

HUMAN RIGHTS AND FUNDAMENTAL RIGHTS
AND THEIR IMPACT ON THE CIVIL LAW SYSTEM

**Fundamental Rights Protection in the
Constitution of the Socialist Republic of Vietnam of 2013**

Comments from the Perspective of European Constitutional Theory¹

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
 - the necessity of constitutional mechanisms for the enforcement of the fundamental rights

- 2) The Constitution of the Socialist Republic of Vietnam of 2013² as a constitution in the sense of constitutional theory
 - a) The constitution as a *legal institution* of modern times
 - developed to ensure a reliable, basic political order and for the moderation, and general orientation, of public power
 - based on two centuries of general *constitutional theory*, supported by a highly developed *constit. law doctrine* in the modern constit. states and unfolded by the *constitutional jurisprudence* provided by constit. courts and councils
 - b) The primacy of the constitution as a conceptual precondition for a constitution
 - cf. US Supreme Courts, *Marbury v. Madison*, 1803
 - why the Soviet Union and the German Democratic Republic did not have constitutions...
 - c) The primacy of the Vietnamese Constitution of 2013
 - guaranteed already in the Constitution of 1992 (cf. art. 146, now art. 119(1)), now secured by the threat of sanctions for violations (art. 119(1), sub-sect. 3) and the mission to defend the Constitution (art. 119(2))
 - the organisation and operation of the state in accordance with the Constitution as a fundamental principle of the political regime in Vietnam (art. 8(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 Constitution of 2013 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.)

¹ Updated version of lectures hold in Bangkok and Hanoi in 2013.

² This lecture is based on the English translation of 15/01/2014, provided by the *Vietnam Law & Legal Forum* and available at Vietnamplus (<http://en.vietnamplus.vn/Home/The-Constitution-of-the-Socialist-Republic-of-Vietnam/20141/45126.vnplus>) and talkvietnam (www.talkvietnam.com/2014/01/the-constitution-of-the-socialist-republic-of-viet-nam).

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" should 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

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) Problematic: a limited commitment to fundamental rights in art. 14(1)
 - Fundamental rights only guaranteed "in accordance with the ... law"? In a modern constitutional state committed to fundamental rights, the law does not stand above the f.r. but must respect itself the f.r.
 - c) 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...
 - direct binding effect on public authorities, not on the citizen (no direct → horizontal effect)
 - 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
 - example: citizens have the right to assemble (art. 25) without waiting for the National Assembly to pass a law on assemblies and demonstrations
 - 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, their 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 02/01/2013³

- 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.

3) The consequences of the failure to introduce a Constitutional Council

- Despite the strong support of this idea in the public constitutional debate, the Constitution of the Socialist Republic of Vietnam of 2013 finally does not contain any provisions on a constitutional council. 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. The same applies to the *general mission of the National Assembly, the President, the Government, People's Courts and Procuracies and all the People to defend the Constitution* under art. 119(2) sub-section 1.
- Art. 119(2) sub-sect. 2 provides that "the mechanism to defend the Constitution shall be prescribed by a law". This entitles the legislator to introduce any specialised institution for the defense of the Constitution and for constitutional review in the future. Hence, the failure to introduce a Constitutional Council may be temporary.

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 reservation that they must not "infringe upon national interests" (art. 15(3))
 - a 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) No degradation by the emphasis of the obligation to respect the right of others (art. 15(2))?
 - this is only an expression of a natural *limit* of fundamental rights but not a constitutional principle on its own

³ 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-1992/20131/158230.vgp>.

2) Important freedoms submitted to regulation by the law (art. 22(3), 23 - 25, 33)

- Some rights are only guaranteed with the far-reaching reservation that their "exercise ... shall be prescribed by the law".⁴ This applies in particular to 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 practically up to the legislator to define them. The relevant provisions do not submit the legislation expressly 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, there is a risk that the *legislator may allow the state institutions to suppress most of the criticism of the government*. However, since it is the function of any fundamental rights clause to guarantee effectively the freedom (and not its restriction), it can be extrapolated from these provisions by the way of teleological interpretation that the law that "prescribes" the exercise of a freedom must respect itself the freedom as a constitutional value and restrain from any restrictive clauses that are not necessary, inappropriate or abusive. Its function is to organise the exercise of the freedom in an effective and rational way - not to hinder it. Furthermore, any legislation that interferes with the core of these freedoms is unconstitutional and void.
- Under art. 24(3)) the citizen is not allowed to take advantage of the freedom of belief and religion "in order to violate the law". This clause too must be understood correctly, following teleological interpretation: Only a law that respects itself the freedom of belief and religion as a constitutional value (and confines itself to limitations that are necessary, appropriate and not abusive) is qualified to restrict the exercise of this freedom. If it does not, it may be ignored by the citizen. However, the citizen will need to establish that and why the law hindering his free exercise of religious activities violates the freedom of belief and religion itself and therefore is void.

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 in a state, not the proclamation of a freedom right but the definition of its limits and "limits of limits" is decisive. Interferences of public authorities with the freedom 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, social order and safety (public order), social morality and community well-being
 - classical constitutional goods whose protection usually justifies f.r. rights restrictions in constitutional states - however: what exactly is "community well-being"?
 - questionable: restrictions of fundamental rights for the enforcement of morality? - controversially discussed in many modern constitutional states
 - 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

⁴ According to the translations of the drafts of the constitutional amendments, the original idea was to grant these rights a priori only "in accordance with the law". This wording would have amounted to an even further-reaching reservation.

- 2) The legal essence of the right to social security (art. 34)
- 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

- The Constitution of 2013 brings important progress, but the new chapter on fundamental rights does not yet fully comply with the standards for a modern constitutional state. This applies in particular to the restricted guaranty of important rights in art. 25. However, if the English translations are correct, and with regard to the required teleological interpretation, the last changes in the wording of art. 25 ("exercise of these rights shall be prescribed by the law" instead of "shall enjoy ... in accordance with the provisions of the law") can be considered as a progress.
- Not providing for a constitutional council or another independent institution for the enforcement and authoritative interpretation of the Constitution, the new Vietnamese Constitution will continue to fall short of the state of the art in constitutional development. However, art. 119(2) sub-sect. 2 allows to introduce a constitutional court or council in a later reform by ordinary legislation.
- Important progress has been achieved by the fundamental commitment to human rights in art. 3 in the Chapter on the political regime and by the general limitation clause in art. 14(2).