

# ENSURING PEOPLE'S SOVEREIGNTY THROUGH THE CONSTITUTIONAL PROTECTION MECHANISM IN VIETNAM

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**Abstract:** *In Vietnam, the constitutional protection activities to ensure the people's sovereignty are not regular and effective. Therefore, some documents, acts of state agencies still violate or restrict the People's sovereignty. To ensure the People's sovereignty through the Constitutional protection, it is necessary to focus on implementing some of the solutions mentioned in the article.*

**Keywords:** *constitutional protection; People's sovereignty; Ensure the People's sovereignty.*

## 1. Ensuring the people's sovereignty - the fundamental goal of the constitutional protection

In essence, the power of the State is the power entrusted by its People. The Constitution, therefore, in most of the democratic institutions in the world today, asserts that all State power belongs to the people. Simultaneously, the concept of the Constitution, according to the theory of modern Constitutional Law, not only refers to the supreme law of the State but also implies the text of the People, expressing the supreme sovereignty of the People. Through the creation of the

Constitution, the People determine the range of power that will be given to the State. C. Marx affirmed: "The sovereignty of the people is not what arises from the sovereignty of the king, but instead, the sovereignty of the king is based on the sovereignty of the people"<sup>1</sup>.

Thus, it can be affirmed that the Constitution is the most effective law of the State, and simultaneously, it is a document of the People, clearly shows the supreme sovereignty of the People; the people's will and common interests are expressed in the entire contents of the Constitution.

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The protection of the Constitution has a special political and legal significance, as the Constitution is a document defining the national political regime, which contains the rules governing the foremost social relations. Simultaneously, the Constitution recognizes and embodies the best social values that are directed by the whole society. Thus, the Constitutional protection is regarded as the protection the People's sovereignty, the legal basis of the State and the highest values in society to ensure the development and prosperity of the country.

The Constitutional protection is regarded as a combination of activities that are carried out by agencies whose duties and powers are defined by the Constitution to ensure the respect and implementation of the Constitution, and to prevent and handle all acts violating the Constitution. Normally, the content of the constitutional protection includes: supervising the constitutionality of legal normative documents and international treaties that the country has signed or acceded; explaining the constitution; resolving unconstitutional lawsuits (including those related to violations of the citizens' constitutional rights and freedoms); considering the constitutionality of elections and referendums, etc

Such above mentioned ways, whether or not being conducted directly or indirectly, at different levels are aimed at ensuring the People's sovereignty that is stipulated in the Constitution. In other words, protecting the people's sovereignty

is both the most basic and essential content and the overarching goal of the protecting the Constitution.

Up to now, there have been diverse mechanisms, models and methods of protecting the constitution in countries around the world. Some countries have a specialized constitutional protection body (the Constitutional Court, the Constitutional Council, etc.), some have a decentralized constitutional model (many courts have the function of protecting the Constitution); some countries protect the Constitution through the judicial path, some countries protect the Constitution mainly by political institutions, etc. However, in most countries, a review of the Constitution essentially includes considering its contents and handling documents and acts that violate the Constitution and people's sovereignty.

## **2. Provisions on People's sovereignty in the Constitution and ensuring People's sovereignty through the constitutional protection mechanism in Vietnam**

### *2.1. Provisions on People's Sovereignty in the 2013 Constitution*

In Vietnam, the current Constitution has affirmed the People's sovereignty and a number of ways in which the People can exercise their power. The foreword of the Constitution in 2013 mentions that: *"The Vietnamese people build, execute and protect this Constitution for the goal of wealthy people, a strong country, a democratic, just and civilized society"*. Articles 2 and Article 3 of the Constitution stipulate that: *"The Socialist Republic of*



*Promote the people's sovereignty through the ballot.*

*Source: tuyengiao.vn*

*Vietnam is owned by the people; all State power belongs to the People, etc."* and *"The State guarantees and promotes the People's sovereignty, etc."* Regarding the mode of exercising the power of the People, Article 6 of the Constitution stipulates: *"The people exercise their State power of direct democracy, of representative democracy through the National Assembly, the People's Council and through other State agencies"*. At the same time, the 2013 Constitution also provides a number of specific rights of Vietnamese citizens. For example, the right to vote, stand for election (Article 27); the right to participate in State management (Article 28); the right to vote when the State organises a referendum (Article 29); the right to make complaints and denunciations (Article 30); the right to dismiss the National Assembly deputies and People's Council deputies (Article 7); the right to supervise

the activities of the state apparatus (Clause 2, Article 8), etc. These are the political democratic rights exercised directly by the Vietnamese citizen.

To a certain extent, the 2013 Constitution refers the protection of the People's sovereignty through the protection of the Constitution. Clause 2, Article 119 states: *"The National Assembly, the National Assembly's Agencies, the President, the Government, the People's Court, the People's Procuracies, other State agencies, and the entire People have responsibility to protect the Constitution. The Constitutional protection mechanism is prescribed by law"*. The Constitution also stipulates the competence of the National Assembly and the National Assembly Standing Committee in supervising the implementation of the Constitution and monitoring the constitutionality of legal normative

documents (Clause 10, Article 70; Clause 4, Article 74; Clause 7, Article 74); It also demonstrates the competence of the Prime Minister in suspending and abolishing unconstitutional documents (Clause 4, Article 98), and so on.

Regarding constitutional rights and amendments to the Constitution, the 2013 Constitution states that the National Assembly exercises constitutional rights (Article 69), creates the Constitution, and amends it (Clause 1, Article 70). Creating and amending the Constitution must be approved by at least two-thirds of the total number of National Assembly deputies (Clause 1, Article 85). Article 120 of the Constitution administers the order of amendments and the following rights and competences including the provisions for referendum on the Constitution to be decided by the National Assembly.

From the above provisions, it can be seen that the People's sovereignty, the constitutional right, and the process of amending the Constitution in the 2013 Constitution have made great progress compared to the Constitution of 1992.

However, the current constitutional protection mechanism in Vietnam still has the following shortcomings:

*Firstly*, there are many institutions (the National Assembly, the National Assembly Standing Committee, the Prime Minister, etc) that are qualified for protecting the Constitution, thanks to their review of the Constitution's implementation and their

consideration of the constitutionality of legal normative documents. By that, the institution is decentralized, assigning the authority to protect the Constitution to different agencies. However, this feature has not been delineated.

*Secondly*, some contents of the constitutional protection have been sketched by the Constitution, but the legal basis for implementing those contents is incomplete, abstract, contradictory, overlapping, missing, and inadequate. For example, the constitutionality of laws and resolutions promulgated by the National Assembly is not included; regulations on the interpretation of the Constitution are sketchy. The process, procedures, and methods for supervising the constitutionality of legal normative documents and acts of constitutional agencies and individuals are not specific. For example, the law does not specify how to resolve matters in case there is a divergence between the Legal Committee and the project submission agency with regards to the constitutionality of a bill, resolution, and ordinance, or in the case of different opinions between the Ministry of Justice and the agency in charge of drafting the constitutionality of the bills, ordinances, and draft resolutions submitted by the Government, etc.

*Thirdly*, so far, the Constitution has not specified direct effects of any provisions of the Constitution, so there is no clear legal basis for decisions on unconstitutional acts.

*Fourthly*, the protection of the Constitution relies mainly on political

measures, which have a mere consultation benefit and a low legal value.

Therefore, the author agrees with the comment on Vietnam's constitutional protection mechanism: *"Vietnam still does not have a specialized agency to check the constitutionality of State power in general and the legislative right of the National Assembly, in particular, that is, do not have a complete constitutional protection regime."*<sup>2</sup> It seems that the statement made on Vietnam's Constitutional protection mechanism in 2003 remains true.

## *2.2. Some limitations in ensuring the Constitutional protection of the people's sovereignty in Vietnam*

- The National Assembly has supervised the implementation of the Constitution and how laws are exercised by the executive agencies. Under this body's supervision, the agencies are required to promulgate documents to implement the Constitution and laws on schedule. However, this supervision is not regular and thorough, leading to fairly common document stagnation, making the Constitution and many laws slow to come to life. *"According to the plan for the first 6 months of 2018, the Ministries must develop, submit for promulgation, or promulgate, according to their competence, 151 documents detailing laws and ordinances. 60 were in effect and 91 documents were not yet in effect. However, as of June 30, the Government, the Prime Minister, Ministries and Ministerial-level agencies have issued 93 out of 151 documents detailing laws and*

*ordinances. 49 out of 60 documents were in effect. Specifically, there are 28 decrees, 4 decisions, 13 circulars, 4 joint circulars, reaching 81.67% of the plan. Thus, there is still "debt" on 11 documents to guide the laws and ordinances that have taken effect."*<sup>3</sup>

Assessing the supervisory activities of the National Assembly, the Working Report of the 13th term work of the National Assembly wrote: *"Monitoring activities of the National Assembly still face many limitations and inadequacies. In some cases, there are some issues such as lack of mechanism in place to clearly identify the responsibilities of stakeholders and inappropriate procedures and sanctions. Also, the follow-up and the implementation of conclusions and recommendations after supervision are not really drastic. Many cases have been resolved slowly, causing frustration in the public. The handling of voters' petitions, complaints, and denunciations is not satisfactory; ... It is not practical to perform some provisions of the law on supervision, such as voters dismiss of the National Assembly members or the vote of confidence in incumbents elected or approved by the National Assembly..."*<sup>4</sup>

In fact, the National Assembly has not paid enough attention to the private supervision of the constitutionality of the legal normative documents. The majority of documents monitoring activities mainly focuses on the enactment of laws in a complete and timely manner, or not, as the case may be. Although the report of the Standing Committee of the

National Assembly has pointed out a few cases of unconstitutional documents, these cases do not represent the reality of the constitutionality of the legal normative document system. Moreover, many acts of unconstitutionality are in the form of inaction. They are prescribed by the Constitution, but have not been discovered by the National Assembly. Such acts may have been discovered, but have not been handled decisively, timely, or thoroughly.

- The interpretation of Constitution has not experienced a proper respect an implementation in practice. The Standing Committee of the National Assembly has not yet given adequate explanations and interpretations of the regulations, causing difficulties and obstacles in implementing the Constitution. For example, they are explanations for the difference between “supreme monitoring of the observance of the Constitution” and “monitoring of the implementation of the Constitution,” or explanations for “necessary cases for reasons of national defence, national security, social order and safety, social ethics, and public health” that need to limit human rights and citizens’

- The National Assembly has not spent sufficient time on reviewing the reports of the implementation of the Constitution, which makes the content of the supervision neither profound nor comprehensive.

The reality of the law and the operation of the Constitutional protection

mechanism in Vietnam as prescribed above contribute to unconstitutional acts and unconstitutional documents in the Vietnamese legal system. It can be asserted that unconstitutional in the form of inaction in Vietnam is difficult to control. Many provisions on the People’s exercise of their sovereignty in the Constitution are not implemented in practice or performed in a formative manner such as regulations on the referendum on the Constitution, and provisions on the right to participate in the State management of citizens, etc. Many citizens’ constitutional rights and freedoms have not been specified by the law. The examples can be seen through the right to dismiss elected representatives, the freedom of association, or the right to protest, etc. These have greatly reduced the guarantee of the People’s sovereignty.

### **3. Some solutions to ensure people's sovereignty through the Constitutional protection mechanism in Vietnam**

*Firstly, innovating thinking, raising awareness about the role and nature of the Constitution, considering the Constitution closely related to the People, expressing the People’s sovereignty and taking direct measures*

The important feature and the principle of the Socialist law-ruled State of Vietnam, is that the State power belongs to the People; therefore, the Constitution of the Socialist law-ruled State of Vietnam must also express the People’s sovereignty principle, to ensure that the People are the final decision

subject in the process of creating the Constitution and amending its content.

Regarding the actual validity of the Constitution in present Vietnam, there are still inadequate, incomplete, or outdated perceptions of this issue. Prof. Doctor of Science Dao Tri Uc holds, *“Legally, the Constitution is the basic law, the political-legal document that has the highest position in the legal system. However, in reality, a clearer, more complete awareness of the direct application of the Constitution does not exist in the minds and actions of citizens and State employees.”*<sup>5</sup>

To regulate the fundamental social relations of a country, the Constitution often includes highly generalized norms, namely the fundamental norms and the goal-oriented norms. The nature and meaning of the Constitution are firstly has seen through the fundamental norms and goal-oriented norms. But in terms of quantity, there are more normative rules and definition-carried norms than fundamental norms and goal-oriented norms. Therefore, *“dealing with the need and sufficiency of all kinds of norms is essential to ensure that the Constitution is the most basic and general political and legal text. Instead, considering it a platform with declarative regulations, it is essential to associate it with a law of the State.”*<sup>6</sup>

The requirements for ensuring the People’s sovereignty require the Constitution - the basic law of the State, the text expressing the supreme will of the People, to be directly

applied. The Constitution in the Socialist law-ruled State of Vietnam must use an appropriate number of the types of fundamental norms, goal-oriented norms, definition-carried norms, and normative rules. *“The proper use of the above-mentioned norms of the Constitution are also explained by the need to apply the Constitution and explain it. The demands of democracy, the desire of the People and, in general, and the rule of law that dictates the need for the Constitution should be applied directly. Therefore, its regulations must meet the requirements for direct application and ensure that the explanation is accurate.”*<sup>7</sup>

*Secondly, enacting the law to build a specialized and independent constitutional protection body*

Clause 2, Article 119 of the 2013 Constitution stipulates *“... The mechanism of Constitutional protection is prescribed by law”*. Institutionalizing the above provisions, the Law on Constitutional Protection stipulates the organization and operation of the specialized Constitutional Protection agency that is a Constitutional Supervision Committee.

The Constitutional Supervisory Committee is an agency established by the National Assembly, which supervises the implementation of the Constitution of the National Assembly, the National Assembly Standing Committee, President, the Government, the Prime Minister, the Supreme People’s Court, the People’s Procuratorate of the Supreme, the State Audit Office, and the National Election Council.

Like the State Audit Office, the Constitutional Supervisory Committee is given jurisdiction to enable an objective, fair, and independent supervision of the implementation of the Constitution by other State agencies.

In terms of organization, the Constitutional Supervisory Committee should be divided into subcommittees for work specialization and assignment. Activities of checking, supervising, and reviewing violations of the Constitution are carried out by specialized sub-committees. Based on the report of the subcommittees, the Committee meets in plenary to discuss for a final decision. As soon as an approval from the Committee is achieved by voting, the outcome of a decision is then submitted to the National Assembly. The Chairman of the Committee does not participate in the vote, but has the final say in case the number of votes for and against is equal.

*Thirdly, handling the responsibilities of agencies, organizations and individuals that issue documents or commit violation, restrict the constitutional rights of citizens.*

The legal basis for the responsibility of state agencies requires a continuous improvement in developing, issuing in a timely synchronous manner, and organizing the implementation of legal normative documents on human rights and citizens' rights; it is necessary to apply appropriate sanctions to agencies and individuals who violate human rights and civil rights, or those failing to implement fully and promptly the competence to promulgate

documents on human rights and civil rights (especially the right to dismiss elected deputies, referendum, supervision of the People, etc). In the meantime, we argue for the increasing need to define the responsibilities of individuals in exercising their rights and freedoms or in failing to fulfil citizen obligations; abuses of freedom and democracy that infringe upon the national security and social order and safety need to be handled strictly and promptly. ■

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