

SOME MODELS OF CONSTITUTIONAL REVIEW IN THE WORLD AND SUGGESTIONS OF NEW MODEL OF CONSTITUTIONAL REVIEW IN VIETNAM

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Abstract: *in the process of constructing the Socialist Republic State of Vietnam, the matter of the constitutional protection is always set because it is a basic act of the State, built with a special procedure, regulating the most fundamental matter, is the principle of the whole legal system of a country. The 2013 Constitution of the Socialist Republic of Vietnam has a constitutional review mechanism in accordance with the law. However, the reality indicated that the mechanism for monitoring the implementation of the Constitution and the law is still vague and has certain limitations. Contents of the article analyze a number of constitutional review models in the world, etc. since then giving some suggestions of a suitable constitutional review model in Vietnam which meets the requirements of constructing a Socialist Republic State.*

Keywords: *constitutional review, Constitutional Court, Constitutional Council, Constitutional review, Constitutional Protections.*

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1. Introduction

The 2013 Constitution of the Socialist Republic of Vietnam in Article 119 states, “*Mechanism of Constitution Protection in accordance with the law*”, but there is no legal document providing a mechanism to protect the Constitution now. The setup of a judicial mechanism to decide what-to-do to solve violations of the Constitution is currently a matter of different attitudes. According to the analysis of the historical, cultural factors, and political context of our country, the article proposes a constitutional review/ judicial review model. This model reflects, closely the current political situation of Vietnam and also references international practices and standards which are considered common, civilized, and progressive.

The Constitution is the primary law of the state which governs the primitive and important social relations related to the determination of political regimes, economic regimes, culture, education, science and technology, domestic and foreign policies, citizen’s legal status and the organization and operation of the State apparatus. The Constitution is the Act with the highest legal effect, all other legal documents must be consistent with the content and spirit of the Constitution, without any conflict with the Constitution. In case there is any document that is contrary to the Constitution, that document is considered a violation of the Constitution and must be invalidated. The State agencies, organizations and citizens must comply with the provisions of the Constitution seriously, guaranteeing the supremacy of the Constitution as one of the primary signs of the rule-of-law state. At present, there are many different viewpoints about unconstitutional (not allowed by the Constitution). However, in my opinion, unconstitutional is an act of violating the provisions of the Constitution recognized by the Constitution and recognized and protected by the specialized sectors of law and violated by organizations, agencies and individuals.

To guarantee the supremacy of the Constitution, most countries in the world now have a mechanism to protect the Constitution (also known as surveillance of the Constitution implementation, constitutional review, and Constitution protection, etc.) aimed at supervising the constitutionality of legal documents and activities of the State agencies, documents and activities of social organizations which are empowered to implement the function of the State’s administrative management, protect the constitutional rights of citizens from violations of public authorities.

Constitutional review mechanism at present appeared in the US in the early 19th century for the first time, and not based on the Constitution but from the case law/ legal precedent. The Chief Justice of the Supreme Court J. Marshall ruled on the Marbury v. Madison (Marbury v. Madison) in 1803: Only the courts have the right and the obligation to declare what is called a law, a legal document that is contrary to the Constitution is not a law. This legal precedent laid the foundation for the American model of constitutional review practice, with the main feature of reviewing the constitutionality of acts/ laws which are implemented by normal courts.

Since then, after World War I, in Europe appeared its model, a new model of principle, created by Austrian scholar Hans Kelsen. The main difference of this model compared to the American model is that the constitutional review activity is separated from the general court system and implemented by the specialized authority: the Constitutional Court. This model is called the European model [2, p. 30].

Thus far, after a period of development, this institution has been spreading largely. By 2008, 158 out of 191 countries surveyed have regulations related to the constitutional review mechanism. Among these countries, 79 countries have applied a direct provision in the Constitution on the Constitutional Court or the Constitutional Council; 60 countries have regulated for the constitutional review mechanism of the normal court or the Supreme Court; A few countries such as China, Vietnam, Malaysia, etc. have stipulated that the legislative authority has right to check the constitutionality. Besides the two main models above, there are also the mixed systems, the French model with the Constitutional Review Council, and some models of constitutional review.

According to the time of implementation, constitutional review activities are classified into two categories: pre-surveillance and post-surveillance. Pre- surveillance is the activity of monitoring the constitutionality of legal documents before being promulgated by competent agencies. Post- surveillance is monitoring the constitutionality of legal normative documents which are effective, activities of the State agencies and social organizations which are empowered to implement the State's management function.

2. Some models of constitutional review in the world

2.1. American Model of Constitutional Review

The 1787 Constitution of the United States America was considered the oldest, most famous constitution with more than 200 years of existence. Also, the US was the first country to establish the judicial court's right to supervise the Constitution and set up a separate model of constitutional review authority. According to the US model, the supervisory authority is given to the competent courts to implement, under which any court can rule on the constitutionality of the law. Later on, the US constitutional model was applied in many countries such as Canada, Mexico, Sweden and Greece, etc [4, p. 71].

* The American model of constitutional review has the following features:

- All courts have the authority to review the constitutionality of an Act. A court considers the constitutionality of an Act when the provisions of that Act are applicable to the resolution of specific cases in court.
- The right of constitutional review is attached to the resolution of a specific case, whereby the litigation is the premise for the court to consider the constitutionality of the act/ law.
- A constitutional review right can only be used by the courts when it is directly related to the legitimate rights and interests of the proposer to consider the constitutionality of the act.
- An Act can only be declared unconstitutional when the Court has clear grounds that the act is inconsistent or inconsistent with the Constitution.
- When a law is found to be unconstitutional, it is no longer valid. However, the form of the act is still in force but it is not actually applied anymore because the judicial court has no authority to cancel or declare act invalidity and the court just does not apply that act in reality.
- The constitutional review activity of the constitutionality has no final effect as in the model of the Constitutional Council or the Constitutional Court but can be reviewed by a superior court.

2.2. European Model of Constitutional Review

Unlike the US-style constitutional model, continental European countries do not give the judiciary the authority to oversee the Constitution but set up a specialized agency to perform this function – called the Constitutional Court, Donation Council. The bodies are not judiciary but it has a special institution that exists relatively independently from the State agencies. This model is called centralized surveillance.

* The European model of constitutional review has the following features:

- The constitutional review activities are performed mainly through specialized constitutional review authorities such as the Constitutional Council, Constitutional Court, etc. these authorities have independent positions with the legislative, executive, and judicial authority.
- Supervising the Constitution in accordance with the European model, which is both specific and abstract, both pre-surveillance and post-surveillance.
- The authority to monitor the Constitution is implemented according to a special procedure, which is different from that of other ordinary cases.
- The decision of the constitutional review body is final and has a compulsory effect on the subjects when causing any violation to regulation, institution, or document, and such document is declared unconstitutional.

Table 1. Classification between American and European Models of Constitutional Review

Factors	American model	European model
<i>Institutionally</i> (Whose authority?)	Decentralized model: Normal courts have the right to monitor the constitutional review - which can declare unconstitutional documents	Centralized model: Only the Constitutional Court has the authority to oversee the constitution; Other constitutional review matters to the Constitutional Court.
<i>Timing</i> (Time to implement?)	Post-surveillance: The Court shall	Both pre- surveillance and post-surveillance:

	grant the Constitution only after the document is granted or taken into court.	Some Constitutional courts supervises the constitutional review before a legal document is passed or takes effect; some monitories both pre- and after-surveillance.
<i>Specific or abstract?</i>	Specific: The Court makes constitutional review in specific cases.	Both specific and abstract: Most Constitutional Courts do not require a specific case; some courts make a constitutional review of specific cases.
<i>Who has the right to make a lawsuit?</i>	The disputing Parties in a normal case can raise the matter of constitutionality.	Different subjects can make a lawsuit against the constitutional review, from executive institutions, parliamentarians, to individual citizens.

2.3. Mixed system of American – European Model of Constitutional Review

The mixed system includes two models of European style and American style. For example, in some countries such as Portugal, Colombia, Ecuador, Greece, etc. constitutional authority is given to both specialized constitutional agencies and judicial courts. The specialized authority has the constitutional review function and the Supreme Court has jurisdiction over specific cases stipulated in the Constitution, and other Courts, when handling specific cases, they have the right to consider the constitutionality of acts and has the right not to apply laws that are deemed to be in violation of the Constitution.

2.4. Model of constitutional authority cum a constitutional review authority

In Vietnam, China, Cuba, Finland, Laos, Korea, etc. in these countries there is no specific constitutional review authority. These countries have a common feature that the highest State authority has the right to make a Constitution, the legislative authority is the National Assembly, the Parliament, the State Council, etc. at the same time is the competent authority to decide the constitutionality of an Act/ Law. In the event that the other authority is empowered to execute the judgment, the National Assembly is no longer is the highest authority. This viewpoint has its reasonable points, but it must also be admitted that if an agency is both constitutional and by itself judges whether a law is unconstitutional or not, it is like “you wager on the matter when you control the outcome”. Hence, in my opinion, it is required to establish a constitutional review authority that is independent of the National Assembly to consider the constitutionality of acts/ laws, which is essential in the condition of building a Socialist Republic State, the State of the people, by the people, for the people.

Therefore, there are many different models of constitutional review mechanisms in the world today, but the most recognized model is American and European models. The European model has many advantages of the American model because of different political, historical, and legal reasons, additionally, the American model indicates limitations such as the long-lasting trial period, the judgment only binding on the Parties which participated in a specific case, etc.

3. Practice of constitutional review activities in Vietnam and suggest building a suitable model of constitutional review for Vietnam

Seemingly, there is no longer debate in Vietnam about the demand to establish a constitutional review mechanism, particularly when there are declarations and provisions of the Constitution and the law of the rule-of-law State, the supremacy of the Constitution, etc. from the highest level is the document of the Communist Party of Vietnam that has had a research policy to establish the mechanism. Its significance and importance have been acknowledged. Different from other countries in the world, the surveillance and protection of the Constitution is not assigned to a specialized authority with the function of monitoring and protecting the Constitution, but rather to the State’s competent authority, particularly the National Assembly in Vietnam. The law stipulates the surveillance mechanisms and contents, of which the most important matter is to supervise and guarantee the constitutionality and legality of legal documents. Nevertheless, we have not seen a mechanism to supervise the activities of the National Assembly and monitor the constitutionality of acts/ laws and resolutions enacted by the National Assembly. The surveillance and protection of the Constitution in Vietnam basically includes the surveillance of the activities of the State’s competent authorities and individuals in the implementation of the Constitution and the law, surveillance of legal documents, international treaties, supervision of the settlement of citizens’ claims, complaints, and denunciations, etc. It can be noted that, during the process of organizing and implementing the constitutional review mechanism under the applicable law, there are some shortcomings and limitations, as follows:

- Surveillance mechanism is given to many State agencies and competent authorities, limiting the activities and obscuring the role of supreme surveillance of the National Assembly. As a result, it is not clearly defined the scope of authority, shifting responsibility, and overlapping, affecting the process of monitoring and protecting the Constitution. In fact, the surveillance of the Constitution and the law of Vietnam includes many different subjects

from the National Assembly, the President, the Government, the Courts, the People's Procuracy, People's Councils at all levels.

- The surveillance and protection of the Constitution is mainly based on the supreme surveillance of the National Assembly, while the supervision activity of the National Assembly is mainly by the National Assembly's agencies such as the National Assembly Standing Committee, Committee for Ethnic Affairs, the Committees of the National Assembly, should result in dependence and ineffective implementation.

- There is no classification of Constitutional surveillance from other types of surveillance, that resulted in the surveillance of the National Assembly itself is left unanswered. The surveillance and protection of the Constitution cover all aspects of the legislative, the executive, and the judicial authorities of the State. Thus, the National Assembly must be under the surveillance, but now, the National Assembly is still self-monitoring; it is impossible to be fair and objective when the National Assembly declares an act/ a law promulgated by the National Assembly itself which is contrary to the Constitution is abolished; up to now, there has been no time that the National Assembly has declared a legal document issued by the National Assembly, the National Assembly Standing Committee, the President, the Government, the Supreme People's Court or the Supreme Procuracy which was contrary to the Constitution and abolished [1, p. 57].

- The effectiveness of constitutional review activity is not remarkable; there are still many legal documents that are contrary to the Constitution but have not been abolished. Surveillance activities of the State agencies such as the National Assembly and People's Councils at all levels often stop at detection and recommendations, many agencies, in case of receiving petitions, ignore or fail to implement, that resulted in no guarantee of surveillance. Many provisions of the legal documents are contrary to the Constitution but could not be handled or abolished. As of January 13, 2003, the Ministry of Public Security issued Circular No.02/2003/TT-BCA providing the organization to issue registration, the registration plate of road motor vehicle which states, "Each individual can only register for one car or motorbike". The Circular infringed the citizen's property rights, citizen's fundamental rights that are specified in Article 58 of the 1992 Constitution. Accordingly, until 2005, the Ministry of Public Security issued the Circular No.17/2005/TT-BCA allowing each individual to have the right to register more than one car, motorcycle, etc.

- In fact, some provisions of the Constitution have not been implemented. For example, citizens have the right to protest, but now there is no law to protest, so citizens do not know when they have the right to protest, they do not know how to legally protest. Or the Constitution stipulated that citizens have the right of freedom of the press, but now, our State has not allowed the private press to operate, so the creative freedom of individuals is limited, not properly reflecting the social situation.

From the aforesaid analysis, we realize that it is required to build and complete a suitable constitutional review mechanism to guarantee the supremacy of the Constitution in our social life, contributing to protecting the constitutional rights of people from the violations of the State agencies, contributing to building a Socialist Republic State.

The 10th National Congress of the Communist Party of Vietnam (2006) clearly stated, "*building a decision-making mechanism on violations of the Constitution in the legislative, executive and judicial activities*". Therefore, with the clear provisions of the afore-said document, it is required to establish a specialized authority to protect the Constitution [3, p. 127]. At present, there are three main ideas about the model of constitutional review to be referred to, particularly, establish of the Surveillance Committee to supervise the implementation of the Constitution under the National Assembly; establish the Constitutional Review Council or the Constitutional Court as an independent and specialized authority; empower the constitutional rule to the Supreme People's Court. If establishing the Surveillance Committee under the National Assembly, would be like self-monitoring. If establishing the Constitutional Review Council or an independent and specialized Constitutional Court has the authority to supervise the constitutionality of the National Assembly, it is in conflict with the provisions of Article 69, the 2013 Constitution: The National Assembly is the highest representative authority of the people and the State's highest authority, exercising the supreme supervision over the activities of the State agencies; if it is established, the authority must amend and supplement the Constitution, change the way of thinking about the juridical authority of the National Assembly. If empowering the constitutional rule to the Supreme People's Court, it does not guarantee power and objectivity; the National Assembly establishes the Court and supervises the Court activities, and now the Court can judge the National Assembly and its agencies which are equal in terms of position. In my opinion, I agree with the opinion that we should establish an independent Constitutional Court, out of the National Assembly, exercising the right to constitutional review for all activities of State's authorities, including the National Assembly due to the following reasons:

- There is an opinion that such establishment of the Constitutional Court would be contrary to the provisions of the Constitution that the National Assembly is the highest body of state power of the Socialist Republic of Vietnam. In my opinion, we should change the way of thinking and perceptions on the matter, reposition the National

Assembly appropriately as the establishment of the Constitutional Court is to overcome gaps of power, not to harm the authority or power of other State's authorities. What's more, establishing the Constitutional Court only judge the correctness/ incorrectness of the dispute or violations related to the provisions of the Constitution, but does not have the right to force other State's authorities to make decisions.

- Establishing a Constitutional Court is a common model in other rule-of-law States around the world. The independence of the constitutional review authority that protects the Constitution is guaranteed by the power balance in relations between the authorities exercising the legislative, executive and judicial power.

- The model of the Constitutional Court has existed in parliamentary polities, recognizing written law in continental Europe, with many similarities with the Vietnamese legal system. Therefore, the regime of the National Assembly and the written legal system in Vietnam is suitable for the formation of a Constitutional Court.

- The establishment of the Constitutional Court shall guarantee the objectivity, independence, specialized operation in accordance with the constitutional proceedings. Only these independent authorities have the right to rule on violations of the Constitution in both legislative, executive and judicial activities.

- The constitutional review activity is a highly professional legal activity, that requires experience in implementation and has high legal qualifications, thus, it is more reasonable for the Constitutional Court to specialize in the implementation.

If the Constitutional Court is established, the juridical authority of the Constitutional Court includes reviewing the constitutionality of Act/ Law, Resolutions of the National Assembly, legal documents of the President, the Government, the Prime Minister, Supreme People's Court, Supreme People's Procuracy, etc.; Settling disputes over constitutional competence among central state agencies and disputes among central and local governments; explaining the Constitution; having relevant authority to protect the constitutional rights of citizens, etc.

To protect the supremacy of the Constitution, there are three-quarters of countries in the world where have Constitutional Courts. In our country, the surveillance and judgment on violations of the Constitution are not assigned to any specialized authority. Hence, the authority of Constitution protection is not clearly assigned responsibilities, resulting in poor effectiveness and efficiency in protecting the Constitution. It's the right time to have a new Constitution to establish a constitutional review mechanism in its own significance – that is, the Constitutional Court [see 2].

It may be said that the request for constitutional review has become an urgent demand in our political and legal life. Therefore, the procedure of establishing a model of constitutional review must have an innovative awareness, placed in a relationship of creative application of models of countries around the world, in accordance with modern trends and practical demand. The act shall bring about a new and effective constitutional review mechanism, contributing to building a Socialist Republic State, the State of the people, by the people, for the people.

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