitutional Law: German Reports Presented to the XVIIth International Congress on Comparative Law, Utrecht, 16 to 22 July 2006*, edited by Eibe H. Riedel and Ruediger Wolfrum. Heidelberg: Springer, 2010.

Shapiro, Martin. "Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience." In *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, edited by Wojciech Sadurski. Kluwer Law International, 2002.

———. "The Success of Judicial Review and Democracy." In *On Law, Politics, and Judicialization*, by Martin Shapiro and Alec Stone Sweet. Oxford University Press, 2002.

Shapiro, Martin, and Alec Stone. "The New Constitutional Politics of Europe." *Comparative Political Studies* 26, no. 4 (January 1994).

Sidel, Mark. "Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam." *Singapore Journal of International and Comparative Law* 6 (2002): 42–89.

———. *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective*. Cambridge: Cambridge University Press, 2008.

———. *The Constitution of Vietnam: A Contextual Analysis*. Hart Publishing, 2009.

Soffer, Oren. "Judicial Review of Legislation in Israel: Problems and Implications of Possible Reform." *Israel Affairs* 12, no. 2 (April 2006): 307–29.

Son, Bui Ngoc. *Constitutional Protection in Vietnam [Bảo Hiến ở Việt Nam]*. Hanoi: Judiciary Publish House [Nhà xuất bản Tư pháp], 2006.

———. "Foreground of Constitutional Review in Vietnam [Tiền Cảnh Chế Độ Bảo Hiến ở Việt Nam]." In *Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, edited by National Assembly Office. Time Publishing House [Nhà Xuất bản Thời đại ], 2009.

———. "The Discourse of Constitutional Review in Vietnam." *Journal of Comparative Law* 9 (2014): 191.

Sternberg, Sebastian, Susumu Shikano, and Ulrich Sieberer. "Ideology, Law and Professional Background. Explaining Dissenting Opinions in the German Federal Constitutional Court." Prague, n.d. https://ecpr.eu/Filestore/PaperProposal/7bccbff2-9a61-40fa-b9e8-c762fee4041a.pdf.

Stone-Sweet, Alec. *Governing With Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000.

———. "Why Europe Rejected American Judicial Review - and Why It May Not Matter." *Michigan Law Review* 101 (2003).

Stumpf, Istvan. "The Hungarian Constitutional Court's Place in the Constitutional System of Hungary." *Civic Review* 13 (2017).

Tadano, Masahito. "The Role of the Judicial Branch in the Protection of Fundamental Rights in Japan." In *Contemporary Issues in Human Rights Law: Europe and Asia*, edited by Yumiko Nakanishi, 73–90. Singapore: Springer, 2018. https://doi.org/10.1007/978-981-10-6129-5_4.

Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004.

Thang, Thai Vinh. "The Need of Constitutional Review and a Suitable Constitutional Review Model for Vietnam [Nhu Cầu Bảo Hiến và Mô Hình Cơ Quan Bảo Hiến Phù Hợp Với Việt Nam]." In

*Proceedings of the International Conference on Constitutional Protection [Kỷ Yếu Hội Thảo Quốc Tế về Bảo Hiến]*, edited by National Assembly Office. Time Publishing House [Nhà Xuất bản Thời đại], 2009.

Thao, Nguyen Van. "Drafting and Amending the Constitution and the Practice of Constitutional Protection [Soạn Thảo, Sửa Đổi Hiến Pháp và Thực Hiện Bảo vệ Hiến Pháp]." *Communist Review [Tạp Chí Cộng Sản]* 33 (2001).

The 1987 Constitution of South Korea.

The 1992 Constitution of Vietnam, amended in 2001.

The 1997 Constitution of Thailand.

The 2013 Constitution of Vietnam.

The 2017 Constitution of Thailand.

The Constitution of Japan (1947).

Vietnamnet. "The Constitutional Council: A Politically Safe Choice? [Hội đồng Hiến pháp - Lựa chọn Chính trị An toàn?]," May 3, 2013. https://vietnamnet.vn/vn/thoi-su/hoi-dong-hien-phap-lua-chon-chinh-tri-an-toan-119577.html.

The Constitutional Court Art of South Korea, Pub. L. No. 12897.

The Court Act of Japan, Pub. L. No. 59 (1947).

Dân Trí. "The Discovery of More Than 5.600 Unlawful Documents: The Concern of 'Whistling' Agency [Phát Hiện Hơn 5.600 Văn Bản Trái Pháp Luật: Trăn Trở Của Cơ Quan 'Tuýt Còi']," August 8, 2018. https://dantri.com.vn/xa-hoi/phat-hien-hon-5600-van-ban-trai-phap-luat-tran-tro-cua-co-quan-tuyt-coi-20180808153351913.htm.

Hà Nội Mới. "The Draft Revision of the 1992 Constitution: A View of the Ministry of Justice [Dự Thảo Sửa Đổi Hiến Pháp 1992: Góc Nhìn Từ Cơ Quan Tư Pháp]," March 23, 2013. http://hanoimoi.com.vn/Tin-tuc/Chinh-tri/581080/du-thao-sua-doi-hien-phap-1992-goc-nhin-tu-co-quan-tu-phap.

The German Federal Constitutional Court Act Act in the version of 11 August 1993 (Federal Law Gazette, p. 1473), last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette, p. 3546).

The German Federal Constitutional Court Act (Bundesverfassungsgerichts-Gesetz, BVerfGG) (1951).

The Government of Vietnam. Decree on Amending Some Provisions of the Decree 51/CP of May 10th, 1997 on Household Registration and Management [Nghị định về việc Sửa đổi, Bổ sung một số điều của Nghị định số 51/CP ngày 10 tháng 5 năm 1997 của Chính phủ về Đăng ký và Quản lý Hộ khẩu], Pub. L. No. 108/2005/ND-CP (2005).

The Law on Oversight Activities of the National Assembly and People's Councils [Luật Hoạt động Giám sát của Quốc hội và Hội đồng Nhân dân], Pub. L. No. 87/2015/QH13 (2015).

Dân Trí. "The Ministry of Justice 'Whitles' Two Unlawful Decisions of Quang Ninh [Bộ Tư Pháp 'Tuýt Còi' 2 Quyết Định Trái Luật Của Quảng Ninh]," March 15, 2016. https://dantri.com.vn/xa-hoi/bo-tu-phap-tuyt-coi-2-quyet-dinh-trai-luat-cua-quang-ninh-20160315091814886.htm.

The Vietnamese Communist Party [Đảng Cộng Sản Việt Nam]. "Documents of the 8th National Party Congress [Văn Kiện Đại Hội Đại Biểu Đảng Toàn Quốc Lần Thứ VIII]." National Political Publishing House [Nhà xuất bản Chính trị Quốc gia], 1996.

———. "Documents of the 10th National Party Congress [Văn Kiện Đại Hội Đại Biểu Đảng Toàn Quốc Lần Thứ X]." National Political Publishing House [Nhà xuất bản Chính trị Quốc gia], 2006.

World Bank. "The World Bank's Overview in Vietnam." https://www.worldbank.org/en/country/vietnam/overview.

Thi Nguyen, Huong. "Constitutional Rights and Dialogic Process in Socialist Vietnam: Protecting Rural-to-Urban Migrants' Rights without a Constitutional Court." In *Social Difference and Constitutionalism in Pan-Asia*, edited by Susan H. Williams, 109–34. Cambridge: Cambridge University Press, 2014.

Tonsakulrungruang, Khemthong. "Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict." *Washington International Law Journal* 26, no. 2 (2017): 247.

Tushnet, Mark. "Comparative Constitutional Law." In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann. Oxford University Press, 2006.

———. *The Constitution of the United States of America: A Contextual Analysis*. 2nd ed. Hart Publishing, 2015.

———. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton University Press, 2009.

Uc, Dao Tri, ed. *Organization and Operation of the Vietnamese Socialist Rule of Law [Mô Hình Tổ Chức và Hoạt Động Của Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Việt Nam]*. Judiciary Publish House [Nhà xuất bản Tư pháp], 2007.

United States v. Nixon, 418 U.S. 683 (1974).

Urofsky, Melvin I. *The Warren Court: Justices, Rulings, and Legacy*. ABC-CLIO, 2001.

Nikkei Asia. "Vietnam Reaps Sixth Straight Record Year in Foreign Investment," January 10, 2019. https://asia.nikkei.com/Economy/Trade-war/Vietnam-reaps-sixth-straight-record-year-in-foreign-investment.

Dân Trí. “When the Household Registration Booklet Will Be Eliminated? [Bao Giờ Mới Bắt Đầu Bỏ Sổ Hộ Khẩu?],” November 6, 2017. https://dantri.com.vn/xa-hoi/bao-gio-moi-bat-dau-bo-so-ho-khau-20171105195948469.htm.

Yang, Chang Soo. “The Judiciary in Contemporary Society: Korea.” *Case Western Reserve Journal of International Law* 25, no. 2 (1993): 303.

Yang, Kun. “Judicial Review and Social Change in the Korean Democratizing Process.” *The American Journal of Comparative Law* 41, no. 1 (1993): 1–8.

Yeu, Nguyen Van. “Building the Socialist Rule of Law State of Vietnam during the Period of Industrializing and Modernizing the Country [Xây Dựng Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Thời Kỳ Công Nghiệp Hoá, Hiện Đại Hoá Đất Nước ].” *Communist Review [Tạp Chí Cộng Sản]* 3 (November 9, 2005).

Zeidler, Wolfgang. “Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms.” *Notre Dame Law Review* 62, no. 4 (1987): 504.