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# Constitutional Defence in Vietnam: New Opportunities, Universality, and Specificity[2]

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## Abstract

Constitutional defence is considered one of the important constituents of a rule-of-law state. Without a professional and independent constitutional defence mechanism, it is difficult to protect the constitution as the foundational law with the highest legal effect. Modern Vietnam is built around the Soviet mode of power organization; therefore, there are many inherent difficulties in building and operating a professional and independent constitutional defence. As a result of the 2013 Constitution and the 2015 Law on Referendum, the opportunity to establish a centralized, relatively independent, and professional constitutional defence model in Vietnam has never been more possible than it is now. By applying certain main research methods such as the normative analysis and comparative methods, this article attempts to clarify the opportunities and analyse the characteristics of the Vietnamese constitutional defence mechanism concerning universal standards. Consequently, it proposes a constitutional defence model for a socialist rule-of-law state.

**Keywords:** constitutional defence, socialist rule-of-law state, Constitutional Council, Vietnam.

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# Obrona konstytucyjna w Wietnamie: nowe możliwości, uniwersalność i specyfika[3]

## Streszczenie

Obrona konstytucyjna jest uważana za jeden z ważnych elementów składowych państwa prawa. Bez profesjonalnego i niezależnego mechanizmu obrony konstytucyjnej trudno jest chronić konstytucję jako prawo podstawowe o najwyższym skutku prawnym. Współczesny Wietnam jest zbudowany wokół sowieckiego sposobu organizacji władzy; w związku z tym istnieje wiele nieodłącznych trudności w budowaniu i prowadzeniu profesjonalnej i niezależnej obrony konstytucyjnej. W wyniku Konstytucji z 2013 r. i Ustawy o referendum z 2015 r. możliwość ustanowienia scentralizowanego, względnie niezależnego i profesjonalnego modelu obrony konstytucyjnej w Wietnamie nigdy nie była bardziej możliwa niż obecnie. Stosując pewne główne metody badawcze, takie jak analiza normatywna i metody porównawcze, w niniejszym artykule podjęto próbę wyjaśnienia możliwości i analizy cech wietnamskiego konstytucyjnego mechanizmu obronnego w zakresie standardów uniwersalnych. W konsekwencji artykuł proponuje konstytucyjny model obrony socjalistycznego państwa prawa.

**Słowa kluczowe:** obrona konstytucyjna, socjalistyczne państwo prawa, Rada Konstytucyjna, Wietnam.

[3] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

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## Introduction

Vietnam is currently attempting to build a socialist rule of law state.[4] This is both a requirement and a mainstream development trend of the modern world. In May 2021, the Politburo established a Steering Committee to develop the project entitled "Strategy to build and perfect a socialist rule of law state in Vietnam by 2030, with orientation to 2045".

Vietnam has adopted the Soviet model in organizing, operating power, and managing society. From the 1950s until the late 1980s, this model was applied relatively thoroughly in the country. Despite numerous reforms, the basic principles of the Soviet model of power organization still exists. Under this model, the constitutional and legislative functions are delegated to the National Assembly.[5] Consequently, such functions are often delegated to many actors and are not the focus of the organization of power. Both historical and practical reality suggest that constitutional defence is ineffective in a model where the National Assembly holds both legislative and constitutional power and is the highest organ of state power.

Stemming from the development requirements, trends of the modern world and the promulgation of the 2013 Constitution, the Law on Referendums has created fertile grounds for a centralised, professional and efficient constitutional defence mechanism that is relatively independent and suitable for the context of Vietnam's birth.

It is universally acknowledged that the Constitution, with its ultimate legal effect, protected by a professional and independent constitutional mechanism, is a guarantee of the rule of law. If the constitution is not defended, the law cannot hold a supreme position, and when the law does not hold a supreme position, the rule of law cannot be secured because supreme law is a universal attribute of the rule of law.

This article utilises normative analysis, comparison, and synthesis methods to clarify the premise discussed above and propose a model of constitutional defence compatible with universal standards and requirements while also being suitable for the specific conditions of today's Vietnam.

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[4] T.H. Bui, *Deconstructing the "Socialist" Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process*, "Contemporary Southeast Asia: A Journal of International and Strategic Affairs" 2014, 36(1), pp. 77–100.

[5] The 1959, 1980 and 1992 (amended in 2001) Constitutions of Vietnam confirmed this.

## New Opportunities for Constitutional Defence in Vietnam

The possibility of a constitutional defence institution has become clearer since the drafts of the 2013 Constitution were discussed and commented on. However, for many reasons, a constitutional protection mechanism has not been recognised in the Constitution. Despite this, the 2013 Constitution also created important prerequisites for the establishment of a constitutional defence mechanism suitable for Vietnam.

First, the 2013 Constitution affirms that 'the Vietnamese People create, implement and defend this Constitution to achieve the goal of a prosperous people and a strong, democratic, equitable and civilized country.'[6] This provision is important because it ensures that the Constitution is the embodiment of the will and the people's sovereignty and that the people are the subjects of national sovereignty; constitutional right is the original right, and it is through the constitution that the people establish the state, authorise the state, and determine the ways of organization and administration of the state.[7] This reflects K.C. Wheare's comment that 'the legal supremacy of the Constitution rests on the will of the people.'[8]

The recognition of constitutional rights belonging to the Vietnamese people is an important premise because without this right, constitutional supremacy cannot be guaranteed. If the Constitution does not have a supreme position and does not derive from the people's sovereignty, then defending the constitution has little practical meaning. The main function of constitutional defence is to prevent constitutional violations by the public (state) and, above all, constitutional violations by the body exercising legislative power.

In addition, the 2013 Constitution made official use of a new technique called *exercise of rights.* The 1992 Constitution, amended and supplemented in 2001, stated in Article 2 that 'State power is unified, with assignment and coordination among state agencies in the exercise of legislative and executive rights law, justice.' However, at this point the content of *exercise of rights* was left unclarified. It is only in the current Constitution that the idea of exercising rights is clearly and systematically expressed. According to the 2013 Constitution, the People are the holder of constitutional rights, and the National Assembly is only the body 'exercising constitutional rights and legislative rights.'[9] Together with the National Assembly, the

6 Preamble of the 2013 Constitution of Vietnam.

7 D.M. Tuan, *Constitutional Defense and Human Rights Protection*, Hanoi 2015.

8 K.C. Wheare, *Modern Constitutions*, Oxford 1966.

9 Article 69, 2013 Constitution of Vietnam.

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Government is assigned to *exercise executive power* and the People's Court is assigned to *exercise judicial power*.[10]

According to this ideology, the People are the subject of constitutional rights, but they entrust the National Assembly to exercise these rights and, obviously, exercise legislative powers. Power is delegated only to perform rights, not to transfer them. The people are still the most important and original right holder/owner of the constitutional right. The National Assembly is assigned to exercise the power, but not to transfer it. In some ways this is analogous to the regulation of land ownership: when the land is owned by the entirety of the people, the state represents the owner, and the people and enterprises etc. are assigned the right to use the land but not given land ownership.

This change has important implications, not only for the effort to build a socialist rule of law state in Vietnam but also for the creation of a premise for protecting the foundations and supremacy of the Constitution. If the people give/authorise the National Assembly to exercise their rights, then the same people can build a mechanism to protect and supervise the exercise of constitutional rights and exercise the legislative, executive, and judicial powers of the National Assembly and other public authorities to protect the Constitution. In this sense, American Founding Father, Alexander Hamilton, was correct when he said that 'The act of the successor will become void if it goes against the mandate, which is a concept based on very transparent principles.'[11] Therefore, all legislative activities contrary to the Constitution cannot take effect. The Constitution must be respected more than the law and the will of the people's successors. Therefore, the National Assembly is now the authorised subject of the exercise of rights, not the holder of power. There is thus a constitutional basis for the People to establish a constitutional protection mechanism to monitor the implementation of the exercise of rights, protect the supremacy of the Constitution, and to protect the will and sovereignty of the people. Despite the fact that constitutional rights in Vietnam are still exercised by the National Assembly, with only fundamental changes in technique and philosophy as analysed above, the 2013 Constitution has created a de facto basis for an independent constitutional defence.

Second, the Constitution lays the foundation for the birth of a constitutional defence through the provision of a 'Constitutional defense mechanism established by law.'[12]

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10 Articles 94 and 104, 2013 Constitution of Vietnam.

11 A. Hamilton, J. Madison, J. Jay, *Federalist No. 80*, [in:] *The Federalist Papers*, ed. by I. Shapiro, J. Dunn, D.L. Horowitz, E. Hunt Botting, New York 2009.

12 Article 119, Clause 2, 2013 Constitution of Vietnam.

Normally, the basic issues of the constitutional protection mechanism are regulated directly by the Constitution because this is a constitutional issue. Such a mechanism is the guarantee for the Constitution to be independent and to operate effectively. However, in the context of Vietnam, recognising an obligation for the State (the National Assembly) to define a constitutional defence mechanism is a remarkable step forward. Recognising this content in the Constitution means that the People assign the National Assembly the responsibility to build a mechanism to protect the Constitution. This is seen as another opportunity for constitutional defence to be established in Vietnam soon.

Third, there is the following new provision: 'All other legal documents must be consistent with the Constitution. Any violations of the Constitution will be handled.'[13]

This provision is not a new one and is found in the previous Constitution of Vietnam, but the latter wording 'All acts violating the Constitution will be handled' is both new and interesting.

In Vietnam, constitutional violations and constitutional responsibilities have never been officially recognised.[14] Vietnamese legal theory only recognises types of criminal violations, administrative violations, disciplinary violations and civil violations. This is because in order to confirm whether or not there is a violation of the constitution, a process is required, and in this case, there is no process other than constitutional proceedings. Constitutional proceedings are one of the basic contents of the constitutional defence mechanism. Currently, Vietnam does not have a mechanism to detect and handle constitutional violations and that is an important basis and an opportunity for the birth of constitutional defence. Without a constitutional defence, it is impossible to detect and address constitutional violations and therefore impossible to protect the constitution. In addition, this means the aforementioned provisions of the 2013 Constitution have no practical significance, and are presently not respected nor implemented.

Fourth, the 2013 Constitution of Vietnam stipulates the possibility of holding a referendum on the Draft Constitution or the draft amendments and supplements to the Constitution[15] and the Law on Referendum promulgated by the 13th National Assembly since 2015.

The 2013 Constitution also affirms that the constitutional right belongs to the People, but the People do not directly exercise it; rather, they give it to the National Assembly to exercise this right. Therefore, the constitutional defence mechanism must be approved by the People, because if the National Assembly decides on the

13 Article 119, Clause 1, 2013 Constitution of Vietnam.

14 M.V. Thang, *Constitutional Responsibility in the Context of Legal Reform and the Need to Control State Power in Vietnam Today*, *Jurisprudence Journal* 2019, 5(228).

15 Article 120, Clause 4, 2013 Constitution of Vietnam.

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constitutional defence mechanism, it will be both 'playing football and blowing the whistle' and not in line with the rule of law principles. Currently, the Constitution specifies the possibility of holding a referendum on amendments to the Constitution, and the Law on Referendum clearly stipulates issues raised for the People's referendum, including: 'the full text of the Constitution or some important contents of the Constitution.'[16]

Therefore, if the constitutional protection mechanism is considered an important part of the Constitution, the submission of the content of the 'constitutional defense mechanism' to the people's referendum will be both constitutional, legal, and in accordance with the principle of rule of law that Vietnam follows.

This means that Vietnam should amend and supplement Chapter XI of the current Constitution. to include the basic contents and principles of the constitutional defence mechanism and model, which can then be put to a referendum. The detailed contents are assigned to the National Assembly to regulate by a law according to the legislative order.

The reason why this article argues it is necessary to amend the Constitution in this manner is because, as mentioned, the model of the constitutional defence mechanism needs to be reflected in the Constitution as it is a constitutional issue; it is a mechanism for the People to monitor the implementation of the constitutional rights that are given to the National Assembly for implementation. The 2013 Constitution has been in effect for nearly a decade, and the amendment of certain articles is not surprising given the experience of Vietnam's constitutional history and international experience, especially in the context of the land developing country dynamic and today's strong integration. A referendum on this content will be clear evidence that Vietnam is well aware of and always makes good efforts to comply with the universal rule of law, respect the implementation of regulations of the Constitution, and implement forms of direct democracy. Furthermore, this is also an opportunity for the Law on Referendum to be put to use to create the basic values of the rule of law.

Fifth, the opportunity derives from the political determination of the leaders of the Party and the State of Vietnam today.

There is clear political determination, as shown from the contents of the Document of the 13th National Congress of the Party and the drastic actions to establish the Steering Committee for the formulation of the Project *Strategy for Building and Perfecting the Socialist Rule of Law State of Vietnam by 2030, with Orientation to 2045*. Scholars are very much aware of the political determination of the leaders of the Party and State when promulgating and organising the implementation of the

[16] Article 6, Clause 1, Law on Referendum No. 96/2015/QH13 promulgated on 25 November 2015.

above-mentioned Project. This is an opportunity for constitutional protection to appear, because, as mentioned, it is very difficult to obtain the rule of law without an ultimate form of protection for the Constitution. Political determination and concrete actions to build and perfect the Socialist rule of law state in Vietnam are an opportunity for a constitutional protection institution to appear in the country.

## Model of Constitutional Defence in Vietnam

The research on constitutional defence and applicability in Vietnam has been discussed extensively by scholars. This includes works by Dao Tri Uc and Vu Cong Giao on constitutional defence, constitutionalism, and the rule of law, and by Nguyen Dang Dung on constitutional violations and types of violations. Nguyen Ngoc Dien discusses the constitutional jurisdiction model for Vietnam and argues for the independence of the constitutional jurisdiction, while there are specific studies by Bui Ngoc Son, Vo Tri Hao, Dang Minh Tuan, and Tao Thi Quyen on the model of constitutional defence for Vietnam.[17] These studies all analyse the need to establish a constitutional defence mechanism, address constitutional violations and requirements for the constitutional defence mechanism, and propose specific models, such as the need to build a Court. For instance, they discuss the option of either an Independent Constitution,[18] a model of a constitutional defence agency established by the National Assembly but operating for life and independently,[19] or alternatively a specialized constitutional defence mechanism but in a weak form. This weak form would involve a Constitutional Court or similar institution with the power to interpret the Constitution and rule on the constitutionality of laws and resolutions of the National Assembly but still leave a dialogue mechanism allowing the National Assembly to veto judgments by a strong majority mechanism or amend documents issued by themselves to be consistent with the Constitution.[20]

The analysis and recommendations are of great significance for the study and building of a constitutional model of Vietnam. However, these proposals mainly appeared before the 2013 Constitution came into force and when the new 'opportu-

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17 Congress Office, *Discussing Amendments and Supplements to the 1992 Constitution*, Labour Publishing House 2012.

18 V.T. Hao, *Selecting Constitutional Jurisdiction Model – Common Problems and National Specifics*, "Journal of Legislative Studies" 2012, 1+2(210+211), pp. 34–39.

19 N.N. Dien, *Which Constitutional jurisdiction model for Vietnam?*, "Journal of Legislative Studies" 2011, 22(207), pp. 62–66.

20 B.N. Son, *Institution of Constitutional Review in Vietnam and the Prospect of a "Weak Form"*, "Journal of Legislative Studies" 2011, 13(221), pp. 3–10.

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nities' analysed above had not yet appeared. Therefore, new legal bases, new conditions and the new context have yet to be discussed.

According to Arne Mavčič's research, from an organisational perspective, constitutional defence institutions can be divided into the following models: (1) the American model; (2) the Continental Europe model; (3) the mixed model (America + Continental Europe); and (4) the parliamentary model. These simultaneously have the functions of defending the constitution and a number of constitutional jurisdictions that cannot be classified.

Vietnam is currently operating a decentralised constitutional defence mechanism whereby the National Assembly is the highest authority on constitutional defence. However, this model has been proven to be ineffective and Vietnam is therefore in need of a new model, especially to build and perfect the Socialist rule of law state in Vietnam. This raises the following question: what model of constitutional defence is appropriate for Vietnam today?

The granting of constitutional defence rights to the courts is frequently done according to the decentralised model of the United States. However, this is not suitable for Vietnam because: 1) the National Assembly is the highest organ of state power; the people's court system is empowered to exercise judicial power but is an agency arising from the National Assembly. The Chief Justice of the Supreme People's Court is also elected by the National Assembly and the appointment of judges of the People's Court must be approved by the National Assembly; 2) Vietnam has no precedent operating on the principle of 'stare decisis'; 3) The American model is designed according to the principle of separation of powers, but Vietnam does not follow this principle. Because of these obstacles, it is very difficult to have an independent, professional and effective constitutional defence institution.

The continental European model does not proscribe the function of constitutional defence to the ordinary courts but to a specialised body such as the Constitutional Court or the Constitutional Council. This model is more suitable for Vietnam because Vietnamese law has many connections with the continental European legal tradition.

The hybrid constitutional defence model is where the constitutional defence function is delegated to both a dedicated constitutional defence body and an ordinary court. However, only the dedicated constitutional defence body has the power to rule on a law or decision as unconstitutional, and the courts generally have the power to disapprove the act only if they consider that the law is unconstitutional without the power to declare the law unconstitutional.[21] This model is difficult to

[21] D.T. Uc, V.C. Giao, *Constitutional Review, Constitutionalism and the Rule of Law*, "Journal of Legislative Studies" 2012, 1+2(210+211), pp. 10–16.

apply in Vietnam due to the position of the National Assembly as the state authority, and the courts as the adjudicating agency and a derivative agency from the National Assembly. Therefore, refusing to apply a law if judged unconstitutional is unacceptable and risks creating conflicts of law, thus hindering the unity of the law.

The model of Parliament/National Assembly simultaneously performing the function of defending the constitution is considered to be the least effective model due to the concern that the ones playing the game will also be the ones refereeing it. The reality of this model in other countries who follow it shows its ineffectiveness.

Therefore, Vietnam should consider the continental European model. However, the political context and power organisation model in Vietnam are quite different from Continental Europe, so it is necessary to consider this in order to appropriately defend the constitution and satisfy the universal attributes of a professional and independent constitutional defence mechanism that still meets the specific conditions of Vietnam.

## A constitutional defence mechanism and model in Vietnam must meet the following requirements:

First, the constitutional defence model and mechanism must be consistent with the current principles and models of power organisation in Vietnam and be in line with the country's development goals and orientations.

Defending the constitution cannot conflict with the most basic and important principles of the organization and operation of the State of Vietnam, such as: 'Leadership Party'; 'State power is unified, with assignment, coordination and control among state agencies in the exercise of legislative, executive and judicial powers'; 'Democratic centralization'; 'All state power belongs to the People' and 'the model of the National Assembly is the highest organ of state power.' In this way, defending the Vietnamese constitution cannot be separated from the goal of advancing socialism and the Socialist State of Vietnam.

Second, a constitutional defence mechanism must be independent and professional. It must be independent both in terms of organisation and in its operation in accordance with Vietnamese context and conditions. Constitutional defence can be designed independently of the system of state agencies; the members participating in this institution are guaranteed independence in organisation and operation but not necessarily political independence because of the characteristics of monism and a ruling party. The demand for political independence in countries following the separation of powers and multi-party model is a reasonable and legitimate request because members of the constitutional defence institution cannot and should not be members of different groups or political forces. This is because in

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multi-party conditions, not setting the requirement for political neutrality will lead to the possibility that the judgments/decisions of this institution are manipulated, losing fairness in the political process. Political competition and the threat of constitutional defence are used as tools for political forces to manipulate state power.

The independence of Vietnam's constitutional defence model also implies the independence of constitutional defence from the National Assembly itself as the body exercising constitutional and legislative rights. To be independent, such a mechanism must be ratified or approved directly by the people, reflect the will of the people, and be established to control the National Assembly and other power-executing institutions. This is not contrary to the current model of power organisation because the National Assembly is still the highest organ of state power, exercising constitutional and legislative rights. Because the current Constitution has removed the term *the only body with constitutional and legislative rights*, the People are able to decide on the mechanism and model to defend the constitution via direct democracy in order to control the National Assembly in exercising its rights without losing the nature or role of the National Assembly.

Constitutional defence must be professional, and this is reflected in the activities, the constitutional defence institutions, and the professional capacity of the members participating in the defence of the constitution. This requirement is consistent with the culture and philosophy of the continental European legal tradition with which the Vietnamese legal system is closely related.

Third, the basic principles and contents of the constitutional defence mechanism and model should be recognised directly in the Constitution. Its details may be provided for in a law developed by the legislative process, but the foundation of constitutional defence must be constitutional. The law on constitutional defence must not contravene the basic principles prescribed by the Constitution. Only when it is established by the Constitution will the constitutional defence institution have the capacity and authority to inspect and supervise the National Assembly in the exercise of constitutional and legislative rights.

Fourth, provisions on constitutional defence can be formulated by the current National Assembly, but in order to ensure independence, at least in terms of the theoretical organisation of power, such provisions must be put to the people to vote in accordance with the provisions of the Constitution and the Law on Referendum. The people's veto on the constitutional defence mechanism and model in the Constitution is a guarantee for the relative independence of the constitutional defence institution from the National Assembly – an issue that society always debates and pays close attention to.

## What model of constitutional defence is appropriate for Vietnam?

From the above analysis, it is argued that the constitutional jurisdiction model (Constitutional Court) or the Constitutional Council is the most appropriate for Vietnam. If a Constitutional Court is established, it will have advantages such as strong expertise, professionalism, strict procedures, and the ability to have a relatively strong constitutional jurisdiction. However, the Constitutional Court also suffers from the following problems:

- The term *court* in Vietnam is often associated with the people's court system. Normally, in the model of power organisation in Vietnam as well as in previous socialist countries, the Court is the adjudicating body that ensures socialist legality and protects the regime and its rights and interests of the state, society, and people. Recently, in Vietnam, courts have been tasked with upholding justice. However, in the perception and ideology of socialist law, the court is a derivative institution from the National Assembly (or the Supreme Soviet or the National Congress of Soviet Deputies) and performs the tasks assigned by this body through fiduciary duties related to judicial work. In the unified model of state power (formerly socialist centralism), there cannot be a court system tasked with monitoring and opposing the documents of the highest state authority. In this model there is no restraint, no balance of power and no decentralisation. Building a Court with the function of opposing decisions of the National Assembly is contrary to the theory of power organisation and difficult to create unity.
- The Constitutional Court is not a court of common sense but a special institution with special proceedings against special subjects. Constitutional jurisdiction is different from ordinary jurisdiction because it must be outside the power of the state and is created to protect people's sovereignty against the wrongdoings of the state in general, but primarily the National Assembly/Parliament. In the legal culture of Vietnam this is not fully understood and not yet accepted.
- The Vietnamese-style power organisation model, despite many reforms, is still essentially based on the Soviet model. Accordingly, the Council is always the most easily accepted and compatible term. Considering the generally accepted legal model and culture, the Constitutional Council model is therefore most likely the most acceptable and compatible.
- If the Constitutional Council is set up, it must comply with the basic requirements as outlined above. In addition, in terms of organisation and authority, the following is relevant:

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(1) Organisation:

- The Constitutional Council headquarters should be located in a place other than Hanoi and Ho Chi Minh City. Experience from Germany shows that constitutional institutions will feel more independent if they are geographically distant from the major political and administrative centre or in the capital of that country. It is best located in Hue, because this is the central location of the two ends of the South and the North, the ancient capital and also a symbolic place in terms of culture, history and convenient transportation.
- The Constitutional Council should have between 9 and 11 members according to the principle of odd numbers. Members must be selected according to criteria such as integrity, ethical integrity, being a major and reputable expert on Constitutional Law, practical experience and/or academia. The members of the Council are equal to each other, and the Chairman of the Council is elected by the members themselves from among its members. Council members are not state employees and are guaranteed their independence by a special public service regime.

(2) Functions and duties.

The Council must have the authority to:

- ❑ Directly or at the request of the subjects specified by the Constitution, examine the constitutionality of draft laws and draft resolutions of the National Assembly;
- ❑ Directly or at the request of subjects prescribed by the Constitution, examine the constitutionality of laws and resolutions of the National Assembly that have taken legal effect;
- ❑ Interpret the Constitution;
- ❑ Make conclusions on constitutional violations committed by the subjects of the Constitutional Law and how to handle them;
- ❑ Make conclusions on jurisdictional disputes, if any, between constitutional agencies and institutions; and
- ❑ Check the constitutionality of international treaties to which Vietnam has or will be a member.

In the context of Vietnam, the 'soft form' recommendation of author Bui Ngoc Son as analysed above is extremely practical and can be considered for application. Regarding interpretations of the Constitution and the conclusions on the unconsti-

tutionality of bills, draft resolutions of the National Assembly or laws and resolutions of the National Assembly that have taken legal effect, if there is a conflict with the opinions of the National Assembly, then a Dialogue Mechanism for Conflict Resolution can be implemented. Accordingly, a dialogue mechanism can be established including representatives of the Constitutional Council and the National Assembly for consultation, explanation and dialogue on issues with different opinions. The results of this activity will be reported to the National Assembly by a representative of the Council participating in the dialogue mechanism and, after hearing the report, if the National Assembly still supports its position with a vote of ¾ of the participants, then the opinion of the National Assembly shall be considered final.

## Universality and Specificity of the Constitutional Council

### Universality of the Constitutional Council

The proposal for a Constitutional Council as mentioned above ensures the universality of institutions, mechanisms and models of constitutional defence in a rule-of-law society. This manifests itself in the following:

- The basic principles and contents of the constitutional defence mechanism and model are enshrined in the Constitution and approved by the people via referendum. This is a form of direct democracy and is the clearest expression of people's sovereignty in the exercise of constitutional rights.
- The independence and professionalism of the Constitutional Defence Council is guaranteed in accordance with the conditions and context of Vietnam.
- The standards of membership and authority of the Constitutional Council of Vietnam are basically compatible with the advanced models of constitutional defence in the world today.
- The Constitutional Council is classified as a centralised constitutional defence, and this centralised constitutional defence is the dominant model in the modern world.
- The Constitutional Council is the basis of the socialist rule of law, ensuring the supremacy of the Constitution. This mechanism ensures the observance and practical effect of the Constitution, and prevents and handles violations of the Constitution. This will affirm the highest legal validity of the Constitution and only in that condition will the law have the ultimate position.

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- The Constitutional Council contributes to ensuring that violations of the Constitution are detected, prevented, and handled by constitutional proceedings.
- The Constitutional Council is a democratic mechanism that clearly demonstrates the people's sovereignty, protects the people's constitutional rights, and simultaneously contributes to clarifying and separating more than two functions: *exercising constitutional rights* and *exercising legislative power* of the National Assembly of Vietnam.
- It partly answers the question that many scholars are interested in when discussing the control mechanism for the exercise of state power in Vietnam: 'Who supervises the National Assembly?' The National Assembly, in addition to the People's supervision, now has another effective monitoring institution: the Constitutional Council.

## Specificity of the Constitutional Council

The Constitutional Council, like every other institution, legal institution, or power is affected by the specific conditions and context of the place where it is born or established. This is consistent and dialectical. Although it is true that the Constitutional Council of Vietnam must embody all the universal values so that this institution is true to its nature as a constitutional protection agency, preserving the dignity and respect of the Constitution as the original law and the basis of the country. However, the Constitutional Council also has the following characteristics associated with Vietnam's political, cultural and socioeconomic conditions:

- Members of the Constitutional Council are not required to be politically neutral given that there is only one ruling Party and no political competition in Vietnam.
- The formation, operation and development of the Constitutional Council is under the leadership of the Communist Party of Vietnam. The Party's leadership of the Constitutional Council should ensure that the specificity does not destroy the universality of the modern constitutional institution.
- The dialogue mechanism between the National Assembly and the Constitutional Council when there is a conflict over the interpretation or conclusion of any decision of unconstitutionality is appropriate and feasible for the context of the model of power organisation in Vietnam.
- Establishing the Constitutional Council is consistent with the 'council/Soviet' model of power organisation and Vietnam's culture and legal consciousness and it is also in line with the principle of the unification of power. Furthermore,

the National Assembly is the highest organ of state power, exercising constitutional and legislative rights in line with the unique philosophy of *exercising the right* recognised in the 2013 Vietnam Constitution.

## Conclusion

In summary, constitutional defence is essential for building and perfecting the socialist rule of law state in Vietnam. There can be no rule of law if the Constitution itself, the highest law, is not protected by an independent, professional, and appropriate institution.

After the 2013 Constitution took effect and the legal system was perfected in the spirit of that Constitution in concert with the efforts and determination of the Party and State, there were many opportunities to establish a constitutional defence mechanism and model. These included the recognition that the subject holding the constitutional power is the People and the National Assembly is only the body assigned to exercise their constitutional and legislative rights; the mandate for the National Assembly to legislate a constitutional mechanism; the philosophy of the *exercise of rights*; and the ability to affirmatively handle violations of the constitution. These have created the opportunity for the establishment of an actual constitutional defence mechanism in Vietnam.

After reviewing and analysing models of constitutional defence worldwide and assessing the current Vietnamese conditions, this article argues that setting up a Constitutional Council is the most appropriate avenue for Vietnam's conditions. This model is universal while nonetheless being specific to Vietnam.

The Constitutional Council of Vietnam may not be the most modern and desirable institution and mechanism, but, as this article contends, this is an appropriate model and institution for the conditions of Vietnam. Together with the efforts of the Party and State and the strong desire for prosperity, integration and a rule of law society, the appearance of the Constitutional Council is an important requirement for building and perfecting the future socialist rule of law state of Vietnam. Simply put, there can be no rule of law if the Constitution is not substantively, effectively and truly protected so that it is always respected and enforced and holds a pivotal position in the legal system, ensuring it is treated as the original law and has the highest legal effect in practice.

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