

Constitutional Reform in Vietnam - the new Chapter on Fundamental Rights Comments from the perspective of European constitutional theory²

I. Introduction

- 1) The constitution as a key instrument for the implementation and protection of human rights
 - the philosophical concept of pre-legal ("natural") human rights
 - the common legal implementation of this concept in the form of constitutional fundamental rights
 - direct binding effect and primacy as prerequisites for the effectiveness of fundamental rights

- 2) The Constitution of the Socialist Republic of Vietnam of 1992 as a constitution in the sense of constitutional theory
 - a) The constitution as a *legal institution* of modern times
 - b) The primacy of the constitution as a conceptual precondition for a constitution
 - c) The primacy of the Vietnamese Constitution of 1992
 - guaranteed from the beginning (cf. art. 146/119), secured by a threat of sanctions for violations (art. 119(1))
 - confirmed by state practice, in particular the *constitutionalisation of the reasoning of the state institutions*, and emphasized in the broad public constitutional debate
 - an important factor in the development of the "socialist rule of law"

- 3) The revised Constitution of 1992³ as a modern example of the socialist type of constitution
 - in substance a revised constitution of 1992, not a new constitution of 2013
 - not a free and democratic constitution in the sense of European constitutional theory
 - classical features of a socialist constitution (dominating role of the Party, democratic centralism, people ownership of land, proclamatory and programmatic style etc.) but innovations within this type of constitution (emphasizing primacy of the constitution and rule of law, socialist-orientated market economy with public and private players, State Audit Office etc.)

II. A source of confusion: the terminological differentiation between "human rights" and "fundamental rights" within the Constitution

- 1) The well-established terminology in constitutional and fundamental rights theory
 - "human rights": the pre-legal rights of the human being according to a certain philosophical doctrine
 - "fundamental rights": the legal positions created by the implementation of this doctrine into law
 - "constitutional rights": (fundamental) rights guaranteed in the constitution
 - "citizens' rights" (= "civic rights"/"rights of citizens"): fundamental rights reserved to the citizens of a state; must be distinguished from the "rights of man" [= rights of all human beings]

- 2) The terminology used in Chapter II of the revised Constitution
 - misleading distinction between "human rights" and "fundamental rights" in the headline of Chapter II
 - note that *all* rights guaranteed in Chapter II are "fundamental rights"
 - misleading distinction between "human rights" and "civic rights" in art. 14 et seq.
 - the Vietnamese term "quyền con người" must be complemented by another term, allowing the differentiation between "human rights" and "rights of man"

- 3) The consequence: frequent mix-ups of "human rights" and "rights of man" in scholarly and public debate

¹ DAAD Lecturer at Hanoi Law University, German Law Centre, www.thomas-schmitz-hanoi.vn; Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen, www.jura.uni-goettingen.de/schmitz; E-Mail: tschmit1@gwdg.de.

² Special paper for legal experts or human rights experts (updated version of a lecture presented in Hanoi on 06.12.2012).

³ This paper is based on the Constitution of the Socialist Republic of Vietnam of 1992 as amended on 28.11.2013 (Hiến pháp nước Cộng hòa xã hội chủ nghĩa Việt Nam [sửa đổi]), www.na.gov.vn/anhhoatdong/Popup/Hien%20phap%202013.pdf.

III. The normativity of the fundamental rights in the revised Constitution

- 1) A constitutional commitment to human/fundamental rights
 - a) Not so important: the symbolic shift of the fundamental rights provisions from Chapter V to Chapter II
 - symbolism without legal consequences
 - b) Fundamental: the commitment to human/fundamental rights as one of the fundamental principles constituting the political regime of Vietnam (→ art. 3)
 - the special legal significance of the constitutional clauses on the fundamental values and ideas of the state - Chapter I on the "political regime" as the "core constitution" of Vietnam
 - a fundamental commitment to the respect, protection and guaranty of human/fundamental rights (art. 3)
 - consequences for constitutional amendment, constitutional and legal interpretation and for the daily work of public authorities
- 2) The direct binding effect of the fundamental rights under the revised Constitution
 - a) The importance of the direct binding effect of fundamental rights
 - lessons from European constitutional history
 - fundamental rights without direct binding effect are not more than a joke...
 - b) The traditional denial of the direct binding effect of fundamental rights in Vietnamese constit. law doctrine
 - c) The direct binding effect of all constitutional provisions as a fundamental principle of modern constitutionalism and the rule of law
 - in *every* modern constitutional state *all* constitutional provisions not explicitly arranging otherwise are directly binding
 - consequently, all fundamental rights provisions that can be directly applied (in particular freedom rights) must be applied directly by all state authorities, including the procuracy and the courts; comparison of law and legal practice can show practicable solutions
 - d) The confirmation of the binding effect of all constitutional provisions in the revised Constitution
 - cf. art. 4(3), 8(1), 119; note that the *revised Constitution* does not make a difference between direct and indirect binding effect and *does not provide for any exceptions*

IV. The enforceability of the fundamental rights

- 1) The necessity of an independent constitutional institution to enforce the constitutional law, including fundamental rights
 - Constitutional history has proved again and again that for the effectiveness of any constitution in any country under any political system it is essential to have an independent enforcement institution, created by the constitution, composed of experts and charged with the constitutional review of legislative acts and other acts of public power in the state. According to contemporary constitutional theory, *constitutions without* such an effective enforcement mechanism *are widely useless*. Independent constitutional courts reflect the state of the art; in Common law countries, there function is usually performed by the supreme courts. Constitutional councils following the French model originally formed a preliminary stage but usually have developed into real constitutional courts.
 - The function of constitutional courts or councils is not confined to the enforcement of the constitution in particular cases. Their most important function lies in the *continuous authoritative interpretation of the constitution* (complemented by the further developing of law), which is a *precondition of the development of a sophisticated constitutional law doctrine*. This applies in particular to the fundamental rights, which are guaranteed in short and vague provisions that use indefinite legal concepts and need a considerable effort of constitutional interpretation in order to become practically operative. For the practical effect of the fundamental rights, usually the jurisprudence of the constitutional court or council is more important than the text of the relevant provisions.
- 2) The Constitutional Council in the Draft Constitutional Amendment of 02/01/2013⁴
 - Art. 120 of the Draft Amendment of 02/01/2013 provided for a Constitutional Council as "an organ established by the National Assembly" ("quan do Quốc hội thành lập"). This wording and the missing guaranty of the independence of the Council and its members in art. 120 raised the question if the Council would be an independent constitutional institution or an auxiliary institution of the National Assembly.
 - Art. 120 provided for a competence of constitutional review, excluding, however, the important competence to declare unconstitutional legal provisions and decisions void. Nevertheless, it would have brought a significant progress because it provided the Constitutional Council with the jurisdiction to decide on all relevant constitutional questions and thereby with the power of authoritative constitutional interpretation and further development of law. Thus, the constitutional reform would have laid the foundation for the development of a sophisticated constitutional law in Vietnam.

⁴ Draft Amendment of the Constitution of 1992 (Dự thảo sửa đổi Hiến pháp 1992) of 02/01/2013, <http://baodientu.chinhphu.vn/Home/Chinh-thuc-cong-bo-Du-thao-sua-doi-Hien-phap-1992/2013/158230.vgp>.

- 3) The consequences of the failure to introduce a Constitutional Council
 - The Revised Draft Amendment of 17/10/2013 does not contain any provisions on a constitutional council anymore. Hence, there will be no institution for an authoritative interpretation of the Constitution in the future. This will affect in particular the protection of fundamental rights. There will be virtually *no protection against the legislator*. Furthermore, constitutional law doctrine, in particular fundamental rights doctrine, will continue to develop slowly in Vietnam.
 - Art. 70 no. 10, 74 no. 4 provide for a kind of "*constitutional review*" of *sub-statutory acts by the National Assembly* and its Standing Committee (art. 70 no. 10, 74 no. 4). However, since the Assembly and its Committee are political, not expert institutions, this cannot replace a constitutional review by a constitutional council.

V. The legal essence of the fundamental rights

- 1) Degradation of the fundamental rights by relativization (art. 15)
 - a) Degradation of civic rights by "inseparable" connection to civic obligations (art. 15(1))
 - inherent reduction of the provided protection allowing easy misuse by government and other authorities
 - b) Degradation of fundamental rights by the prohibition to "abuse" them "to violate the interests of the country and the nation" (art. 15(4))
 - denial of the basic human rights idea that every human being is entitled by nature to stand up and act against the interests of his or her own community, nation or country, and that the public authorities have to tolerate this
 - serious *danger of misuse for the systematic suppression of any criticism* of the government or other authorities
 - c) Degradation by the emphasis of the obligation to respect the right of others (art. 15(2))?
 - no: only an expression of a natural *limit* of fundamental rights but not a constitutional principle on its own; however, this clause should have been integrated into the limitation clause (art. 14(2))
- 2) Important freedoms guaranteed only in accordance with the provisions of the law (art. 23 - 25, 33)
 - see in particular the freedoms under art. 25, which are essential for the democratic process: freedom of opinion and speech, freedom of the press, free access to information, right to assemble and form associations, right to protest
 - These freedoms are only guaranteed to a minimum extent, since it is up to the legislator to define them. The provisions do not submit the legislation to special standards. Thus, concerning these rights, the *Constitution denies the protection of the citizen against the arbitrariness of the legislator*, failing to perform an essential function of the constitution generally recognized in modern constitutional theory. In particular, the *legislator can allow the state institutions to suppress most of the criticism of the government*. However, it can be extrapolated from these provisions by the way of teleological interpretation that at least any legislation that interferes with the core of these freedoms is unconstitutional and void.
 - Art. 24(3)) guarantees the freedom of belief and religion only in accordance with the law and "state policies". Since this reservation threatens to practically destroy the freedom, it must be understood in a restricted sense: Only state policies that strictly respect the freedom of belief and religion as a constitutional value may lead to a limitation of it.
- 3) An important progress: the introduction of a limitation clause (art. 14(2))
 - a) The importance of the fundamental rights' limits for the actual freedom under the constitution
 - For the effective realisation of freedom, not the proclamation of a freedom right but the definition of its limits and "limits of limits" is decisive. Interferences of public authorities must be reliably channeled and limited.
 - b) Special and general limitation clauses
 - c) The *general limitation clause* in art. 14(2) of the revised Constitution
 - modelled on limitation clauses in international human rights treaties (e.g. art. 12(3), 18(3) ICCPR)
 - aa) A *legal reservation* for restrictions of fundamental rights
 - no restrictions allowed that cannot be based on statutory law
 - this assures that in the end the National Assembly as the highest representative organ of the people and the highest state power organ in Vietnam (cf. art. 69) takes responsibility for any interference of the state with fundamental rights
 - bb) The limitation of fundamental rights restrictions to the *purposes* of national defense, national security, public order, public/social morality and public health
 - classical constitutional goods whose protection usually justifies f.r. rights restrictions in constitutional states
 - questionable: restrictions of fundamental rights for the enforcement of morality?
 - controversially discussed in many modern constitutional states (also in Europe)
 - cc) The limitation of fundamental rights restrictions to the case of *necessity*
 - dogmatic background: an important "limit of limits" referring to the central requirement of the global standard of the *principle of proportionality*
 - includes the requirement of *suitability* (→ unsuitable measures cannot be necessary...)
 - the measure must be conducive to its purpose
 - includes the requirement of *proportionality in the strict sense* (→ can be derived from the term "necessity" by the way of teleological interpretation)
 - the burden imposed must not be out of proportion to the aim in view
 - requires thorough *weighing* of the concerned rights and goods

VI. Selected special aspects

- 1) The legal essence of the fundamental duties (cf. art. 39, 43 - 46)
 - fundamental duties as a distinct dogmatic concept of Vietnamese constitutional law?
 - the problem of the legal significance, the contents and the constitutional limits of the fundamental duties
- 2) The legal essence of the right to social security (art. 34)
 - in particular: a right to social security or to social insurance?
- 3) The legal essence of the right to live in a fresh environment (art. 43)
 - objective constitutional principle or subjective fundamental right?
 - specific consequences for the legislator and public authorities?

VII. Conclusion

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