

**【Research Article】**

**The 2013 Constitution of Vietnam:  
Improvement toward Constitutionalism and Challenges**

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Abstract

This paper examines the 2013 Constitution of Vietnam through the lens of constitutionalism. It focuses on two important aspects of constitutionalism, i.e. constitutional protection and human rights protection.<sup>1</sup> The paper first discusses the constitutional provisions on the constitutional supremacy, constitutional protection, followed by a critique on the challenges to the realization of constitutional supremacy and implementation of the human rights limitation clause in Vietnam. The paper shows that the 2013 Constitution of Vietnam does reflect, from its words, values of constitutionalism such as enhanced provisions on constitutional supremacy and human rights. However, the paper argues that Vietnam is facing significant challenges in bringing the supreme value to the constitution in practice.

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<sup>1</sup> Constitutionalism is recently accounted on in the Vietnamese legal research. It is proposed that the concept is composed of some essential elements, such as a constitution having the effect of limiting the exercise of power, people's sovereignty, human rights protection, constitutional protection and separation of powers. (See Son, Bui Ngoc, "The Constitutionalism in Vietnam", Journal of the State and Law, no. 11 (2009): 12 – 24; Dung, Nguyen Dang, "From Constitutionalism to the Constitution", Journal of Political Theories, no. 2 (2012): 81 – 84; Giao, Vu Cong and Tam, Nguyen Minh, "Some Theoretical Accounts on Constitutionalism", Jurisprudence Journal, no. 8 (August 2019): 24-28).

1. Preserving the supremacy of the Constitution and challenges in establishing a constitutional protection mechanism in Vietnam.
2. On the implementation of the principle of limiting human rights under Clause 2, Article 14 of the 2013 Constitution.
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##### **I. The 2013 Constitution and its supremacy**

“The supremacy of the Constitution” can be understood as the accreditation of the Constitution’s ultimate value within the legal system in a theoretical sense, and the absolute adherence to the Constitution in the political landscape, state operations and social life. The “supremacy” in question means that as far as the political system is concerned, no institutions shall be prioritized over the Constitution, whether expressly or impliedly.

Compared to the previous versions of the Constitution, the 2013 Constitution has included provisions that reflected the maturity in common preconceptions about the supremacy of the constitution. That is expressed through provisions on the effect of the constitution, protection of the constitution and the due process for amendment and supplement of the constitution.

##### **1. On the supremacy of the Constitution**

The first two constitutions of Vietnam – the 1946 Constitution and the 1959 Constitution – have no assertions for the highest-priority status of the constitution. It was only until 1980 that the Constitution first claimed its supremacy in effect in the following terms:

“The Constitution of the Socialist Republic of Vietnam is the fundamental law of the state, bearing in it effect of the highest order.

All other legal provisions must adhere itself to the Constitution.”<sup>2</sup>

This provision was carried over to the 1992 Constitution (amended in 2001).<sup>3</sup> Within the Vietnamese legal system, only the Constitution may be referred as the fundamental law, which

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<sup>2</sup> Article 146, the 1980 Constitution.

<sup>3</sup> Article 146, the 1992 Constitution (as amended in 2001).

intends to emphasize that Constitution shall provide the foundation for the entire legal system and also serve as the highest law. Consequently, all legal documents must be in adherence to the Constitution.

The 2013 Constitution has carried on this sentiment that began in 1980 and 1992. However, its development has surpassed the precursors. Article 119 of the 2013 Constitution stipulates:

“1. The Constitution is the fundamental law of the Socialist Republic of Vietnam, bearing in its effect of the highest order.

All other legal provisions must adhere itself to the Constitution”.

While the 1980 and 1992 Constitutions still regarded themselves as the fundamental law of the **State**, the 2013 Constitution has now assigned itself the fundamental law of the Country – the Socialist Republic of Vietnam. This is a minor difference in the wording, but it expresses a significant leap in perception. “Country” is an entity that consists of three components: borders, populations, and a state with a legal system to rule over the its land and populations. Meanwhile, “State” refers only to the governmental system as part of “Country”. When something asserts its representation of “the Socialist Republic of Vietnam”, it represents the highest regarded virtues to the entire country. In other words, the constitution has now been transformed from the law that establishes state structure to the law that protect the society by prescribing the highest values of the country by which state organs must abide. Vietnam The constitution certainly bears values more supreme than the will of state organs.

## **2. On the protection of the constitution**

Protection of the Constitution is an essential issue to its supremacy in effect. If all unconstitutional violations are not defined and not applied and countered with appropriate measures, the offender will be free from all sanctions. As a result, there would be no meaning for the existence of the constitution. No matter how the constitution asserts its fundamentality and supreme legal status, all contents do not have any substance. Theories on constitutionalism always hold in highly developed countries with strong constitution protection mechanisms. For example, Germany has “Bundesverfassungsgericht”, which means “the Federal Constitutional Court”, and France has “Conseil Constitutionnel” – “the Constitutional Council” - which has recently obtained similar capacities to the German Bundesverfassungsgericht. It is obvious that without a proper constitution protection mechanism, the supremacy of the Constitution cannot be truly upheld.

In the constitutional history of Vietnam, the emergence of the Constitution did not coincide with the requirement to preserve it. The 1946 Constitution did not have a rule for constitutional protection. The 1959 Constitution did not mention constitutional protection either, though there was a rule that stipulated the capacity to indict for unconstitutional laws. Accordingly, the National Assembly Standing Committee reserved the power to “amend or annul all decrees, resolutions, and directives that are not adherent to the Constitution as well as laws and ordinances”<sup>4</sup>. There were only restrictions on unconstitutional documents ratified by the Governmental Council, and nothing on unconstitutional documents ratified by higher institutions like the National Assembly Standing Committee, the President, and the National Assembly itself. The 1980 Constitution made no substantive changes to the 1959 Constitution in this regard. Therefore, it was the State Council<sup>5</sup> that had the power to “suspend, amend or annul all resolutions, decrees, decisions of the Minister Council that are not adherent to the Constitution as well as laws and ordinances”<sup>6</sup>. Eventually, in the 1992 Constitution (amended in 2001), the power to contend with unconstitutional documents was considerably expanded. Except for documents ratified by the National Assembly, all unconstitutional documents from all government institutions may be subject to suspension or annulment. The power to annul unconstitutional documents adopted by the President, the National Assembly Standing Committee, the Government, the People’s Supreme Court, and the People’s Supreme Procuracy belonged to the National Assembly.<sup>7</sup> The National Assembly Standing Committee reserved the power to suspend such documents and recommend them to the National Assembly for annulment. On the other hand, the power to annul unconstitutional documents of the provincial People’s Committee was reserved by the National Assembly Standing Committee. The power to suspend or annul documents ratified by a Minister, other members of the government, decisions and directives of the provincial People’s Committee and its Chairman was reserved by the Government.<sup>8</sup> Even though the scope of subject documents was expanded, the 1992 Constitution (amended in 2001) did not address constitutional protection directly.

In the 2013 Constitution, all provisions regarding the annulment authority and the range of institutions subject to document annulment have been inherited entirely from the 1992 Constitution (amended in 2001).<sup>9</sup> Additionally, the 2013 Constitution has also provided new stipulations for the

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<sup>4</sup> Clause 7, Article 53, the 1959 Constitution.

<sup>5</sup> This body is an equivalent of the National Assembly Standing Committee which emerges in the 2013 Constitution of Vietnam.

<sup>6</sup> Clause 8, Article 100, the 1980 Constitution.

<sup>7</sup> Clause 9, Article 84, the 1992 Constitution (amended in 2001).

<sup>8</sup> Clause 4 and Clause 5, Article 114, the 1992 Constitution (amended in 2001).

<sup>9</sup> Clause 10, Article 70; Clause 4 and Clause 7, Article 74; Clause 4, Article 98, the 2013 Constitution.

protection of the supremacy of the Constitution.

First, the 2013 Constitution was drafted with meticulous emphasis on legislative technique. All articles have been presented in precise legal writing. Therefore, their legality is more pronounced compared to the previous constitutions. Provisions on human rights, fundamental citizen rights are a few of the most notable examples. Whereas the 1992 Constitution (amended in 2001) only states in general that “rights and duties of citizens are determined by the Constitution and laws”, the 2013 Constitution stipulates that “human rights, citizen rights shall only be restricted under the provisions of legislations in cases of national security, social order, social ethics and welfare of the community.”<sup>10</sup> Whereas the 1992 Constitution (amended in 2001) only states in general that “all citizens are equal in the application of the law”, the 2013 Constitution supplements it by stipulating “no one shall be discriminated by their political, civil, economic, cultural and social positions”<sup>11</sup>. Furthermore, whereas the 1992 Constitution (amended in 2001) stipulates: “Citizens are free to conduct business in accordance with the law”, the 2013 Constitution supplements by stipulating: “Everyone is free to conduct businesses that were not expressly prohibited by the law”.<sup>12</sup>

The above provisions of the 2013 Constitution clearly present significant improvements in legality compared to the 1992 Constitution (amended in 2001). The entire structure and legal wording of the 2013 Constitution underscore its gradual emancipation from its preconceived form of a political/legal manifestation, as was seen in the 1980 and 1992 Constitutions. It gradually becomes a zeitgeist legal document. It is clear how relevant parties in legal interactions established by the Constitution shall calibrate their behavior. Under constitutional rules of such pronounced legislative characteristics, unconstitutional behaviors can now be identified more easily, which results in a greater need for the constitutional protection.

Second, the establishment of the 2013 Constitution marks the first time in the constitutional history of Vietnam to explicitly monitor the problem of the constitutional protection and supporting mechanisms. According to the definition, constitutional protection means to contend and apply sanctions to all unconstitutional actions, regardless of the offender being any governmental institution. This is a key definition to preserve the supremacy of the constitution. In accordance with this sentiment, Clause 2 of Article 119 stipulates: “The National Assembly and its subordinate institutions, the President, the Government, the People’s Supreme Court, the People’s Supreme Procuracy, other institutions of the State, and the entire People bear the duty to protect the

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<sup>10</sup> Article 51, the 1992 Constitution (amended in 2001); Clause 2, Article 14, the 2013 Constitution.

<sup>11</sup> Article 52, the 1992 Constitution (amended in 2001); Clause 2, Article 16, the 2013 Constitution.

<sup>12</sup> Article 57, the 1992 Constitution (amended in 2001); Article 33, the 2013 Constitution.

Constitution. Constitutional protection mechanisms shall be determined by the legislation.”

This provision in Clause 2 of Article 119 is still considerably vague in clarifying the responsibilities of the constitutional protection. However, this provision has expressed three essential increments in the common perception of the constitutional protection in Vietnam. First, it presents the explicit imperative to protect the constitution. The term “constitutional protection” being first mentioned in this Constitution shows the comprehensive sentiment toward this problem. Second, the responsibility to protect the constitution is now pronounced. Even though this responsibility has not yet been assigned to a specific body, the need for a protection mechanism is determined. Third, a protection mechanism has been mentioned. Although Article 119 does not clearly stipulate it, there must be dedicated institutions for constitutional protection, and there needs to be a proper process for the prosecution of unconstitutional actions to be reviewed and determined publicly. The second sentence of Clause 2, Article 119 can be considered as a vivid call upon the National Assembly to legislate for constitutional protection. This is clearly a new and significant improvement on the conceptions and general thought on the supreme status of the constitution and the need to construct a constitutional protection mechanism in Vietnam.

### **3. On the procedures of amendment and supplement of the constitution**

“The process of Constitution drafting has significant importance in legislation activity. A constitution that is constructed by a certain procedure with democratic technology and science, when all steps are carried out perfectly and subprocesses are logical and airtight, must be of high value.”<sup>13</sup> However, the process to create or amend a constitution does not only ensure the quality of the constitution, but it also reflects the opinions on the power of constitutions in general. Because a constitution is a fundamental law with an absolute effect of a country, it requires a procedure to create, amend, and supplement that fully emphasizes such importance. Conversely, through the steps and procedures in the legislative process, one can also assume the conceptions and opinions based on the respect a society of any country pays to its constitution. The more airtight the constitution drafting process and the broader the public participation are, the higher the political credibility to the resulting constitution is, and by association, the more pronounced the effort to uphold the supreme effect of that constitution shall be.

In the constitutional history of Vietnam, the first constitution enacted in 1946 stipulated the procedure to amend the constitution. Firstly, the constitution amendment process shall only initiate

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<sup>13</sup> Lien, Hoang The, *2013 Constitution: New breakthroughs*, Hanoi: Judicial Publishing House, 2015, page 285.

when a single-majority of votes within the Parliament is in favor of the amendment; then the Parliament shall vote to appoint a Constitutional amendment drafting committee. Finally, the changes ratified by Parliament shall be affirmed by the general public<sup>14</sup> through a referendum. In practice, due to the emergent situation regarding wars after the Constitution was ratified, this affirmation process was never implemented.

The 1959 Constitution did not inherit the procedure of its predecessor. This constitution stipulates in simplistic terms about the constitutional amendment with only two matters. First, only the National Assembly may amend the Constitution; second, the amendment shall only be initiated upon a single-majority of the vote among delegates of the National Assembly.<sup>15</sup> In the 1959 Constitution, there is neither stipulation on the procedure of the constitutional amendment, nor steps nor designations to take. The 1980 Constitution and the 1992 Constitution (amended in 2001) inherit both elements of the 1959 Constitution regarding the amendment.<sup>16</sup>

Unlike the three previous constitutions, the 2013 Constitution stipulates in considerable detail the process to enact and revise a constitution. The process shall be suggested only by either the President, the National Assembly Standing Committee, the Government, or at least one-thirds of all the National Assembly delegates. A two-thirds majority of the National Assembly is required to endorse the suggestion. Then, the revision process can begin officially by the National Assembly establishing a Constitutional Drafting Committee. This committee shall be established based on the recommendations of the National Assembly Standing Committee. In the drafting process, the drafting committee must organize polls for the People to express their opinions. Constitutional changes shall be adopted by at least two-third majority of the National Assembly. Constitutional referenda may be held should the National Assembly deem it necessary.<sup>17</sup>

The participation of the people in the process of creating and amending the Constitution under the 2013 Constitution is significant. This process requires the poll and the opinion review of the People as a prerequisite before a draft is presented to the National Assembly.<sup>18</sup> There are no specific requirements for the level of participation. However, in the resolution of the Constitution, each Vietnamese individual and household must be afforded an opportunity to participate in the opinion polling. The 2013 Constitution also stipulates the extent to which the People assert their role in deciding whether or not a Constitution draft would be ratified through a referendum. This is similar

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<sup>14</sup> Article 70, the 1946 Constitution.

<sup>15</sup> Article 112, the 1959 Constitution.

<sup>16</sup> Article 147, 1980 Constitution; Article 147, the 1992 Constitution (amended in 2001).

<sup>17</sup> Article 120, the 2013 Constitution.

<sup>18</sup> Clause 3, Article 120, the 2013 Constitution.

to the affirmation vote as stated in the 1946 Constitution. However, the difference lies in this process being optional and may only be initiated upon resolution of the National Assembly.<sup>19</sup>

Therefore, in general, the process to create and amend the Constitution stipulated in the 2013 Constitution is thorough and airtight with detailed procedures. This reflects the consistency and the priority of the Constitution. The participation of the population is mandatory, and in certain circumstances, it provides the definitive impact upon the creation and amendment of such constitution. Along with the removal of the exclusive power to enact a constitution of the National Assembly by the 2013 Constitution as its precursor, the 2013 Constitution has attached itself more firmly and fundamentally to the base power vested in the people. This element reinforces the political credibility and priority status of the Constitution in a Constitutional Socialist Vietnam, especially regarding the dynamics between the institutions of the same political system.

## **II. The 2013 Constitution and the protection of human rights**

Compared to the 1992 Constitution (amended in 2001), the 2013 Constitution has expressed more clearly on the perception in Vietnam regarding the natural human rights. The 2013 Constitution emphasizes the comprehensive approach to human rights as seen in Article 3 and Clause 1 of Article 14 of the 2013 Constitution which state that the Socialist Republic of Vietnam recognizes, enshrines, and protects human rights. This shows that the State fully understands the dynamics between itself and human rights as a principle. This sentiment was not clear enough in Article 50 of the 1992 Constitution (amended in 2001). In Chapter II of the 2013 Constitution, civil and political rights are firstly mentioned instead of economical, cultural, and social rights as seen in the 1980 Constitution and the 1992 Constitution.

For the respect for natural, comprehensive, and universal human rights, the 2013 Constitution has also expressed a development in its conception of the dynamic between state agencies and human rights in comparison with the 1992 Constitution (amended in 2001). Rather than being bodies that “grant” or “protect” human rights, state agencies are responsible for recognizing, respecting, and ensuring the practice of human rights. The bound of state agencies to human rights is now highly legislative. In other words, the 2013 Constitution now bars state agencies from being “arbitrary” in matters concerning human rights. This is reflected by the following aspects.

First, Clause 2, Article 14 of the 2013 Constitution clearly stipulates a condition to limit rights,

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<sup>19</sup> Clause 4, Article 120, the 2013 Constitution.



stating that "human rights and citizens' rights can only be restricted according to the provisions of legislative acts". Though this regulation only places conditions on formality, it is highly normative. In the current legal system of Vietnam, almost any state agency has the right to issue legal documents. Previously, there was no provision in the Constitution that is similar to Clause 2, Article 14 of the 2013 Constitution, which means that any legal document and accordingly almost every agency could restrict human rights. The state, whether it is a central or local state administrative agency, can arbitrarily restrict human rights in a constitutional and legal manner. In accordance with the provisions of Clause 2, Article 14 of the 2013 Constitution, all restrictions on human rights must comply with the law adopted by the Legislature, which means only in cases where the National Assembly has foreseen in the law. Any legal document with a restrictive effect against human right that has not been specified or contemplated in a legislative act is considered unconstitutional. Any restrictions on human rights, therefore, must be authorized or contemplated by the National Assembly. Government agencies are no longer allowed to arbitrarily restrict human rights.

Second, many provisions in the 2013 Constitution on specific human rights, especially civil and political rights, clearly state that any restrictions, including procedures for implementation or assurance of implementation must comply with the provisions of the legislation. In the 1992 Constitution (amended and supplemented in 2001), common phrases are found in the provisions on specific human rights that "citizens have rights... as prescribed by law" or "[infringement of rights of citizens] must comply with the provisions of law". For example, Article 71 of the 1992 Constitution (amended and supplemented in 2001) stipulates that "No one shall be arrested without a decision of the People's Court, a decision or approval of the People's Procuracy, except for when they are caught red-handed. The arrest and detention of people must be in accordance with the law"; Article 73 states that "No one may enter another person's residence without his consent, except in cases permitted by law; the search of residences, the opening, controlling and seizure of citizens' correspondence and telegrams must be conducted by competent persons in accordance with the law". If the above provisions are exercised by promulgating legal documents, state agencies could infringe on human rights and that would still be considered completely constitutional. It would only take a written decision or a normative document adopted by an administrative agency to conduct an infringement of human rights which is still considered "lawful" or "permitted by law" or "as required by law".

In the 2013 Constitution, such arbitrary terms have been eliminated by the provision that "human rights, citizen rights may only be restricted by the legislation". Arrests are redefined as follows: "No one shall be arrested without a decision of the People's Court, or a decision or an

approval of the People's Procuracy, except in the case of a criminal being caught red-handed. The arrest, detention and imprisonment of people are prescribed by legislation.”<sup>20</sup> Intentional entry into another's residence is regulated as follows: "The search of a residence is prescribed by legislation."<sup>21</sup> The opening and seizure of letters and telephones are regulated as follows: “No one may open, control or seize correspondence, telephones, telegrams, and other forms of private information exchanges of other people, unless it is allowed by legislation.”<sup>22</sup> This adjustment in the way of regulating human rights in the 2013 Constitution adds constitutional value to human rights and significantly limits the arbitrariness of state agencies when dealing with issues of human rights. As affirmed by key members of the 1992 Constitutional Amendment Committee, “this represents progressive thinking in acknowledging the possibility of the direct application of constitutional norms, and, at the same time, noting the binding force on the State to take responsibility for the protection and the assurance of human rights.”<sup>23</sup> This remark is reasonable because if a government’s decree has limiting effect over a fundamental right without a manifest permission in a legislative act, such decree shall be in direct violation to the Constitution and Article 14, Clause 1 of the 2013 Constitution can be applied to annul the decree. On the other hand, if a legislative act bears provisions that have limiting effect over a fundamental right and the limitation is not based on the interest of national security nor public morality, health, order or safety, the same constitutional provision may be applied to hold such legislative act unconstitutional.

Third, even though the phrase "according to the law" is still used in some provisions on human rights in the 2013 Constitution, the discretion of state agencies regarding human rights is limited compared to the 1992 Constitution (amended in 2001). For instance, Article 23 of the 2013 Constitution stipulates the right to freedom of movement as follows: “Citizens have the right to freely move and reside in the country, have the right to go abroad and return home from abroad. *The exercise of these rights is prescribed by the law.*”<sup>24</sup> Similarly Article 25 regulates that citizens have the right to freedoms of speech, the press, access to information, assembly, association and demonstration. *The exercise of these rights is prescribed by law.*<sup>25</sup> On the other hand, the 1992 Constitution (amended and supplemented in 2001) stipulated the right to freedom of movement as

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<sup>20</sup> Clause 2, Article 20, the 2013 Constitution.

<sup>21</sup> Clause 3, Article 22, the 2013 Constitution.

<sup>22</sup> Clause 2, Article 21, the 2013 Constitution.

<sup>23</sup> Hung, Sinh Nguyen et al., *Constitution of the Socialist Republic of Vietnam in 2013 and legislative achievements during the 13th National Assembly term*. pg.102.

<sup>24</sup> Author extra in italics.

<sup>25</sup> Author extra in italics.

follows: “Citizens have the right to freely move and reside in the country, have the right to go abroad and return from abroad *in accordance with the provisions of the law*”<sup>26</sup>. The freedom of speech, the press, assembly, etc. were defined as follows: “Citizens have the right to freedom of speech and freedom of the press; have the right to be informed; have the right to hold meetings, to form associations, and to demonstrate *in accordance with the provisions of the law*.”<sup>27</sup>

Thus, if it is stipulated that citizens have certain rights (freedom of movement, freedom of speech, freedom of the press, etc.) "in accordance with the provisions of the law" as the 1992 Constitution (amended and supplemented in 2001) means, it implies that the entire scope as well as procedures and limitations are decided by state authorities, including the National Assembly as well as the government and the governmental agencies, when promulgating legal normative documents. In the 2013 Constitution, it is recognized that people have those rights first and then specifically states that "the exercise of these rights is prescribed by law", which means that the law, including administrative regulations, only provides on procedures for people to exercise the human rights recognized by the Constitution. Combined with the provisions on restriction of rights in Clause 2, Article 14 makes it clear once more that all restrictions on rights must be stipulated or envisaged by legislation, which means, authorized by the National Assembly. Other state agencies, by their own promulgated legal documents, may prescribe only the manner and procedures for exercising their rights and must not violate the limitations set forth by the legislation.

The provisions on human rights of the 2013 Constitution not only bring about truly progressive and universal values of mankind, but also serve as a tool to restrict the arbitrariness of state agencies for the purpose of ensuring human rights. This clearly demonstrates the improvements in the spirit and ideology of the socialist rule of law that Article 2 of the 2013 Constitution has recognized.

### **III. Challenges against the supremacy of the 2013 Constitution**

#### **1. Preserving the supremacy of the Constitution and challenges in establishing a constitutional protection mechanism in Vietnam.**

Constitutional protection is difficult because the constitution, as the fundamental law, regulates the organization and sets the standard for the operation of the nation's highest state organs from the National Assembly as the highest state power, to the President as the Head of State, to the

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<sup>26</sup> Article 68, the 1992 Constitution (amended in 2001). (Author extra in italics)

<sup>27</sup> Article 69, the 1992 Constitution (amended in 2001).

Government as the highest state administrative agency and to the Supreme People's Court as the highest judicial body. The actors who violate the constitution can be powerful authorities at both central or local levels, making constitutional protection even more difficult to be done. Yet, the issue is important for the guarantee of constitutional supremacy in practice.

To protect the constitution, countries must build a strong constitutional protection mechanism. Without a constitutional protection mechanism, there will be no way to prevent or deal with unconstitutional activities conducted by powerful state agencies. In the course of making the 2013 Constitution, the drafters were already aware of the need for a specialized constitutional protection agency. In fact, the 2013 Draft of the New Constitution, which was published for public consultation in January 2013, included the Constitutional Council as the constitutional protection institution, along with two other constitutional bodies, the National Election Council and the State Audit.<sup>28</sup> However, at the final stage of the National Assembly session for approval, the Constitutional Council was removed from the draft. Instead, the 2013 Constitution stipulates that there should be a constitutional protection mechanism specified by legislation. This shows that the construction of a constitutional protection mechanism in Vietnam still faces many obstacles, and it is still not ready for the 2013 Constitution to recognize the presence of a constitutional protection agency as an independent constitutional body. Until now, 10 years after the 2013 Constitution took effect, the National Assembly has still not been able to make a law specifically providing for an independent, effective and efficient constitutional protection mechanism.

Based on the criteria for building a constitutional protection mechanism, we can see that the difficulty of establishing a constitutional protection agency in Vietnam comes from the particularity of the principle for the allocation of state power. According to the Party's principle, the model for protecting the constitution must be "suitable to the political system and specific situation of our country".<sup>29</sup> Regarding the organizational and operational characteristics of the Vietnamese state apparatus, the socialist state apparatus model attaches great importance to two fundamental principles: the people's sovereignty and the unity of power. Accordingly, the National Assembly, as the highest representative body, is determined to be the agency with the highest position of power in the state apparatus. There is no intention or vision of any other agency more powerful than the National Assembly. Even when the 2013 Constitution was adopted with an emphasis on the necessity

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<sup>28</sup> Chapter X, the Draft of the New Constitution published for public consultation in January 2013. The Constitutional Council is stipulated in Article 120.

<sup>29</sup> According to the conclusion of the 5th plenum of the XI Central Committee (quoted in Report No. 287/BC-UBDTSĐHP on the explanation, reception and revision of the 1992 Constitution Draft on the basis of the people's opinions of the Drafting Committee for Amendments).

of controlling state powers,<sup>30</sup> yet no mechanism has been foreseen for the control over legislative power. This is the main reason leading to the difficulties in building the constitutional protection mechanism in Vietnam. Because while the National Assembly is certainly a potential subject of constitutional control, no willingness or intention of such constitutional control institution has been made available.

**2. On the implementation of the principle of limiting human rights under Clause 2, Article 14 of the 2013 Constitution.**

The advantages of setting the principle of restriction of rights in the 2013 Constitution have been mentioned above. However, the implementation of this principle is also a big challenge. The first difficulty comes from the vague interpretation of the principle's content, which leads to confusion in the implementation process.

Clause 2, Article 14 of the 2013 Constitution reads as follows:

“Human rights and citizens' rights can only be restricted according to the provisions of legislation in cases of necessity due to reasons concerning national defense, national security, public safety, public morality, public health.”

Currently, the common interpretation of the provision is that any restriction of rights can only be made when such restrictions have been contemplated by a legislative act of the National Assembly. This means that the National Assembly must “foreshadow” or “pre-approve” such restrictions. For instance, the law that the National Assembly prescribes on the limitation of rights will set the framework for the restriction. In other words, the establishment of a law will establish the principle of restriction; it is to limit the content of the restriction; it is to identify the subject with limited authority. The Government, ministries, or local authorities rely on the issuance of regulatory documents. A criminal offense under the law may restrict a right [mostly stipulating how the restriction of a right is to be exercised] but must “follow” the framework provided by the law. However, authorities and researchers hold different views on the explanation of this principle in practice.

The first group of views proposes that the phrase "restriction as prescribed by legislation" means “restriction as prescribed by law”, which can be understood as any form of restriction of rights could

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<sup>30</sup> Clause 3, Article 2, the 2013 Constitution.

be provided by and specified in legislative acts or governmental regulations. In other words, human rights can be effectively restricted by any form of law.<sup>31</sup>

The second group of views deems that any restriction of rights must be prescribed clearly in statutory laws adopted by the National Assembly. In other words, the National Assembly, must not only allow for any restriction of human rights but also determine, via its legislation, the scope and details of such restriction. Government and governmental agencies can issue legal regulations but their regulations must not include provisions that have the effect of limiting rights.<sup>32</sup>

The third group of views holds that "restriction as prescribed by legislation" means the restriction of the rights specified in the law or legal documents of state agencies authorized by the National Assembly.<sup>33</sup> Based on this view, apart from the National Assembly, state agencies authorized by the National Assembly to legislate in specific fields will be able to proactively regulate the issue of limitation of rights in the fields of their mandate. However, this understanding partially does not meet the spirit of the 2013 Constitution for setting out the principle of limiting rights to control the restriction of the rights of state agencies, because Vietnam still lacks legal provisions to ensure the control over legislative authorization activities. For example, there is no regulation on the responsibility of the National Assembly for the inspection and supervision of documents. Though regulations are promulgated on the basis of legislative mandate, there is no clear regulation on the time limit for legislative authorization.

Although the application of this principle in the understanding of the third point of view is prominent, it has not really eliminated the other two views. The ambiguity in the understanding and application of the principle of limitation of rights in Clause 2, Article 14 of the 2013 Constitution above shows an urgent need for an official explanation from the body competent to interpret the constitution. Otherwise, it will lead to arbitrary application of this principle.

The next difficulty posed in the implementation of the principle of restriction of rights is the determination of conditions for restricting rights: "in case of necessity for reasons of national defense, national security, social order and safety, social ethics, and public health". How to ensure that the

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<sup>31</sup> Dat, Bui Tien, "The Principle on Limitation of Human Rights: Meaning, the Need for Interpretation and Application", *Legislative Research Journal*, no 19 (August 2017): 13-20.

<sup>32</sup> Tuan, Dang Minh, "Issues That are Untouched by the Draft Amended Constitution", *Legislative Research Journal*, no 5 (March 2013): 54-63; Nghi, Pham Huu, "The Issue Concerning Restriction of Human Rights in International Law, National Constitutions and the 2013 Constitution of Vietnam", *Vietnam Journal of Human Rights Law*, no. 1, 2018: 39-28.

<sup>33</sup> Quang, Truong Hong, "The Need to Explain the 2013 Constitution's Restrictions on Human Rights and Civil Rights", *Journal of the State and Law*, no. 3 (March 2018): 3 – 13; Hoa, To Van, "The Thought of Limiting Human Rights and the Principle of Limiting Constitutional Fundamental Rights under the 2013 Constitution the 2013 Constitution", *Jurisprudence Journal*, no. 8 (August 2018): 28-42.

provisions restricting that right have met the conditions set forth by the Constitution? How to assess the “necessity” to restrict rights in those five areas? Practices show that the determination of meeting constitutional conditions is completely based on the subjective will of legislators, in case there are individuals and organizations that think that the regulation on limiting certain rights is unnecessary. Is it extremely difficult to solve? In many countries, the role of the Court in the control of limited rights is very important. Through its adjudication function, the Court can assess whether the provisions restricting rights are really necessary, appropriate, and proportionate to the purpose of the restriction. But in Vietnam, the Court has not yet fully promoted its position in the matter of considering the constitutionality of a law in general and the issue of limited rights in particular. On the other hand, according to current legal regulations, the scope of lawsuits to court does not include suing legal documents, even if the Court during the adjudication process detects legal documents showing signs of contravention of the law. Based on the Constitution, the Court can only recommend competent state agencies to consider amending and supplementing such legal documents and request agencies to respond to the Court on the results of handling of such legal documents. The Court settle the case on the basis of giving recommendations in accordance with law<sup>34</sup>. Those provisions are not enough for the Court to control whether the restriction of the rights of state agencies is really in accordance with the necessary conditions in one of the five cases set out by the Constitution. On the other hand, the lack of a constitutional protection mechanism as mentioned in the first challenge is also the reason why it is difficult for Vietnam to assess whether the process of implementing the principle for limiting the rights of state agencies has been consistent with the spirit of the 2013 Constitution or not.

### **3. On the dynamics between the Constitution, the law and Party leadership**

A society under the rule of law is a society in which all organizations and individuals, in any respect, must respect and comply with the common standards of society, which are usually defined in the constitution. Political parties, the state, social organizations and the people need to be deeply aware of the supremacy of the constitution and law to ensure the appropriateness in the process of exercising their power. The rule of law creates a principled order in the arrangement of power positions of the political party, the state and the people, expressed through the relationship between the constitution, the law, and the leading role of the political party.

The rule of law society derives from the ideal that social power within a country belongs to the

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<sup>34</sup> Clause 7, Article 2, the Law on Organization of People's Courts 2014.

people. The people are the subject with the highest power in deciding the issues of society. The instrument for the people to protect their supreme power is the constitution. Next, the political party, especially the ruling party, is the subject that has the role of leading the country's development. In the rule of law state, the ruling party can only do this through holding state power [a legitimate state established on the basis of a constitution and empowered by the people]. Thus, the relationship between the state, the ruling party and the people in the exercise of power is quite complicated and it is difficult to distinguish whether the domination of the party or the people is decisive for the exercise of power of the state.

We can see this issue more clearly in the practice of exercising the legislative power - "a particularly important power of a society"<sup>35</sup>. In this regard, the state is the official subject with legislative power, but the ruling party governs legislative activities through party members who are members of the parliament and the government. They will be expressed and supported by MPs for adoption. On the other hand, the legislative power will be controlled by the people to ensure that the enacted laws protect people's lives because the people are the subjects of establishing the state by voting and the functions of the state government. Fundamentally, the state is for the people. So, who will have the ultimate decision on the content of a law? In a society under the rule of law, the ruling party can dominate and direct the parliamentary and parliamentary activities through the role of politicians holding state positions. The quality of a law is assessed based on its ability to meet the needs of the people. Ensuring this is first and foremost that laws must be constitutional. Even if a law is supported by politicians, if it is contrary to the constitution, i.e. it goes against the general spirit of the social contract, it must be amended or repealed. Thus, constitutional control in legislative activities is very important and must be ensured.

As analyzed in terms of the 2013 Constitution and the rule of law, in the spirit of upholding the rule of law, the 2013 Constitution partly identified the role of the ruling party, the state, and the people in the exercise of power. However, Vietnam's legal and political tradition has not entirely ensured that principled order. The influence of the Party during the struggle for national liberation and in the period of national construction and development has built up the people's deep trust in the Party's leadership, creating the concept of the supremacy of the Party to decide on state and social issues. This is clearly reflected in the Constitution of Vietnam. Both the 1980 Constitution and the 2013 Constitution affirm the leadership of the Communist Party in state and society by a specific

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<sup>35</sup> Giang, To and Cuong Nguyen Van, "The Ruling Party Through Legislative, Executive and Judicial Power in Vietnam", Vietnam Lawyers Association, Dec 13, 2022, <http://hoiluatgiavn.org.vn:8080/dang-cam-quyen-thong-qua-quyen--lap-phap-hanh-phap-va-tu-phap-o-viet-nam-d2552.html>.



provision in the constitution. Since then, the activities of the state and society are practically under the leadership of the Party. In view of the implementation of the 2013 Constitution, the concept of the Party's ultimate decision is a challenge for ensuring constitutional supremacy.

Returning to the exercise of the legislative power to prove this statement. Just like in other modern countries, the ruling party governs the activities of the state, especially the legislative ones. In Vietnam, this dominance has more pronounced manifestations. Not only the role of the National Assembly deputies as Party members to participate in the legislative process, but the drafting of bills is also often directed by the competent committee. The opinions of the committees determine the direction of the bill, even the specific content of the bill<sup>36</sup>. If it is approved by the Party Committee or with bills related to important issues, which may be the consensus of the Politburo or the Central Committee of the Party, that will be the basis for deciding the bill to be approved by Parliament. Meanwhile, the review of constitutionality is not an independent stage. It may arise at the stage of application of the law, which has been accompanied by the examination and appraisal of the bill. The concept of the Party's supreme decision-making has created the attaching importance to the conformity with the Party's guidelines, when bills are considered for approval, and it has led to the restriction of constitutional activities in Vietnam. Thus, the tradition of operating political power in Vietnam creates ambiguity in determining the position of power among the ruling Party, the State, and the people. This entails the challenge of linking the People's power to the constitutional protection.

## V. Conclusion

The conception of the 2013 Constitution marks an advancement in the thoughts on constitutionalism in Vietnam. Compared to previous constitutions, components of constitutionalism are more clearly manifested, at least from the wording of the new constitutional provisions. The 2013 Constitution has more comprehensively affirmed the constitutional supremacy and initially affirmed that a constitutional protection mechanism needs to be built. Not only that, the 2013 Constitution placed the Party, State together with the people in the spirit of respecting the law and further strengthened the sense of protection of human rights and basic rights of citizens in modern

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<sup>36</sup> Giang, To, Cuong Nguyen Van, "The ruling party through legislative, executive and judicial power in Vietnam", <http://hoiluatgiavn.org.vn:8080/dang-cam-quyen-thong-qua-quyen--lap-phap-hanh-phap-va-tu-phap-o-viet-nam-d2552.html>. Accessed on 22/10/2021.

society. Although the advantages of the 2013 Constitution on the idea of the rule of law have been recognized, they are accompanied by considerable challenges in the implementation of the Constitution. The lack of a specific constitutional protection mechanism and legal-political traditions makes the awareness of constitutional issues not raised. The problem of constitutionalism in Vietnam is not about what are stipulated in the constitution but how to address these issues fully and properly so that constitutional values really thrive in practice.