



NATIONAL ASSEMBLY
STANDING COMMITTEE
Insitute for Legislative Studies



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UNITED NATION
DEVELOPMENT PROGRAMME



RESULTS OF THEMATIC RESEARCHES SUPPORTING THE AMENDMENT OF THE 1992 CONSTITUTION



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HaNoi – 2013

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PREFACE

The Resolution on amending and supplementing 1992 Constitution and establishing Committee for Draft Revised 1992 Constitution was approved in the 1st session of 13th National Assembly. In implementing the assigned tasks, Committee for Draft Revised 1992 Constitution has established the Editorial Board to summarize, research, propose and prepare the Draft Revised Constitution. The first Draft Revised 1992 Constitution was submitted to the National Assembly for discussions and comments in the 4th session of 13th National Assembly at the end of October 2012, and under referendum on January 2, 2013.

During the referendum on the Draft Revised 1992 Constitution, there were a large number of issues that drew the attention and recommendations of people from different backgrounds. The outputs of the referendum suggest that there are a number of issues which remain controversial or even opposite to each other. Therefore, as a body majoring in researches to facilitate legislative activities, ILS has conducted a number of thematic researches.

With the support of United Nations Development Programme (UNDP) through the project “Enhancing legislative research and information and communications technology (ICT) capacities of the National Assembly’s Institute for Legislative Studies”, ILS has selected three (03) themes including (1) *Regulations related to two independent institutions (National Electoral Council and Constitutional Protection Body)*; (2) *Improvement of Provisions of Draft Revised 1992 Constitution on Tasks and Powers of the National Assembly and its Standing Committee*; (3) *Statutes on local government* to do researches with an aim to timely develop and provide in-depth legal and practical basis for NA, NA’s agencies and deputies, and especially for member of Editorial Board to finalize the Draft Revised Constitution.

After researching, ILS has organized a Workshop on Research Results and Expert Consultation to finalize above-mentioned thematic reports. In an

effort to further provide helpful information to NA's agencies and deputies during the amendment of 1992 Constitution, ILS issues the book entitled ***“Results of Thematic Researches Supporting the Amendment of the 1992 Constitution”***.

Due to the limited coverage of the book, we wish not to include all the writings on thematic researches into the book, but the consolidation reports.

We would like to take this opportunity to express our gratitude to the effective, timely support and cooperation extended by UNDP in conducting the thematic researches and publishing this book.

We hope you enjoy the book.

March 2013

**DR. DINH XUAN
THAO
DIRECTOR OF INSTITUTE FOR
LEGISLATIVE STUDIES**

TABLE OF CONTENTS

SECTION 1

RESEARCH ON

“REGULATIONS RELATED TO TWO INDEPENDENT INSTITUTIONS: NATIONAL ELECTORAL COUNCIL AND CONSTITUTIONAL PROTECTION BODY” SUPPORTING THE AMENDMENT OF THE 1992 CONSTITUTION

A. INTRODUCTION.....	3
B. RESEARCH RESULTS.....	11
CHAPTER I: THE NATIONAL ELECTORAL COUNCIL	11
I. FUNDAMENTAL ISSUES ON ELECTORAL BODIES	11
1. Bases for the formation of national electoral bodies.....	11
2. Legal status and role of the national electoral bodies	13
3. Tasks and powers of national electoral bodies.....	15
II. MODELS OF ELECTORAL MANAGEMENT BODY IN THE WORLD.....	18
1. Three Models of Electoral Management.....	18
2. Differences of the models of electoral management.....	28
3. Some guiding principles for EMBs.....	35
III. THE ELECTORAL COUNCIL IN VIET NAM: CURRENT SITUATION AND SOLUTIONS.....	41
1. Overview on the electoral bodies in Viet Nam	41
2. Current situation in the organization and operation of the Electoral Council.....	60
3. Orientations and proposals to establish a National Electoral Council	65
CHAPTER II: CONSTITUTIONAL PROTECTION BODY.....	76
I. THEORY AND PRACTICE FOR THE ESTABLISHMENT OF THE CONSTITUTIONAL PROTECTION BODY IN VIET NAM	76

1. Theory for the establishment of the constitutional protection agency in Viet Nam..	76
2. Practical bases for the establishment of the professional constitutional protection body in Viet Nam	90
II. EXPERIENCES IN CONSTITUTIONAL PROTECTON BODIES OF SOME COUNTRIES IN THE WORLD	100
1. Constitutional protection in some countries in the world.....	100
2. Some lessons learnt in constitutional protection of countries in the world.....	108
III. RECOMMENDATIONS FOR THE ESTABLISHMENT OF CONSTITUTIONAL PROTECTION BODY MEETHING REQUIREMENTS OF BUILDING THE SOCIALIST STATE RULED BY LAW IN VIET NAM	111
1. Overview on recommendations and proposals related to constitutional protection in researches over the pas time.....	111
2. The professional constitutional protection body in Viet Nam – legal status, nature, functions, tasks, powers, establishment, term of office of the constitutional protection body	113

SECTION 2

RESEARCH REPORT

“INNOVATING THE ORGANIZATION AND OPERATION OF LOCAL GOVERNMENTS”

A. INTRODUCTION.....	123
----------------------	-----

B. RESEARCH RESULTS.....	128
--------------------------	-----

CHAPTER I: THEORETICAL BASES FOR THE ORGANIZATION AND OPERATION OF LOCAL GOVERNMENTS IN OUR COUNTRY	128
---	-----

1. Concepts of local governments	128
--	-----

2. Division of power between central and local governments	138
--	-----

3. Viewpoints of the Party on the organization and operation of local government	150
--	-----

4. Organizational models of local governments of some countries, applicable experience for Vietnam	159
--	-----

CHAPTER II: THE CURRENT SITUATION OF LOCAL GOVERNMENT ORGANIZATION IN OUR COUNTRY	165
---	-----

1. Organization of local governments in our country in different periods since 1946.....	165
--	-----

2. Current situation of administrative decentralization between central and local governments based on social survey in some fields.....	190
--	-----

3. The pilot organization of no people’s councils at some urban, rural districts and wards, experience and lessons	199
--	-----

CHAPTER III: VIEWPOINTS AND SOLUTIONS TO INNOVATING THE ORGANIZATION AND OPERATION OF LOCAL GOVERNMENTS IN ACCORDANCE WITH NEW DEVELOPMENTS.....	212
--	-----

1. Viewpoints on innovating the organizational model of local governments.....	212
2. Solutions for the innovation of local government organization and operation	218
3. Recommendations for amending the 1992 Constitution chapter on “the people’s councils and people’s committees”	222

SECTION 3

RESEARCH REPORT

“FURTHER IMPROVEMENT OF PROVISIONS OF THE DRAFT REVISED 1992 CONSTITUTION ON TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE”

A. INTRODUCTION.....	231
B. RESEARCH RESULTS.....	234
CHAPTER I: ISSUES IN AMENDMENT AND SUPPLEMENT OF THE 1992 CONSTITUTION ON TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE	234
I. ROLE AND FUNCTIONS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE: PROVISIONS SUBJECT TO REVISION	234
1. Role and functions of the National Assembly and its Standing Committee under the 1992 Constitution	234
2. Concerning issues on role and functions of the National Assembly and its Standing Committee in revision and amendment of the 1992 Constitution.....	235
II. TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE – PROVISIONS SUBJECT TO REVISION AND AMENDMENT	239
1. Tasks and powers of the National Assembly and its Standing Committee under the 1992 Constitution	239
2. Concerning issues on tasks and powers of the National Assembly and its Standing Committee in revision and amendment of the 1992 Constitution.....	251
CHAPTER II: FURTHER IMPROVEMENT OF PROVISIONS OF THE DRAFT REVISED 1992 CONSTITUTION ON TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE.....	258
I. ROLE AND FUNCTIONS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE.....	258

1. Proposed changes on role and functions of the National Assembly and its Standing Committee under the draft revised Constitution compared to those under the 1992 Constitution	258
2. Recommendations on further improvement of role and functions of the National Assembly and its Standing Committee under the draft revised Constitution	263
II. TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE.....	267
1. Proposed changes on tasks and powers of the National Assembly and its Standing Committee under the draft revised Constitution compared to those under the 1992 Constitution	267
2. Recommendations on further improvement of tasks and powers of the National Assembly and its Standing Committee under the draft revised Constitution	276
REFERENCES.....	300

SECTION 1

RESEARCH ON

**“REGULATIONS RELATED TO TWO INDEPENDENT INSTITUTIONS:
NATIONAL ELECTORAL COUNCIL AND CONSTITUTIONAL
PROTECTION BODY” SUPPORTING THE AMENDMENT OF THE 1992
CONSTITUTION**

A. INTRODUCTION

The amendment of the 1992 Constitution is in line with the new context and objective requirements of the constitutional-making activities and sustainable development of the nation. Objectives of the amendment of the 1992 Constitution are to timely legalize major guidelines, plans and policies of the Party mentioned in the Political Platform in the transitional period to the socialism (supplemented in 2011) and other documents of the Party so as to strongly affirm the people's will and sovereignty, further develop democracy, solidarity, mobilization of all forces of the State and society for national construction and defense; to construct and make perfect the Viet Nam socialist state ruled by law of the people, by the people and for the people; to respect and ensure human rights, citizen rights; to form and develop a socialist-oriented market economy; maintain and develop the traditional and national culture and customs; develop and encourage education, science, technology and environmental protection.

New issues are put forward in the face of the comprehensive renovation of the country, and active and positive international integration. In this context, the amendment process of the 1992 Constitution has focused on clarifying and supplementing the following contents: continue affirming that people are the highest entity of the state power, and the power belongs to the people including the classes of workers, peasants and intellectuals, under the leadership of the Communist Party of Viet Nam; The people exercise the state power by direct democracy and representative democracy through the National Assembly (NA), People's Council (PC) and other state agencies; The people directly elect their representative bodies, and have the right to dismiss from office those who do not reserve the people's trust, to participate in the management of state and society, implement democracy at grass-root level, and to vote when referendums are held; To develop the national solidarity, mobilize social forces for the national construction and development; The Viet Nam Fatherland Front and social organizations play a vital role in the course of national solidarity and national construction and defense; To represent, protect the people's legitimate rights and interests, and to care for their lives; to take the role of oversight and social criticism. The draft amended Constitution continues to affirm and clarify the legal

status and leading role of the Communist Party of Viet Nam; to fully develop human aspects, respect and protect human rights; to ensure better enforcement of people's rights, obligations; to clearly define responsibilities of the state and society to respect, guarantee and protect human rights and citizen rights. With regard to the organization and operation of the state apparatus, the draft amended Constitution affirms that the NA is the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam. The NA is the only body vested with constitutional and legislative powers. The NA decides on important issues of the nation and exercises the authority of supreme oversight over all State's activities; the President is the Head of State, acting on behalf of the Socialist Republic of Vietnam in domestic and foreign affairs, and assumes command of the People's armed forces and the legal status of Chairman of the Council for National Defense and Security; the Government is the executive body of the National Assembly and is the highest administrative State body, and exercises the executive power; Court exercises judicial rights; the Procuracy exercises the right of public prosecution and oversight of judicial activities; amend and supplement operating principles of the people's court and procuracy in the orientation to the judicial reform, ensuring the independence of judicial agencies and implementing principles of adversary proceedings. In addition, the draft amended Constitution also supplements some independent institutions such as the National Electoral Council, the State Auditor to fully implement the state democracy and rule of law.

Besides existing regulations of the draft amended Constitution, at the 4th session of the NA XIII, through discussion on the draft, many NA deputies mentioned the establishment of the constitutional protection body.

Given its role, functions and tasks, the Institute for Legislative Studies continues to study contents related to the National Electoral Council and the constitutional protection body with UNDP's support through Project "Enhancing Legislative Research and ICT Capacities of the NASC Institute for Legislative Studies". The researches aim to timely provide NA deputies, NA agencies and members of the Constitutional Amendment Commission for examination and discussion on issues related to the constitutional amendment.

2. Necessity of the research

2.1. The National Electoral Council:

Under the current law of Viet Nam, the National Electoral Council is the agency with important legal status and role in elections of deputies to the National Assembly and People's Councils at all levels. The National Electoral Council which is set up by the National Assembly Standing Committee (NASC) includes 15-21 representatives from the Viet Nam Fatherland Front, NASC, Government with the tasks and powers of organizing, leading elections throughout the country, checking and encouraging the implementation of the Law on election of deputies to the NA. The Electoral Councils for elections of deputies to the Provincial People's Councils, provincial cities, districts, and communes have similar tasks and powers.

Though playing an important role in elections of deputies to the NA and PC, the organization and operation of the Electoral Council are limited, particularly when the Electoral Council is not an independent body. Under the current law, members of the National Electoral Council are also NA deputies. Being aware of the important legal status and role of the National Electoral Council, and based on the conclusion of the 5th Conference of the Central Party Committee on "strengthening the direct democracy to the improvement of the electoral system", the Constitutional Amendment Commission has requested to establish the National Electoral Council to constitutionally regulate the legal status of the council in the current electoral law. This will contribute to express the objectiveness to lead and organize the election of deputies to the National Assembly and People's Council.

The establishment of independent and constitutional agencies is a general tendency to meet requirements of the formulation of the socialist state ruled by law so as to increase the control over state power (constitutional review aims to ensure constitutional supremacy; control over corruption and abuse of power; protection of basic human rights). The current constitutional institutions (the National Assembly, the Government, the Supreme People's Court, and the Supreme People's Procuracy) reveal limitations in preventing the abuse of power, controlling corruption and protecting citizen rights. The Party defines that corruption is a nation's serious evil, and that protection of people's legitimate

rights and interests is a permanent objective, the establishment of independent and constitutional agencies is the most effective solution. These institutions which are state agencies or agencies of semi-state nature may belong to or be separated from the legislature, the executive and the judiciary, but relatively independent from state agencies in any cases. Indispensable among these institutions, is the National Electoral Council that leads and organizes elections throughout the country.

The tendency of constitutional amendment of transitional countries and Asia expresses the constitutional regulations on independent agencies controlling powers, and these agencies have shown their vital role in the prevention of power abuse, corruption and violation of human rights in these countries. The national electoral bodies have important legal status and role in ensuring the constitutionality and legality of elections.

2.2. The constitutional protection body:

The Constitution plays a vital role in the political and social life of a nation. The Constitution is the legal document which defines the origins and nature of the state powers, ways to exercise state powers; regulates the most important issues of the nations such as the regimes of politics, economy, culture, society, state apparatus, working principles, authorities of state agencies, and basic rights and obligations of the people, etc. Given these contents, the Constitution is regarded as the national legal foundation, the basic law with supreme status of the nation. Each state which has its own Constitution requires activities to protect its constitution. Particularly to the rule of law state, one of the special characteristics of this state is the constitutional supremacy. This characteristic requires that the Constitution be respected, ensured to be implemented and protected against any acts of violation by agencies and individuals. In other words, all agencies and individuals must respect the Constitution and all documents and social behaviors must be suitable with the Constitution; any documents which are incompatible with the Constitution and acts of constitutional violation will be handled.

Constitutional protection activities aim to implement the following main tasks: to make judgement on the constitutionality of documents issued by authorized state agencies or individuals; to handle disputes on jurisdiction among

state agencies; constitutional interpretation; to settle complaints on violation of people's rights and freedom as provided by the Constitution, etc.

In Viet Nam, right after the establishment of the state, the Constitution was developed and affirmed as the supreme political and legal document. The constitutional protection mechanism was also formed and gradually contributed to ensuring the protection and implementation of Constitutions. Since the amendment of the 1992 Constitution in 2001, the operation of the constitutional protection mechanism has brought about positive results. However, the mechanism also reveals limitations. The directive principles of constitutional protection have not been confirmed strongly and comprehensively, and these principles have not sufficiently reflected the requirement of the socialist state ruled by law; lack of a mechanism to examine and make judgement on the constitutionality of legislative activities; lack of a mechanism to make judgement on violated documents and behaviours to people's rights and freedom as prescribed in the Constitution. The constitutional protection institutions are duplicated, inconsistent, and lack of legal ground to implement constitutional protection activities; lack of a professional constitutional protection body. The constitutional protection authority is assigned to agencies and individuals, but the division is improper, and their responsibilities are unclear. Many agencies have not implemented their assigned functions and tasks correctly. The tools which can be used by these constitutional protection bodies are consultative and suggestive with low legal validity. Elements of constitutional protection mechanism are inconsistent. The mechanism does not run regularly, smoothly or effectively. In fact, there are acts of constitutional violation which are not detected and handled timely.

The main reasons are that theoretical research on constitutional protection and its mechanism in the Viet Nam socialist state ruled by law is not sufficient and comprehensive. Moreover, the material facilities, legal awareness and operation of the constitutional protection mechanism have not met requirements of the Viet Nam socialist state ruled by law.

The Document of the Xth Party Congress reads: *"to define the constitutional protection mechanism and ways to ensure the constitutional and legal supremacy"*, *"to build and improve the mechanism to check and supervise*

the constitutional compatibility of activities and decisions of civil authorities”, “to develop a mechanism to rule on constitutional violations in legislative, executive and judicial activities”. In the Document of the XIth Party Congress, in the work of developing the Viet Nam socialist state ruled by law, the Party defines that: “Study to build, establish institutions, operation to ensure the principles that all state powers are of the people; state powers consistent, divided, coordinated and controlled among the legislature, the executive and the judiciary”; “Study, amend, supplement the 1992 Constitution (amended in 2001) in the new context. Continue to improve the mechanism to check and supervise the constitutional and legal compatibility of activities and decisions by civil authorities ”.

These are the directive principles to continue improving the constitutional protection mechanism. The activity is required to be studied for recommendations and solutions to the improvement of the constitutional protection mechanism in the Viet Nam socialist state ruled by law.

3. Overview of the research

3.1 National Electoral Council

In Viet Nam, there has been no thorough research on the National Electoral Council. This issue could only be mentioned when we plan to regulate the National Electoral Council as the independent and constitutional agency in the current constitutional amendment process.

Issues related to the legal status, role, organisation and operation of the National Electoral Council have not been studied. Moreover, there are few comparative researches on this institution.

3.2 Constitutional protection body

Constitutional protection has been an important political issue which is studied by different agencies and individuals.

– *Reference:*

+ “Constitutional protection mechanism” – Judicial Publisher – 2005, Board of Legislative Affairs, edited by Dang Van Chien.

+ “Constitutional review and issues of the development of constitutional review in Viet Nam” by Prof. Dr. Dao Tri Uc and Asst. Prof and Dr. Nguyen Nhu Phat, (2007) with the support of the Konrad Adenauer Stiftung, Germany.

+ “Constitutional building and protection – national and international experiences” by Prof. Dr. Nguyen Dang Dung, Asst. Prof. Dr. Truong Dac Linh, MA. Nguyen Manh Hung, Luu Duc Quang and MA. Nguyen Van Tri (Viet Nam Education Publisher - 2010).

– *Articles, bulletins and other publications:*

“Functions, tasks and powers of the constitutional protection body”, Legislative Studies Journal, No. 107, October 2007 by Prof. Dr. Tran Ngoc Duong; “Constitutional review and the prospective constitutionalism in Viet Nam” – Legislative Studies Journal No. 4 (141), February 2009 by Bui Ngoc Son; “Constitutional review and legal status of the National Assembly”, Legislative Studies Journal No. 153, August 2009 by Bui Ngoc Son; “Defining conditions for constitutional review in Viet Nam” by Bui Ngoc Son – People’s Court Magazine, No. 4/2008 ; “Constitutional review and issues to ensure citizen rights in the rule of law state” by Nguyen Nhu Phat – State and Law Magazine, No. 5/2009; “Constitutional protection bodies in some countries in the world” - Legislative Studies Journal, No. 14/2008...

Some international researches on constitutional protection: "Legal comparison on constitutional review" - Cambridge University Press Evisit Published (1989) by Allan R. Brewer Carsiás, "Case of Marbury and Madison and the theory of constitutional review"- 12 Michigan Law Review (1914) by E. S. Corwin; "Constitutional review in the modern world" Indianapolis (1971) by M. Cappelletti; "Development and assessment on constitutional review" - 13 Washington Law Review (1938) by C.P. Patterson...

4. Research objectives

- To analyze basic issues on electoral management bodies; constitutional protection bodies;

- To analyze regulations of some countries in the world to draw experiences for Viet Nam;

- To assess the current situation of Viet Nam’s related regulations;

- To propose orientations and solutions to the establishment of the National Electoral Council and the constitutional protection body in Viet Nam.

5. Research methodology

- Methods of analysis, consolidation to assess regulations and application of electoral law, thus to establish the national electoral body and constitutional protection body.

- Comparative analysis of different models to draw experiences for Viet Nam.

6. Scope of the research

- Laws and the implementation of laws related to the two independent institutions;

- Models of the national electoral body and constitutional protection body in the world.

B. RESEARCH RESULTS

CHAPTER I: THE NATIONAL ELECTORAL COUNCIL

I. FUNDAMENTAL ISSUES ON ELECTORAL BODIES

1. Bases for the formation of national electoral bodies

a) To meet requirements on ensuring the right to vote and right to stand for democratic, free and transparent elections

The formation of electoral bodies is attached to the formation and development of the democratic, free and transparent electoral system, where the right to vote and the right to stand for an election are ensured¹. These rights are human rights provided in the Universal Declaration on Human Rights, particularly at Article 21 as follows:

- Everyone has the right to take part in the government of his country, directly or through their elected representatives.

- Everyone has the right of equal access to public service in his country.

- The will of the people shall be the basis of authority of the government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

International convention on civil and political rights 1966 also declares similar basic human rights at Article 25:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely elected representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot,

¹ Dr. Vu Cong Giao, “Electoral management bodies in the world and regulations on these bodies in the 1992 Constitution amended in 2013 of Viet Nam”, in the Institute for public policies and law, *Independent Constitutional institutions: International experiences and prospective in Viet Nam* (Referent book), by Prof. Dr. Dao Tri Uc, Prof. Dr. Nguyen Thi Mo, Dr. Nguyen Van Thuan and Dr. Vu Cong Giao, Ha Noi National University, 2013, p. 104.

guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country”.

Human rights to participate in democratic, free and transparent elections are regulated in the Constitution and laws and ensured to be implemented. The national acknowledgement of the human rights means that countries define their responsibilities to respect, protect and promote these rights. Countries shall promulgate laws; develop effective mechanisms to ensure human rights in elections. Their responsibilities to organize a democratic, free and transparent election are acknowledged by the Inter-Parliamentary Union through recommendations to set up “*a neutral and equal electoral management mechanism*” with the participation of independent observers, political parties, and interest groups so as to ensure the right to vote and the right to stand for an election; and that complaints and denunciations related to the election are handled by an independent electoral body, a court or an Electoral Council.

b) To meet requirements on the profession and complexity of elections

Election is not only the high professional activity but also the activity reflecting political issues related to national interests and the rights and interests of the people, which may affects political forces and powerful individuals in the society. Therefore, it is necessary to have an authorized and capable agency to ensure free and objective elections.

According to Dr. Vu Van Nhiem², the formation of national electoral bodies of countries comes from the following reasons:

First, if the election is not organized honestly and objectively, electoral principles, though comprehensive and advanced, will be diminished and even neutralized;

Second, if the electoral results are expected to be honest and objective, the electoral organization and administration shall abide by regulations of laws;

Third, as election is the empowerment and legalization of power, the electoral activities of countries have recently been affected, dominated even

² Dr. Vu Van Nhiem, *National Electoral body* (Item 3, IX Chapter V), the Drafting Board of the Draft 1992 Constitution, *Some basic issues of Constitutions of countries in the world* (referent book), National Politics Publisher, Ha Noi, 2012, p.292-293.

intervened by political powers. Parties and forces which hold the state powers will have advantages to dominate and intervene for their interests.

Dr. Vu Van Nhiem³ mentioned that it is not easy to organize an equal and honest election, because: 1/ a general election takes place throughout the country. That is, many electoral activities of different stages are concurrently organized and implemented; 2/ an election is the activity to change political power into state power. Therefore, electoral systems need to limit the intervention of ruling party, but it is contradictory to the requirements on the organization and administration of the election. Because without the assistance from the Government and the executive organs, who control almost necessary facilities and human resources, it will be difficult to deal with a huge amount of electoral work; 3/ Unlike other administration activities, the organization and administration of the election are often conducted by unprofessional staff, who work at different agencies, when the election takes place, they are mobilized for electoral work. Many of them participate for the first time, so their hesitation can be seen; 4/ As the electoral results are decisions on whom to hold the state power, there are always plots to change the electoral results. The recent elections of countries in the world are evidences of the situation.

Therefore, requirements on the open and transparent organization of elections ensuring the right to vote and the right to stand for elections are bases for the formation of the equal and neutral national electoral body.

2. Legal status and role of the national electoral bodies

According to the Institute for Democracy and Electoral Assistance (IDEA), though the national electoral body is one of the popular bodies in the world, the organization and administration of multi-party democratic elections has not traditionally attracted a high profile or been newsworthy. The administration of many electoral events largely passed unnoticed, except by those directly affected, even though the losing political parties often challenged the election conduct and results. From around the mid-1980s, this began to change. The conduct of democratic elections started to be seen, and reported, as a central element of transitions from authoritarianism or the resolution of conflicts. Elections came to

³ Dr. Vu Van Nhiem, Ref above, p. 293-294.

be more closely scrutinized by political parties, by the media and by international and domestic election observers.

The democracy, freedom, transparency of the election and the complexity and specialist skills necessary for electoral management require that an institution or institutions be responsible for electoral activities. Such bodies have a variety of shapes and sizes, with a wide range of titles to match, which include ‘Election Commission’, ‘Department of Elections’, ‘Electoral Council’, ‘Election Unit’, or ‘Electoral Board’. The term ‘electoral management body’ (EMB) has been coined as a name to refer to the body or bodies responsible for electoral management whatever wider institutional framework is in place.

According to the ACE Electoral Knowledge Network, an EMB is an organization or body which has the sole purpose of, and is legally responsible for, managing some or all of the elements that are essential for the conduct of elections and of direct democracy instruments – such as referendums, citizens’ initiatives, etc⁴.

According to IDEA, the management tasks of the EMB for elections include: a) determining who is eligible to vote; b) receiving and validating the nominations of electoral participants (for elections, political parties and/or candidates); c) counting the votes; and d) tabulating the votes. These tasks can be implemented by different organizations and agencies, and in this case all these organizations and agencies are called EMBs.

In addition to these essential elements, an EMB may undertake other tasks which assist the conduct of elections and direct democracy instruments, such as the conduct of voter registration, boundary delimitation, voter education and information, media monitoring and electoral dispute resolution. However, these are the non-electoral tasks of the EMB.

Different EMBs may be established for different electoral processes. In Mexico and Poland, the EMB is responsible both for presidential elections and for parliamentary elections; in Lithuania, one EMB deals with presidential elections and a separate one with parliamentary elections. In the United Kingdom (UK), the

⁴ Dr. Vu Cong Giao, ref above, p. 102.

arrangements for the conduct of elections and referendums are totally different from each other.

Some bodies that are not engaged in any of the ‘essential elements’ of elections may be popularly regarded as EMBs due to the breadth of election-related activities which they undertake. An example is the New Zealand Electoral Commission, which is responsible for the registration of political parties, the allocation of broadcasting time and official funds to parties, oversight of party funding and expenditure, and voter education and information. However, such institutions do not qualify as EMBs under the definition of IDEA.

In addition to the division of functional responsibility for different elements of the electoral process, electoral responsibilities may be divided between bodies at different levels. The central-level EMB manages the elections at the central and local level.

3. Tasks and powers of national electoral bodies

According to IDEA, EMB powers and functions are influenced by many factors. The result of the negotiation processes among political forces, within the country or beyond. Other specific political, administrative and geographical influences can include the structure of the state (e.g. unitary or federal, presidential or parliamentary), demographics, the electoral system (e.g. single- or multi-member electoral districts) and the existence of other electoral service providers. The historical interaction of these factors within each country has created a wide variety of models for EMB powers and functions.

The majority of EMBs have powers to make rules, regulations and determinations which are binding on all players in the electoral process - voters, political parties and candidates, the media and observers - provided such rules, regulations and determinations are consistent with both the constitution and the electoral laws.

In South American countries, there are some EMBs whose powers are executive, legislative and judicial. For example, the establishment of powerful EMBs was necessary to curtail the dominance of the executive over the other branches of government under the oligarchic governments of Latin America. In countries such as Costa Rica and Uruguay, EMBs became known as the fourth

branch of government. These EMBs can make regulations, directions and reviews of regulations that are binding on the electoral processes and their decisions cannot be reviewed by any other branch of government. They also have executive powers to call and conduct elections, to certify or nullify electoral results, and to resolve electoral disputes.

Some EMBs have powers which combine executive powers with a greater or lesser degree of adjudicative power. For example, the EMBs in Cameroon, Canada, Lithuania, Papua New Guinea, the Philippines and Romania have powers to investigate and, where appropriate, prosecute violation of electoral laws. In Cambodia and South Africa, the EMB has powers to investigate and resolve disputes of an administrative nature or disputes which do not necessarily fall within the jurisdiction of the courts.

The majority of EMBs have powers which are primarily of an executive nature, related to implementing electoral activities. The Yemeni EMB can initiate secondary legislation, while in many countries – Gambia, Ghana, Mozambique and Thailand, for example – EMBs can make regulations or issue proclamations.

In some countries, these powers extend to determining the election date, within parameters set by law. In India and Pakistan, the EMB has the power to draw up an election schedule and issue the election writ if the legislature has failed to do so while in Yemen the EMB has the power to call a by-election but not a general election.

In some countries like Thailand and Uruguay, the EMB has the power to order re-polling if an election did not proceed in an honest and fair manner as defined in the law. Sub-district level committees can do likewise for individual polling stations, and the Namibian EMB can order a re-poll in the event of violence or an emergency.

However, many EMBs have no influence on when an election is called. For example, in countries such as Mexico and the United States, with presidential constitutions which incorporate the separation of the legislative and executive powers, elections are held on a fixed date. However, in countries with parliamentary systems, the power to call elections may belong either formally or in practice to the leader of the government, who can use it for political advantage.

Particularly in emerging democracies, electoral legal frameworks are being designed to cover all electoral process matters relevant to the delivery of free and fair elections. Tasks and powers of the EMBs include:

- Determining who is eligible to vote;
- Receiving and validating the nominations of electoral participants (for elections, political parties and/or candidates);
- Conducting polling;
- Counting the votes; and
- Totaling the votes.

Other tasks and powers of the EMB may include:

- Making national or regional electoral policies;
- Planning electoral services;
- Training electoral staff;
- Conducting voter information/education and civic education;
- The delimitation of electoral district boundaries;
- The planning and implementation of electoral logistics;
- The identification and registration of voters;
- The development and maintenance of a national electoral register;
- The registration of political parties;
- The regulation of financing of political parties;
- Political party pre-selections or primaries;
- Regulating the conduct of political parties and candidates;
- Regulating the conduct of the media during elections;
- Regulating opinion polls;
- Training political parties' and candidates' poll watchers;
- The accreditation and regulation of the conduct of election observers;

- The announcement and certification of electoral results;
- The adjudication of electoral disputes;
- The review and evaluation of the adequacy of the electoral framework and the EMB's own performance;
- Advising the government and legislature on electoral reform issues; and
- Participating in international electoral assistance services.

II. MODELS OF ELECTORAL MANAGEMENT BODY IN THE WORLD

While there are many variations in detail, EMBs are classified differently depending on the legal-political, social and cultural conditions of each country. According to researches by IDEA, EMB are classified into different types, namely three broad models of electoral management (Independent, Governmental and Mixed Models); permanent and interim EMBs; EMBs in neighboring countries; international transitional EMBs and national electoral body. This chapter will present the models of electoral management under researches of IDEA.

1. Three Models of Electoral Management

a) Independent Model of Electoral Management

The Independent Model of electoral management exists in those countries where elections are organized and managed by an EMB which is institutionally independent and autonomous from the executive branch of the government, and which has and manages its own budget. Under the Independent Model, an EMB is not accountable to a government ministry or department. It may be accountable to the legislature, the judiciary, or the head of state. EMBs under the Independent Model may enjoy varying degrees of financial autonomy and accountability, as well as varying levels of performance accountability. They are composed of members who are outside the executive while in EMB office. Many new and emerging democracies have chosen the Independent Model of electoral management. Examples of EMBs under the Independent Model include Armenia, Australia, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Estonia, Georgia, India, Indonesia, Liberia, Mauritius, Nigeria, Poland, South Africa, Thailand and Uruguay.

In some countries, two bodies are established for the management of elections, both of which are independent from the executive and can be considered as independent EMBs. One of these bodies is likely to have responsibility for policy decisions relating to the electoral process, and the other is responsible for conducting and implementing the electoral process. Examples of this ‘double-independent’ framework under the Independent Model include Jamaica, Romania, Suriname and Vanuatu.

Table 1: Attributes of the Independent Model of Electoral Management

	Essential Attributes	Possible Attributes	What it is not
Institutional arrangement	Institutionally independent from the executive branch of government		Is NOT part of the structure of a department of state and/or local government
Implementation	Exercises full responsibility for implementation	May be a legal entity which can sue and be sued in its own right (e.g. Azerbaijan, Kenya and Lithuania) or not a legal entity (e.g. Botswana and Namibia)	Is NOT above the constitution or law
Accountability	Is subject to good governance constraints	Most usually is formally accountable to the legislature, the judiciary or the head of state. May have varying levels of financial autonomy and accountability. May have financial autonomy	Is NOT formally accountable to the executive branch of government. Is NOT free of policy,

	Essential Attributes	Possible Attributes	What it is not
		through drawing up its own budget and receipt and use of public funds with minimal involvement of the executive branch of government. May have varying levels of performance accountability	financial, and performance accountability and good governance constraints
Powers	Has powers to make policy decisions independently under the legal framework	Usually has powers to develop the electoral regulatory framework independently under the law. More usually has broad overall powers and functions for electoral implementation. May have powers to hire, fire and discipline its own staff. May have power to establish its own procurement and accounting procedures	
Composition	Is composed of members who are outside the executive while in EMB office	Members may be non-aligned 'experts' or politically affiliated	

	Essential Attributes	Possible Attributes	What it is not
Term of office	Members have security of tenure	May have a fixed term of office	Members can NOT be removed/ dismissed arbitrarily by the executive branch
Budget	Has and manages its own budget under the governmental control	May have a separately allocated budget from the legislature. May receive funding from the executive branch or the donor community	Does NOT fall within the budget of any government ministry
Staff	Has autonomy to determine its staff needs, rules and policies	May be able to access personnel from within the public service	Staff members are NOT necessarily public servants

Source: Intertional Institute for Democracy and Electoral Assistance

b) The Governmental Model of Electoral Management

The Governmental Model of electoral management exists in those countries where elections are organized and managed by the executive branch through a ministry (such as the Ministry of the Interior) and/or through local authorities. Where EMBs under the Governmental Model exist at national level, they are led by a minister or civil servant and are answerable to a Cabinet minister. With very few exceptions they have no ‘members’. Their budget falls within a government ministry and/or under local authorities.

Countries whose EMBs fall into this model include Denmark, New Zealand, Singapore, Switzerland, Tunisia, the UK (for elections but not referendums) and the United States. In Sweden, Switzerland, the UK and the United States, elections are implemented by local authorities. In Sweden and Switzerland the central EMB assumes a policy coordinating role.

Table 2: Attributes of the Governmental Model of Electoral Management

	Essential Attributes	Possible Attributes	What it is not
Institutional arrangement	Is located within a department of state and/or local government	May be a department, an agency, or a local authority	Is NOT an institution that is independent of the executive branch of government
Implementation	Implementation is subject to direction by the executive branch of government	Implementation responsibilities may be shared with ministries, departments or local authorities	
Accountability	Is fully accountable for policy, finance, performance and governance to the executive branch of government		
Powers	Powers are limited to implementation	May often share electoral implementation responsibilities with other departments and local governments	Does NOT have independent regulatory powers

	Essential Attributes	Possible Attributes	What it is not
Composition	Is led by a minister or civil servant	With very few exceptions has no members, only a secretariat. Selection of members (if any) and secretariat may be done exclusively by the executive	
Term of office		Usually has no members and therefore no term of office	
Budget	Budget is a component of a government ministry's budget	May receive funding from donor community	Does NOT decide on its own budget
Staff	Is primarily staffed by public servants	May be able to access personnel from outside the public service	Can NOT hire and fire its own staff

Source: Institute for Democracy and Electoral Assistance

c) The Mixed Model of Electoral Management

In the Mixed Model of electoral management, there are usually two component EMBs, and dual structures v exist: a policy, monitoring or supervisory EMB that is independent of the executive branch of government (like an EMB under the Independent Model) and an implementation EMB located within a department of state and/or local government (like an EMB under the Governmental Model).

Under the Mixed Model, elections are organized by the component governmental EMB, with some level of oversight provided by the component independent EMB.

The Mixed Model is used in France, Japan, Spain and many former French colonies, especially in West Africa, for example Mali, Senegal and Togo.

The powers, functions and strength of the component independent EMB in relation to the component governmental EMB vary in different examples of the Mixed Model, and the classification of a particular country as using the Mixed Model is sometimes not very clear. In some cases, the component independent EMB is little more than a formalized observation operation, although this version is dying out, having been abandoned for example in Senegal. In other cases, the component independent EMB has a role to supervise and verify the implementation of electoral events by the component governmental EMB, as in Madagascar, and sometimes also to tabulate and transmit results, as in Congo (Brazzaville) and Togo. In some francophone countries, the Constitutional Council is engaged in the tabulation and declaration of results and can be considered as a component independent EMB within the Mixed Model. In Chad, this applies to referendums only, and not to elections. In Mali, where elections are organized by the Ministry of Territorial Administration, both the Independent National Electoral Commission and the Constitutional Court undertake their own tabulation of results: three component EMBs may therefore be said to exist, one which is governmental and two which are independent.

The relationship between the component EMBs in a Mixed Model is not always clearly defined in legislation or interpreted by stakeholders, and friction can result. In the 1999 elections in Guinea-Conakry (which used the Mixed Model at that time), the majority representatives and the opposition representatives in the component independent EMB had strongly differing approaches to its role to supervise and verify the elections, and its effectiveness was therefore heavily disputed. International IDEA's 2005 survey of electoral management in 214 countries and territories worldwide showed that 55 per cent followed the Independent Model, 26 per cent the Governmental Model and 15 per cent the Mixed Model.

Table 3: Attributes of EMBs under Mixed Model Electoral Management

Country	France		Japan	
Component EMBs	Component Independent EMB	Component Governmental EMB	Component Independent EMB	Component Governmental EMB
Title	Constitutional Council	Ministry of Interior, Bureau of Elections	Central Election Management Council (CEMC)	Ministry of Internal Affairs and Communications – Election Divisions
Composition	Body defined in the constitution with 9 appointed members, 3 each appointed by the President, the National Assembly and the Senate		5 members appointed by the Parliament	
Structure	Term of office 9 years	Permanent	Temporary term of office 3 years	Permanent
Relationship between EMBs	Oversight and some dispute resolution only	Organization and piloting of the electoral process, the major	A secretariat within the ministry gives the CEMC	Implementation of CEMC instructions and decisions and ensuring

		functions of which are the responsibility of the administration at commune level	administrative support; the minutes of the CEMC meetings are available on the ministry's web site	their implementation by highly decentralized EMBs at regional and local level
Powers and functions	Acceptance of nominations in presidential elections. Watching over the regularity of presidential elections and referendums, and declaration of their results. Ruling on disputes over the results of parliamentary elections	Organization and administration of all elections	Exercise of general direction and oversight of the administrative conduct of national elections	Administrative conduct of all aspects of elections
Country	Senegal		Spain	
Component EMBs	Component Independent EMB	Component Governmental EMB	Component Independent EMB	Component Governmental EMB
Title	Autonomous National	Ministry of the Interior-	Central Electoral	Ministry of the Interior-General

	Election Commission	General Directorate of Elections	Board	Directorate of Elections
Composition	12 members sworn in by the Constitutional Council		8 judges of the Supreme Court + 5 experts (professors of political science, law, sociology, etc.) jointly proposed by parties represented in Parliament. Chairman and vice-chairman are elected by Central Electoral Board from among the 8 judges	
Structure	Permanent	Permanent	Permanent. Renewed once every 4 years after each parliamentary election	Permanent
Relationship between EMBs	Independent oversight, review and verification of the electoral	Organization and administration of the entire	Supervision of the entire electoral	Exercise of all electoral implementation functions. Must

	process	electoral process	process	consult with the other component for important decisions
Powers and functions	Independent supervision, review and verification of registration and of the electoral process	Organization and administration of the entire electoral process	Supervision of electoral events. Nomination of candidates. Handling of complaints. Declaration of results. Allocation of seats	Registration of voters. Polling. Counting. Electoral logistics

Source: Institute for Democracy and Electoral Assistance

2. Differences of the models of electoral management

Each model of electoral management has its own attributes on the institutional arrangement, composition, powers, accountability, term of office and implementation⁵. These are the bases to classify models of electoral management, creating special attributes of each model.

Each model of electoral management has its own advantages and disadvantages⁶. However, researches show the advantages of the independent model. They are: better ensuring the independence, objectiveness and impartiality; ensuring the consistency and legality of elections, and promoting cooperative working environment and profession⁷.

⁵ See Chart 1.

⁶ See Table 1, 2, 3, 4, 5 and Chart 1.

⁷ Dr. Vu Cong Giao, ref above, p. 108; See: statistics of countries under independent model as Table 4.

Table 4: Characteristics of the three broad models of electoral management

	Independent Model	Governmental Model	Mixed Model	
			Independent Component	Governmental Component
Institutional arrangement	Is institutionally independent from the executive branch of government	Is located within or under the direction of a department of state and/ or local government	Is institutionally independent from the executive branch of government	Is located within or under the direction of a department of state and/ or local government
Powers	Has powers to develop the electoral regulatory framework independently under the law	Powers are limited to implementation	Often has powers to develop electoral regulatory framework independently under the law. Monitors or supervises those who implement elections	Powers are limited to implementation
Accountability	Does not report to executive branch of government but with very few	Fully accountable to executive branch of government	Does not report to executive branch of government and is formally	Fully accountable to executive branch of government

	Independent Model	Governmental Model	Mixed Model	
			Independent Component	Governmental Component
	exceptions is formally accountable to the legislature, judiciary or head of state		accountable to the legislature, the judiciary, or the head of state	
Composition	Is composed of members who are outside the executive branch while in EMB office	Is led by a minister or public servant. With very few exceptions has no ‘members’, only a secretariat	Is composed of members who are outside the executive branch while in EMB office	Is led by a minister or public servant. Has no ‘members’, only a secretariat
Term of office	Offers security of tenure, but not necessarily fixed term of office	Usually no members, therefore N/A. Secretariat staff are civil servants whose tenure is not secured	Offers security of tenure, but not necessarily fixed term of office	Term of office is not secured
Budget	Has and manages its own budget independently of day-to-day governmental control	Budget is a component of a government ministry’s budget or local authority budget	Has a separately allocated budget	Budget is a component of a government ministry’s budget or local authority budget
Rate and distribution	- 55% of (118 out of /214	- 26% (56 out of 214	- 15% (32 out of 214 countries and territories).	

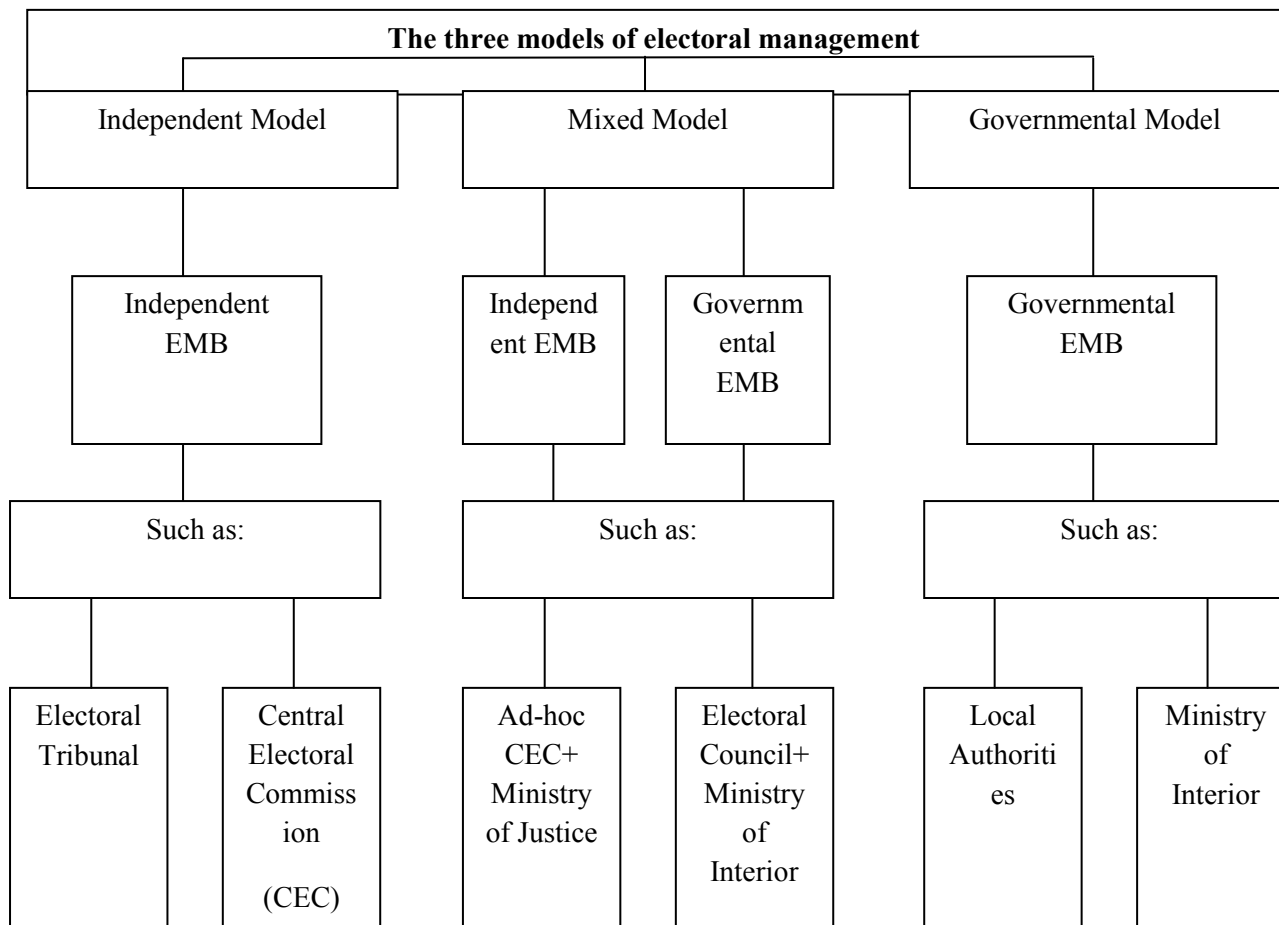
	Independent Model	Governmental Model	Mixed Model	
			Independent Component	Governmental Component
	<p>countries and territories).</p> <ul style="list-style-type: none"> - Popular in new emerging democracies like Armenia, Australia, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Estonia, Georgia, India, Indonesia, Liberia, Mauritius, Nigeria, Poland, South Africa, Thailand and Uruguay 	<p>countries and territories).</p> <ul style="list-style-type: none"> - Apply in developed countries like Denmark, New Zealand, Singapore, Switzerland, Tunisia, the UK 	<ul style="list-style-type: none"> - Apply in Japan, Spain, France and French speaking countries like Mali, Senegal and Togo. 	
Advantages	<ul style="list-style-type: none"> - Better ensures the independence, objectiveness and impartiality. - Ensures the consistency and legality of the election - Provides a 	<ul style="list-style-type: none"> - Has available a pool of experienced staff - Is well placed to cooperate with other government departments in providing electoral 	<p>Has the advantages of the Independent and Governmental Models.</p>	

	Independent Model	Governmental Model	Mixed Model	
			Independent Component	Governmental Component
	conducive environment for the development of electoral corporate identity and staff professionalism	services - Has cost advantages through resource synergies within and between government departments - Has a power base and influence within government		
Disadvantages	<ul style="list-style-type: none"> - May be isolated from political and electoral framework decision makers - May not have sufficient political influence to acquire sufficient or timely funding - Member turnover may reduce 	<ul style="list-style-type: none"> - Credibility may be compromised by perceptions of being aligned with the current government or subject to political influence - Is subject to internal decisions of government departments or 	Has the disadvantages of the Independent and Governmental Models.	

	Independent Model	Governmental Model	Mixed Model	
			Independent Component	Governmental Component
	<p>corporate experience and institutional memory</p> <ul style="list-style-type: none"> - May not have the skills or experience to deal with bureaucratic and corporate environments - May be higher-cost, as institutional independence makes it difficult to co-opt low-cost or no-cost governmental structures to assist in electoral implementation 	<p>local authorities on funding allocations and electoral policies</p> <ul style="list-style-type: none"> - May not have staff with the appropriate electoral skills • Bureaucratic style may not be appropriate to electoral management needs - Electoral administration may be fragmented among a number of arms of the executive branch of government with differing agendas 		

Source: Institute for Democracy and Electoral Assistance

Figure 1: The three models of electoral management



Source: Institute for Democracy and Electoral Assistance

The electoral management model used by a country is an important factor in EMB behavior, but far from being the only one: it is simplistic to think of three different behavior patterns. EMB behavior also depends on the electoral framework, political and social expectations, and the cultural environment within which each EMB exists. Influences include the political commitment to allow an EMB to act freely and impartially, the range of powers and functions given to an EMB, the qualifications of members or staff for appointment and their terms of office, the way in which members and/or staff are selected and appointed, the oversight and accountability framework, and whether the EMB has a legal personality and is thus able to sue and be sued. For example, an independent EMB comprising representatives of competing political parties and an independent EMB comprising non-aligned academics, or others free of political association, both follow the Independent Model but are likely to operate differently. Similarly, an EMB under the Governmental Model whose sponsoring department controls local electoral management offices is likely to behave differently from one that is dependent on numerous local authorities to implement electoral activities.

However, there are some general characteristics, advantages and disadvantages of the three Models and their EMBs, researches show the basic principles for the organization and operation of the EMBs, laying ground for the establishment of proper EMBs.

3. Some guiding principles for EMBs

No matter which model is used, every EMB should be certain that it can ensure the legitimacy and credibility of the processes for which it is responsible. This can be done if electoral management is founded on fundamental guiding principles.

According to IDEA, guiding principles for EMBs include:

- Independence;
- Impartiality;
- Integrity;
- Transparency;
- Efficiency;

- Professionalism;
- Service-mindedness

a) Independence

EMB independence is one of the most hotly debated issues in election administration, yet there is still no clear, accepted view on what EMB independence really means. Partly this is because the term ‘independent’ embraces two different concepts – that of structural independence from the government (the ‘Independent Model’ of electoral management); and that of the ‘fearless independence’ expected of all EMBs, no matter which model is used, in that they do not bend to governmental, political or other partisan influences on their decisions. The two are separate issues, one being formal and the other normative; nonetheless, they are seen as being linked in that the Independent Model of electoral management is regarded in many parts of the world as the model most likely to ensure an EMB’s independence of decision and action.

Institutional or ‘structural’ independence can only be found in the constitution or the law. The simplest way to promote independence of decision and action in an EMB is to create a legal framework that embeds EMB independence, as provided in the constitutions and principal EMB laws of many countries, as in Mexico and Uruguay. While this is always feasible with the Independent Model of electoral management and may be feasible when the Mixed Model is used, it may be more difficult to embed, apart from strict requirements for impartiality of action, under the Governmental Model, given the integration of the EMB(s) into ministries or local governments.

For both Independent and Mixed Model electoral management, both a culture of independence and the commitment of EMB members to independent decision making are more important than the formal ‘structural’ independence. A strong leadership is important for maintaining an EMB’s independence of action. For example, a senior member of the judiciary may fill the position of chair of an independent EMB within the Independent or Mixed Model. Such a link to the judiciary may make undue interference by the government or opposition parties in EMB operations less likely. However, it would not be appropriate where the judiciary is not regarded as impartial or free of corruption, or does not have enough

members for it to be possible to avoid conflicts of interest in election-related court cases. Countries which use judges or former judges as EMB chairs include Australia, Brazil, Costa Rica and Zambia.

Alternatively, the appointment of a respected public figure, a person who is known for political non-alignment, may advance the independence of the EMB. Some countries, like Burkina Faso and Mozambique, provide for the appointment of a civil society leader as the EMB chair. In governmental EMBs the appointment as executive head of a public servant who is known for his or her integrity and unwillingness to be politically directed, as has been the case in Northern Ireland, can have a similar effect.

b) Impartiality

To establish the integrity and credibility of electoral processes and promote the widespread acceptance of electoral results, it is critical that an EMB not only conducts electoral events in a fearlessly independent manner, but that it is impartial in its actions. Without impartiality of electoral management and independence of action, the integrity of the election is likely to fail, and it can be difficult to instill widespread belief in the credibility of electoral processes, especially among the losers.

Every EMB is expected to manage elections impartially. Irrespective of the model under which the EMB exists, its source of accountability, management control or funding, it should treat all election participants equally, fairly and even-handedly, without giving advantage to any political tendency or interest group.

In theory, an independent EMB made up of non-aligned 'expert' appointees might be best able to achieve this. Other independent EMBs, for example where nominees of the contesting political parties are appointed to the EMB, may have a more difficult time establishing their credentials with the public as completely impartial bodies. Except in those countries that have a tradition of a non-aligned civil service, the decisions and activities of EMBs under the Governmental or Mixed Models may potentially be publicly regarded as likely to favor the incumbent government.

On the other hand, governmental EMBs in some countries which use the Mixed Model – such as Spain – and some countries which use the Governmental

Model – such as New Zealand and Sweden – are generally regarded as impartial. Conversely, some EMBs which follow the Independent Model may be independent in name but not in nature. Impartiality may be imposed by the legal framework or EMB structure, but it has to be put into practice through the EMB's behavior and attitudes to its stakeholders. Impartiality is a state of mind more than a statement in law, although this state of mind can be encouraged by effective external review of EMB decisions and an EMB code of conduct with strong sanctions.

It is important that EMBs be seen to be impartial by the general public. The best way to achieve this is through transparent actions backed by vigorous marketing and public relations efforts.

c) Integrity

The EMB is the primary guarantor of the integrity and purity of the electoral process and EMB members have the direct responsibility for ensuring this. Integrity may be easier to maintain if the EMB has both full independence of action and full control of all essential electoral processes. Where other bodies have electoral functions, EMBs need to be empowered to monitor their activities closely to ensure that they meet the highest integrity standards.

Electoral law or EMB regulations benefit from incorporating clear powers for the EMB to deal with electoral officials who threaten electoral integrity by acting to benefit political interests or who are corrupt. Ignoring such problems can create larger public issues of integrity and credibility than the public use of disciplinary powers will. To the extent possible, it is in the EMB's interests to ensure that breaches of the electoral laws, rules and codes of conduct are followed by appropriate sanction.

d) Transparency

Transparency in operational and financial management lays out for public scrutiny the decisions and reasoning of the EMB. Transparency is a basic good practice for all EMB activities. It can assist an EMB to combat perceptions of and identify actual financial or electoral fraud, lack of competence or favoritism towards particular political tendencies, and can enhance the EMB's credibility.

Electoral transparency may be backed by electoral law, as exemplified by the requirement that the EMB inform the public of its activities, as in Indonesia. It may be a practice required by the EMB's code of conduct, or may be adopted as an EMB policy, an example of which is the frequent media briefings and releases, and stakeholder consultations undertaken by the Liberian EMB for the 2005 elections. The absence of transparency in electoral processes invariably leads to the suspicion that fraudulent activities are taking place. For example, where observers and the public are unable to access progressive vote count and aggregation data, and there are significant delays in announcing and validating electoral results – as in Belarus and Ukraine in 2004, and in Ethiopia in 2005 – then the credibility of the election suffers.

e) Efficiency

Governments and the public expect that funds for elections will be used wisely and services delivered efficiently. In the face of expanding and ever more expensive technological solutions, and demands for increased effort in high-cost areas such as voter education and information, EMBs have to be careful that their programmes sustainably serve electoral efficiency, as well as integrity and modernity.

A successful EMB is one that has displayed integrity, competence and efficiency. These qualities help to generate public and political party confidence in election processes. The legal framework can assist by defining efficient standards for electoral and financial management. However, sometimes members of an EMB may be unfamiliar with electoral practices and procedures; at other times they may be unused to dealing with contracting for equipment and materials in a cut-throat corporate environment. The resulting inefficiency in election organization may be confused with corrupt and fraudulent behavior, leading to more serious challenges to the EMB's credibility.

g) Professionalism

There are a number of elements of professionalism in electoral management. Meticulous and accurate implementation of electoral procedures, and suitable skilled staff, are both key elements for the delivery of credible elections. EMBs need to ensure that all election officials, whether core staff or temporary

workers, are well trained and acquainted with the necessary skills to apply high professional standards in the implementation of their technical work.

Professional training prompts public trust that the entire process is ‘in good hands’. However, while a continuous training and skill development programme is an essential part of creating and maintaining a professional electoral management body, professionalism depends just as much on the attitude of every member and secretariat staff person. A personal commitment by each individual in an electoral management body to equity, accuracy, diligence and service in all they do, and to self-improvement, is necessary to maintain professionalism in electoral management.

Visible professionalism in an electoral management body also gives political parties, civil society, voters, donors, the media and other stakeholders the confidence that electoral managers are capable of undertaking their tasks effectively. A lack of visible professionalism in electoral management, on the other hand, will lead to public suspicions of inaccurate and perhaps fraudulent activity, and a lack of trust. It will make it easier for complaints from election losers to find public support, whether the complaint is valid or not.

h) Service-mindedness

EMBs do not only have a responsibility to provide service to their stakeholders – it is the major reason for their existence. Developing and publicizing service delivery standards for all their activities provides both internal motivators for EMB members and staff to provide high quality service and external yardsticks for stakeholders to assess the EMB’s performance. Some basic service standards are often included in the electoral legal framework, as in Canada: these include time-based standards such as deadlines for announcing electoral results, compiling the electoral registers, distributing voters’ identification (ID) cards, or distributing information on voting locations.

Further useful service delivery standards can be adopted by the EMB itself as part of its procedures for each electoral process. These may be time-based service standards such as the average, maximum and minimum times voters spend queuing to receive ballot papers, the time within which an enquiry from a member of the public will be answered, or the average time taken to process voter

registration data for an elector. They may be quality-based standards such as the percentage of electors being refused a vote due to errors on the electoral register; the proportion of materials missing or not delivered on time to polling stations; the proportion of polling stations that did not open on time on election day; or the accuracy and timely availability of preliminary voting results.

As well as such hard facts, stakeholder perceptions of EMB service performance are critical in influencing public judgments of the integrity and the effectiveness of the EMB. Post-election evaluations are a good way to review stakeholder perceptions of EMB service delivery.

III. THE ELECTORAL COUNCIL IN VIET NAM: CURRENT SITUATION AND SOLUTIONS

1. Overview on the electoral bodies in Viet Nam

a) System of electoral bodies

The Constitution and laws of Viet Nam do not regulate the establishment of professional electoral body, but the establishment of ad-hoc electoral bodies at central and local level. These electoral bodies are organised to serve each election and dissolved at the end of the election.

Under Article 1 and 2 of the Law amending and supplementing a number of articles of the Law on Election of Deputies to the NA, and Law on the Election of Deputies to the People's Council 2010, the electoral bodies are regulated as follows:

- To the election of deputies to the NA, the electoral bodies include (i) Electoral Council at central level; (ii) Electoral committee of NA and PC deputies at provincial level; (iii) Electoral board of the constituency; (iv) Electoral group at the casting area.

- To the election of deputies to the PC at all level, the electoral bodies include: (i) Electoral Council at central level; (ii) Electoral committee of NA and PC deputies at provincial level, Electoral committee of PC deputies at district level; Electoral committee of PC deputies at commune level; (iii) Electoral board of PC deputies at provincial level, Electoral board of PC deputies at district level,

Electoral board of PC deputies at commune level; (iv) Electoral group at casting areas.

Compared to earlier, the new law has provided only the organisation of the Electoral Council at central level for both NA and PC deputies (abolishment of the electoral council at local levels). In addition, the Provincial Electoral Council is now reformed as the Provincial Electoral Council of NA and PC deputies. The change comes from the fact that the election of deputies to the NA and PC is organised at different time. However, under Resolution No. 1018 NQ/UBTVQH12 dated 21/01/2011 of the NASC, the election of deputies to the NA and PC at all levels for the term of 2011-2016 was concurrently organised. This is the first time that such election took place.

Table 5: Electoral groups in Viet Nam

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
Electoral Council at central level	NASC	15-21 people, including Chairperson, Vicechairpersons, Secretary General and members who are representatives of the NASC, Government, Central Committee of the Viet Nam Fatherland Front and other concerned agencies	105 before the election day	<ul style="list-style-type: none"> - To lead and direct the organization of the election in the whole country; to supervise and urge the implementation of the election law; - To direct election information, propaganda and electioneering work; the maintenance of security and social order and safety during the election; - To receive and consider the personal records of National Assembly candidates nominated by political, socio-political and social organizations, people's armed forces and state agencies at the central level; to forward the summarized biographies of the candidates to the Standing Board of the Vietnam Fatherland Front Central Committee; - To define the forms of voter cards and ballot papers for the election of NA and PC deputies; - To draw up and publish lists of National Assembly candidates for all constituencies throughout the country; - To settle complaints and denunciations about the election

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
				<p>work, the election of deputies to the National Assembly, and about the returns of the election of deputies to the National Assembly;</p> <ul style="list-style-type: none"> - To receive and check the reports confirming election returns which are sent by the provincial-level Committees for Election of Deputies to the National Assembly and Deputies to the People's Councils and by the Electoral boards; and prepare a summary report on the national election of deputies to the National Assembly; - To decide upon election reruns or additional elections or to cancel the returns of the election of deputies to the National Assembly in the constituencies; - To make public the returns of the election of deputies to the National Assembly in the whole country; - To issue certificates to the elected National Assembly deputies; - To submit to the National Assembly Standing Committee and the National Assembly of the new tenure the summary

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
				report on the national election of deputies to the National Assembly, records and documents related to the election ⁸ .
Electoral committee of NA and PC deputies	People's Committees at provincial/district/commune level decide the establishment (upon agreement with the Standing Board of the People's Council and	21-31 people including Chairperson, Vicechairpersons, Secretary General and members who are representatives of the Standing Board of the People's Council, People's Committee, Committee of the	95 before the election day	<ul style="list-style-type: none"> - To direct the preparation and organization of the election of deputies to the National Assembly in the constituencies; to supervise and urge the implementation of the law on the election of deputies to the National Assembly by the Electoral boards and Election Teams; - To direct election information, propaganda and electioneering work in the locality; - To direct the maintenance of security and social order and safety for the election in the locality; - To receive and consider the personal records of National Assembly candidates nominated by political, socio-political and social organizations, the people's armed forces and state agencies in the locality and of self-nominated

⁸ Clause 3, Article 1 and 2 of the Law amending and supplementing a number of articles of the Law on Election of Deputies to the National Assembly and the Law on Election of Deputies to the People's Councils 2010.

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
	the Standing Board of the Fatherland Front at the same level)	Fatherland Front and concerned agencies at the same level		<p>candidates for the National Assembly election; to send the list and summarized biographies of the nominated and self-nominated National Assembly candidates to the Standing Board of the Fatherland Front Committee of the province or centrally run city;</p> <ul style="list-style-type: none"> - To receive the documents and ballot papers for the election of deputies to the National Assembly from the provincial-level People's Committee and distribute them to the Electoral boards at least twenty-five days before the election day; - To draw up the list of National Assembly candidates for each constituency and report it to the Electoral Council; - To direct and supervise the drawing up and posting of the voter list; - To settle complaints and denunciations about the work of the Electoral boards and Election Teams; about the election forwarded by the Electoral boards and the Election Teams;

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
				<p>and about the National Assembly candidates;</p> <ul style="list-style-type: none"> - - To receive and check the reports confirming the returns of the election of deputies to the National Assembly from the electoral boards; make a report confirming the returns of the election of deputies to the National Assembly in the locality; - To make public the returns of the election of deputies to the National Assembly in the locality; - To report on the organization and process of the election of deputies to the National Assembly according to the regulations of the Electoral Council; - To forward the records and reports confirming the returns of the election of deputies to the National Assembly to the Electoral Council; - To hold election reruns or additional elections of deputies to the National Assembly under decisions of the Electoral Council".⁹

⁹ Clause 4 Article 1 and 2 the Law amending and supplementing a number of articles of the Law on Election of Deputies to the National Assembly and the Law on Election of Deputies to the People's Councils 2010.

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
Electoral committee of PC deputies at district level		11-15 people with district level, 9-11 with commune level, including Chairperson, Vicechairpersons, Secretary General and members who are representatives of the Standing Board of the People's Council, People's Committee, Comxmittee of the Fatherland Front and concerned agencies at the		Similar to the tasks and powers of the Electoral committee of Deputies to the People's Council at provincial lelvel (as provided at clause 4, Article 2 of the Law amending and supplementing a number of articles of the Law on Election of Deputies to the National Assembly and the Law on Election of Deputies to the People's Councils 2010)
Electoral committee of PC deputies at commune level				

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
		same level		
Electoral board of NA deputies in election units	People's Committee at province/district/commune decide the establishment (upon agreement with the Standing Board of the People's Council and	9-15 people including Chairperson, Vicechairpersons, Secretary and members who are representatives of the Standing Board of the People's Council, People's Committee, Committee of the Fatherland Front and concerned agencies at the	60 days before the election day	<ul style="list-style-type: none"> - To examine and urge the implementation of law provisions on election by the Election Teams in the election units; - To examine and urge the making and posting-up of lists of voters and the posting-up of lists of candidates in the Election Teams in the election units; - To examine and urge the arrangement of the polling rooms and the election work in the polling rooms; - To receive documents and ballots from the Electoral Councils for distribution to the Election Teams in the election units; - To settle the election work-related complaints and denunciations by the Electoral groups as well as election-related complaints, denunciations and petitions sent to by the Election Teams; - To receive, synthesize and examine vote-counting records

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
	Standing Board of the Fatherland Front at the same level)	same level.		sent by the Election Teams; to make records on determination of the election returns in the election units; - To transfer the records certifying the election returns as well as election-related dossiers and documents to the Provincial People’s Committee; - To organize additional elections or re-elections under decisions of the Electoral Councils. ¹⁰
Electoral board of Provincial People’s Council deputies in election units		11-13 including head, deputy-heads and members who are representatives of state agencies, political-social organisations, social organisations at the province	45 days before the election day	
Electoral board of District People’s		9-11 people including head, deputy-heads and members who are		

¹⁰ Clause 2, Article 17 of the Law on Election of Deputies to the People's Council 2003

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
Council deputies in election units		representatives of state agencies, political-social organisations, social organisations at the district		
Electoral board of Commune People's Council deputies in election units		7-9 people including head, deputy-heads and members who are representatives of state agencies, political-social organisations, social organisations at		

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
		the commune		
Electoral group¹¹	People's Committee at commune level decides the establishment (upon agreement with the Standing	11-21 people including head, deputy-heads and members who are representatives of state agencies, political-social organisations,	35 days before the election day	<ul style="list-style-type: none"> - To take charge of the election in the electorate; - To establish polling stations and ready ballot boxes; - To receive the documents and ballot papers from the Electoral board; to distribute voters cards and ballot papers stamped by the Election Team to voters; - To regularly inform voters of the election day, polling venues and polling time within ten days before the election day;

¹¹ Under clause 6, Article 1 of the the Law amending and supplementing a number of articles of the Law on Election of Deputies to the National Assembly and the Law on Election of Deputies to the People's Councils 2010, in localities without administrative units being communes, wards and townships, the People's Committee of the rural district, urban district, town or provincial city shall, after consulting the Standing Board of the People's Council and the Standing Board of the Fatherland Front Committee of the same level, decide to establish in each electorate an Election Team composed of between eleven to twenty-one persons including me Head, Deputy Heads and secretary and other members who are representatives of state agencies, socio-political organizations, social organizations and voters in the locality. A people's armed forces unit shall establish in each of its electorates, an Election Team composed of between five and nine persons, including the Head, Deputy Heads, and secretary and other members who are representatives of me unit's command and soldiers. In case a People's Armed Force unit and the locality share an electorate, the People's Committee of the commune, ward or township shall, after consulting the Standing Board of the People's Council and the Standing Board of the Fatherland Front Committee of the same level and the command of the people's armed force unit, decide to form an Election Team composed of between eleven and twenty-one persons, including the Head, Deputy Heads and secretary and members who are representatives of state agencies, socio-political organizations, social organizations and voters in the locality together with representatives of the unit's command and soldiers.

Name of organizations	Authority to establish	Number, composition	Time limit for the establishment	Tasks, powers
	Board of the People's Council and Standing Board of the Fatherland Front at the same level)	social organisations, and voters at the locality		<ul style="list-style-type: none"> - To ensure strict compliance with regulations at the polling stations; - To settle complaints and denunciations about electoral work under its charge; - To count the votes and produce a report on the vote count results for sending to the Electoral board; - To send the report on the vote count results and all the votes to the commune, ward or township People's Committee; - To report on the organization and election process according to the regulations of the higher level organizations in charge of the election; - To hold election reruns or additional elections.

In addition, some other agencies, organisations such as the NASC, Government, local governments and the Viet Nam Fatherland Front coordinate with the electoral bodies as follows:

- *The National Assembly Standing Committee* is the permanent agency of the NA, which is entitled to announce and chair the election of deputies to the NA; supervise the election, ensure that the election takes place democratically and as provided by laws.

The tasks and powers of the NASC in the election of deputies to the NA are regulated as follows:

- ✓ To set up the Electoral Council;
- ✓ To fix and announce the election day and chair the election of deputies to the NA;
- ✓ To project the structure and composition of the NA deputies; the number of to be-elected deputies of political organisations, socio-political organisations, social organisations, people's armed forces, central and local state bodies;
- ✓ To project the number of deputies to be women; to adjust the structure, the numbers of deputies of agencies, organisations and units at the central and local levels to be elected;
- ✓ To adjust for the first and second time of the structure, composition, and number of people from agencies, organisations and units at central and local level to be elected;
- ✓ To fix and announce the number of constituencies, the list of constituencies and the number of National Assembly deputies to be elected at constituency;
- ✓ To decide and announce the additional election of National Assembly deputies and the date of additional election; to form the Committee for additional election of National Assembly deputies; to coordinate with the Presidium of the Central Committee of the Viet Nam Fatherland Front in specifying the consultations and nomination of National Assembly candidates for additional election;

✓ To examine reports of the Electoral Council on the preparations for, the organisation and results of elections of National Assembly deputies; to inspect and supervise the elections in localities;

✓ To consider complaints and denunciations about elections of National Assembly deputies according to law.

The National Assembly Standing Committee shall direct the Board on Deputies' Affairs and concerned agencies and organisations to assist the National Assembly Standing Committee in performing the tasks and powers as prescribed.

- *The Government* directs the election as provisions of law (Article 5 Law on the Election of Deputies to the NA). Based on the leadership of the NASC, the Electoral Council and Government, *local governments at different levels* organise the election according to law.

- *Viet Nam Fatherland Front* organises the consultation to select and introduce candidates to the election of deputies to the NA; and supervises the election.

Some comments:

- Under regulations of the electoral law, electoral bodies from the central to local level shall include the Electoral Council at central level, electoral committees at localities, electoral boards at constituencies and electoral groups at voting areas. These agencies have the similar tasks and powers as the electoral bodies of other countries such as to rule on the voters' eligibility; receive and announce the list of candidates, organise the voting, and vote counting;

- Of these agencies, the Electoral Council at central level is the most powerful, which organises and manages the election of deputies to the NA and PC at all levels consistently. Under regulations of the electoral law, the Electoral Council at central level leads, directs, checks, supervises the implementation of electoral law throughout the country.

- Other agencies, organisations like the NASC, Government, local governments and Fatherland Front, though being not the managing agencies of the election, take an important role in coordinating with electoral bodies to organise

and manage elections in Viet Nam. Of these agencies, the NASC and Viet Nam Fatherland Front have particular role in elections of Viet Nam.

- Agencies which manage elections in Viet Nam are organised differently with those of the independent or mixed system. Under regulations of the electoral law, the Electoral Council at central level is established by the NASC and includes members from different organisations and agencies (including representative of the Government) and is accountable to report to the NASC. Meanwhile, electoral bodies at localities are established by the People's Committees (executive branch) upon agreement with the Standing Board of the People's Council and Standing Board of the Fatherland Front at the same level (including representatives from different organisations and agencies).

b) Legal status and role of the Electoral Council

No later than one hundred and five days before the election day, the National Assembly Standing Committee shall set up an Electoral Council composed of between fifteen and twenty one persons, including the chairman, vice-chairmen, secretary general and members being representatives of the National Assembly Standing Committee, the Government, the Central Committee of the Viet Nam Fatherland Front, and a number of concerned agencies and organisations.

The Electoral Council has the following tasks and powers:

- To direct the organisation of the election in the whole country; supervise and urge the implementation of the Law on the Election of Deputies to National Assembly;

- To direct election information, propaganda and electoral work; the work of maintaining security, social order and safety during the election;

- To receive and consider the files of the National Assembly candidates nominated by the political, socio-political and social organisations, the people's armed forces and the State agencies at the central level; forward the summarised biographies of the candidates to the Standing Board of the Central Committee of the Viet Nam Fatherland Front;

- To define the forms of the voter's cards and ballots for the election of National Assembly and People's Council deputies;

- To draw up and produce public lists of National Assembly candidates for all constituencies throughout the country;

- To consider and settle complaints and denunciations about the work of the Electoral committees, Electoral boards and Election Teams; consider and settle complaints and denunciations about the election, submitted by the Electoral committees or the Electoral boards; consider and settle complaints and denunciations about the candidates; consider and settle complaints about the election returns;

- To receive and check the reports on election returns which are sent by the Electoral committees and Electoral boards; produce a summary report on the national election;

- To consider and decide upon election reruns or additional elections or to disregard the election returns in the constituencies;

- To make public the election returns in the whole country;

- To issue certificates to the elected candidates;

- To submit to the National Assembly Standing Committee and the new

National Assembly the report summarising the national electoral result, records

and documents relating to the election.

From the regulations of the Law on the Election of Deputies to the NA, it can be seen that the Electoral Council is the agency which holds some characteristics of the independent model, because:

- The Electoral Council is independent from the Government with its name as the Electoral Council at central level.

- The Electoral Council executes many powers in the organisation and administration of the election.

- The Electoral Council does not report to the Government but to the NASC.

- It includes its own members.

However, compared to other systems, the Electoral Council in Viet Nam has its own peculiarities:

- The Electoral Council does not have all powers in organisation and management of the election. Such powers are shared with the NASC (the agency which is entitled to announce and chair the election of deputies to the NA; supervise the election and ensure that the election takes place democratically provided by law);

- The Electoral Council is not entitled to develop a regulation on election based on the electoral law;

- The Electoral Council is accountable to report to the NASC.

- The election council is not established on the term/tenure basis, but it is the ad-hoc agency, which is established to serve the election and dissolved upon completion of its work;

- The Electoral Council does not have an independent source of budget and self-determines that budget.

Table 6: Electoral bodies under the independent system of some countries and the Electoral Council of Viet Nam

	Electoral bodies under the independent system of countries	The Electoral Council in Viet Nam
Institutional arrangement	Independent from the Government, normally called electoral committee (central and national).	Independent from the Government and called Electoral Council and central level
Powers	Fully authorized to organize and manage the election, and entitled to develop election regulation based on election law.	Authorized to organize and manage the election (partly shared with the NASC), but not entitled to develop election regulation based on election law.

	Electoral bodies under the independent system of countries	The Electoral Council in Viet Nam
Accountability	Do not have to report to the executive branch, but are answerable to this branch or the state leader in some cases.	Does not have to report to the executive branch, but to the legislative branch (the NASC).
Composition	Often organized in council (including members), of whom there are no representatives from the executive branch.	Organized in council (including members), including representatives of the executive branch (Government)
Term of office	Do or do not regulate term; regulation on re-election	Does not regulate term, but an interim agency, which is organized to serve the election.
Budget	Independent budget and manage the budget; not dominated by the Government.	Budget comes from the state budget, but it is not independent, self-managed and dominated by the Government.
Rates and distribution	<ul style="list-style-type: none"> - 55% (of 118/214 countries and territories). - Popular in new democracy like Armenia, Australia, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Estonia, Georgia, India, Indonesia, Liberia, Mauritius, Nigeria, Poland, South Africa, Thailand and Uruguay 	<ul style="list-style-type: none"> - Mainly applied by socialist countries.

The aforementioned analysis reveals that though there exist some characteristics of an independent electoral body, the Electoral Council in Viet Nam lacks of the relative independence (particularly with the NASC) with its limited authority to develop election regulations. The electoral council is shared with the

NASC and not established for regular activities. It lacks independent budget and a mechanism of administration.

2. Current situation in the organization and operation of the Electoral Council

a) Current situation on the organization of the Electoral Council

- Establishment

As provided by law, the Electoral Council is set up by the NASC and accountable to report to the NASC. The advantage of the establishment is to ensure the independence of the Electoral Council from the executive branch. However, the electoral council lacks the independence from the NASC as the NASC is fully entitled to rule on the members, reporting mechanism of the Electoral Council.

- Composition

The Electoral Council includes representatives of the National Assembly Standing Committee, the Government, the Central Committee of the Viet Nam Fatherland Front, and a number of concerned agencies and organizations.

In fact, members of the Electoral Council are not only representatives of the state agencies but also of the fatherland front and its members at the central level. Members of the Electoral Council are leaders of NASC agencies, Government, Central Committee of Viet Nam Fatherland Front and political-social organizations. The NA Chairman is the Chairman of the Electoral Council¹².

Representation of different agencies (state agencies, political-social organizations, etc) in the Electoral Council obtains the advantages, avoiding the dependence of the Electoral Council on a state agency. 7 out of 21 representatives from the political-social organizations in the Electoral Council of the NA legislature XII and XIII enable the independence of the Electoral Council from state agencies.

However, the Electoral Council lacks experts and neutral representatives from social organizations. This may diminish the independence of the Electoral Council with political and state agencies.

¹² The Electoral Council of the election of deputies to the NA legislature XII and XIII.

The current law and practice in the election of deputies to the NA are different from those of the election of deputies to the NA legislature I and II, in which parties could participate in electoral bodies. For instance, the Electoral Council included 25 members with representatives from different parties, fatherland front, mass organizations, and nations, religions to organize and manage the election of deputies to the NA legislature I. At present, the Communist Party is the ruling party, so there are no political parties participating in the state apparatus in general and in the Electoral Council in particular. Therefore, the participation of neutral representatives from social organizations is significant to increase the legal status of this organ in the organization and administration of elections.

Quantity

As provided by law, the Electoral Council composed of between fifteen and twenty one persons, and in fact the number is twenty one. Such number is fewer when compared to that of the election of deputies to the NA legislature II, III and IV with 25 persons. In general, the prescribed number of member in the Electoral Council is appropriate with the organisation and management of elections in Viet Nam and with the international practice.

Term of office

The Electoral Council in Viet Nam is now established for each election of deputies to the NA and People's Councils as the 'ad-hoc' agency. The council shall dissolve upon completion of its work. The interim nature does not enable the Electoral Council to take its role in preparation for the election.

Budget

Budget for activities of the Electoral Council at central level and electoral bodies comes from the state budget. The Electoral Council is not entitled to self-manage the budget.

Relations with electoral bodies at local level

In the relations with electoral bodies at local level, the Electoral Council leads, directs and encourages the implementation of electoral law throughout the country. The electoral bodies at local level are not subject to the administration of the Electoral Council at central level but the local governments and fatherland front

at the same level. This ensures the consistency in the administration of election from central to local level, and the self-control of electoral bodies at local level.

Relations with the Party

The establishment of the Electoral Council and appointment of its members are under the leadership of Party agencies. According to the report on the results of the election of deputies to the NA legislature XIII and the People's Council for the term 2011-2016, the Politbureau has directed the NA Appointed Party Committee to develop a "Overall Project and detailed plan on issues related to the election of deputies to the NA legislature XIII and People's Councils at all levels; based on the instructions of the Politbureau, the NASC issued Resolution No. 1018/NQ/UBTVQH12 dated January 21st 2011 announcing the election day, which was on Sunday, May 22nd 2011, and established the Electoral Council with 21 members.

The Party's leadership in the organisation of the Electoral Council is considered one of the important tasks for each election of Viet Nam so as to select true and qualified party members working at different agencies and organisations to participate in the Electoral Council. However, this leads to the dependence of the Electoral Council of the party organisations, diminishing the independence of the Electoral Council.

b) Current situation on the operation of the Electoral Council

Based on regulations of law, the Electoral Council leads, directs, checks and encourages the implementation of Law on the election of deputies to the NA legislature XIII throughout the country, which can be seen in the following contents:

- The Electoral Council, NASC, Prime Minister, Central Committee of the Viet Nam Fatherland Front, Organisation Department of the Central Party Committee and concerned ministries have issued leading and guiding documents for the election of deputies to the NA legislature XIII and People's Council at all levels. Local party committees, governments and fatherland front established steering committees and electoral committees; and issued instructions for the preparation of the election in the localities.

- During the preparation for the election, the NASC and Electoral Council organised 3 supervising times with 31 oversight missions to oversee the preparation for the election at 61 provinces and cities;

- Information on the election was paid attention and prepared carefully, ensuring the right orientations, accuracy and time, creating the encouraging and enthusiastic atmosphere for the election; combating against reactionary tones; contributing to the success of the election.

- Security and social order were ensured and paid attention from the central to local level. The public security, armed forces, civil defence were active with their plans to deal with extraordinary cases during the election.

- Electoral bodies closely coordinated with concerned agencies and organisations to handle complaints and denunciations on the election. Up to May 12th 2011, the Electoral Council received 122 complaints and denunciations including those related to NA candidates. The Electoral Council sent these complaints and denunciations to concerned organisations and agencies for verification and settlement. The work met the set requirements with clear conclusions, ensuring the internal politics of the election.

- During the preparation of the election, the Electoral Council, NASC, Government, Central Committee of the Viet Nam Fatherland Front and concerned ministries closely coordinated to lead, direct the election consistently, ensuring the election time. The local party committees, governments, committees of the fatherland front and electoral bodies closely coordinated, focused on their tasks, requirements and paid attention to the election. The local political system raises its high spirit of responsibility to overcome difficulties for the success of the election¹³.

The leadership, directions and encouragement of the Electoral Council has contributed to the positive success of the election of deputies to the NA and People's Council, as mentioned in the reports by the Electoral Council for the election of deputies to the NA legislature:

¹³ Report on results of the election of deputies to the NA legislature XIII and People's Council at all levels for the term 2011-2016.

- The rate of voters who went to vote was high. This shows the political consciousness, responsibility and patriotism of the people, and the trust to the leadership of the party and administration of the state agencies; the active public participation was the important element for the success of the election, a political event of the whole party, people and armed forces;

- The democracy in the election has been developed from the projection of candidates, composition, number of candidates; consultations by the Fatherland Front, collection of public opinions where the candidates are living and working so as to introduce truly qualified candidates for the election; the canvass and casting votes of those who represent the people in the highest organ of the state;

- The preparation and organisation of the election took place as regulated in good security and social order; no extraordinary cases;

- 500 NA deputies were elected without re-election, additional election. The number of PC deputies was elected almost sufficient;

- Qualification of NA deputies and PC deputies has been considered and improved compared to previous tenures. This can be a good condition to improve the effectiveness and efficiency in operation of the elected bodies. The composition and structure are appropriate, reflecting the wide public representation in elected bodies; the rate of those stand for the election and re-elected is higher.

- The plan of the Central Party Committee on the election of deputies to the NA and People's Councils at all levels on the same day has been successfully implemented, right after the Party Congress. This has also saved time, budget and efforts of the people, and the election has been linked to the implementation of socio-economic plans. This re-affirms the rightness of the plan in Viet Nam's context.

Apart from the success, there appeared some limitations of the Electoral Council:

1. Electoral regulations are somewhat inappropriate with unclear authority of electoral bodies. Some guiding documents were issued late; some templates were not consistent, which needs additional guidance.

2. During the handling of complaints, denunciations, security and social order, some cases were detected late; complexity was not fully anticipated; at some localities, cases were settled just before the election day.

3. Some localities have not paid proper attention to the electoral training for members of electoral groups; the directions and checks took place loosely, which leads to certain limitations; cases of voting on behalf of others still took place.

4. At some localities, the public consultations and canvass were inconsistent; electoral campaigns were few; inequality in canvass could be seen.

5. Consultations has not taken place as regulated time; requirements on representation have not been met, particularly at commune level. Some criteria on the young age, non-partisan, women have not been met during consultation process at some localities. There is still difference in capacity and qualification of candidates in one constituency.

One of the basic reason for the aforementioned situation is the limitation in the organisation and management of election by the Electoral Council and concerned organisations and agencies:

- Besides the Electoral Council, there are many organisations and agencies participating in the election, which is hard to ensure the consistency, coordination and clear responsibility;

- The Electoral Council lacks necessary independence related to the organisation, so many of its activities are not self-determined.

- The Electoral Council is limited with some important rights. It is not entitled to issue legal normative documents; to rule on the list of candidates, but receive and approve the list based on the consultation process; to self-control and manage its budget.

3. Orientations and proposals to establish a National Electoral Council

a) General orientations

- *Establishing the Electoral Council in line with the independent model of electoral management as it has superior advantages in the three basic areas: better*

ensuring the independence, objectivity, impartiality; ensuring the consistency and legality of the election; promoting a cooperative and professional working environment.

Realities in the world have indicated advantages of the independent model of electoral management in relation to the Government electoral system. As an independent electoral body, the Electoral Council is independent in terms of organization from political parties, state agencies, and particularly the executive branch. Organizational independence of the Electoral Council is an important condition to ensure operational independence of the Electoral Council.

Vietnam's laws and practices have pointed out limits in current electoral bodies as the latter heavily depend on party organizations, state agencies (the NASC, the Government, People's Committees at different levels, etc). The lack of organizational independence of those institutions in charge of elections is a factor accounting for their lack of independence in election-related work.

- Establishing the Electoral Council based on principles in line with development of electoral bodies in the world, including independence, equality, integrity, transparency, efficiency, professionalism and service-mindedness.

Regardless of any model, organization and operation of the Electoral Council shall need to be based on fundamental principles that determine special features of this institution. Such principles as independence, equality, integrity, transparency, efficiency, professionalism and service-mindedness are the criteria for designing the roles, organizational structure, tasks, authorities, operational procedures, and relations of the Electoral Council.

As experiences show, the electoral model is not the only factor determining the success of electoral bodies, but various factors like the environment, political-legal traditions, qualifications and competence of members of the Electoral Council, procedures of the Electoral Council etc, which plays an equally important role in asserting the role of the Electoral Council. The diversity of elements affects the Electoral Council, resulting in a need for a systemic view about organization and operation of the Electoral Council. Each factor/principle contributes to the general success of the Electoral Council.

In Vietnam, the political-legal system is imbued with many unique features, creating both advantages and barriers to independent constitutional institutions which can control state powers. Despite different conditions, the Electoral Council and those organizations in charge of elections cannot depart from foundational principles for an electoral body. There can be different ways of conducting; however, fundamental objectives are common.

- Establishing the Electoral Council in line with the orientation to build a rule by law state of the people, by the people and for the people; state powers are all united, allocated, coordinated and controlled among state institutions in the exercise of legislative, executive and judiciary powers to protect human rights and citizens' rights.

The proposal for a constitutionally independent National Electoral Council has come as a result of a process of recognizing and building a rule by law state of the people, by the people and for the people. The documents of the 11th National Congress of the Party and the Draft Constitution have asserted the principle of 'control' among state agencies in the exercise of legislative, executive, and judiciary powers. Against that background, the Electoral Council should be designed to concretize the constitutional principle of power control, and at the same time be based on the fundamental principle of a ruled by law state of the people, by the people, and for the people.

The identification of the Electoral Council as a constitutionally independent institution means its legal status, character, authority, and operational procedures shall be formed in accordance with fundamental principles of a constitutionally independent institution, which plays a role of controlling state powers and protecting human rights and citizen rights.

b) Detailed proposals

- Legal status and character of the National Electoral Council

The National Electoral Council is a central agency for administration of elections which is established by the National Assembly, but independent from the National Assembly, the Government and other state agencies in its exercise of consistent administration of elections of deputies to the NA and People's Councils at all levels.

The National Electoral Council needs to have the authority to lead and manage elections for the NA and PC deputies; local organizations in charge of elections shall be subject to the direct leadership and management of the central Electoral Council; all decisions by the national Electoral Council are legally binding. The legal status and character of the National Electoral Council as such is to ensure the avoidance of conflicts and lack of coordination among organizations in election-related work; transfer election management mandate from other state agencies (the NASC, the Government, the VFF, local governments etc.) to the National Electoral Council. The National Electoral Council also needs independent authorities in organizing and managing local electoral bodies to avoid the difficulty of coordination and control among local electoral bodies.

The Electoral Council is a constitutionally independent institution established by the National Assembly, but independent from the National Assembly, the Government and other state agencies in its electoral management. The national Electoral Council has the legal status as an independent power in relation to the legislature, the executive and the judiciary. In its relations with the National Assembly, the National Electoral Council has its members elected or dismissed by the NA and it is answerable to the NA through a reporting regime. However, it is independent from the NA in its exercise of electoral management. In its relations to other state agencies, the National Electoral Council is independent in terms of organization and operation from the Government, the People's Procuracy, the People's Court and local governments.

- *Organizational structure*

- + Method of establishment

The National Electoral Council is established by the National Assembly (members elected and/or dismissed by the NA), and is answerable to the NA. Neither state agencies nor any other organizations shall be involved in the establishment of the National Electoral Council. Only the NA as the highest representative of the people is eligible for establishing the Electoral Council.

The fact that only the NA can establish the Electoral Council is to confirm the legal status, independence and significance of the Electoral Council in relation to other state agencies.

Local organizations in charge of elections shall be established by local representative bodies (People's Council at all levels) and approved by the national Electoral Council. This is to ensure the independent status of these organizations and at the same time to ensure the leadership role of the National Electoral Council over elections.

+ Number of members

The National Electoral Council comprises of 9-15 members (odd number), including a Chairperson, Vice Chairpersons elected among members.

+ Membership eligibility

Due to the level of professional and political sophistication in the activities of the Electoral Council, its members shall be those with sufficient qualification (a bachelor at least) and experience (at least 30 years old and 10 years of working experience) in political, administrative, legal and electoral fields.

Members of the Electoral Council shall be qualified, prestigious and experienced experts in related fields, working in party and state agencies, political and social organizations, civil society organizations. The representation from civil society organizations can be a condition to ensure the increased independence of the Electoral Council, especially in our political regime which is placed under the single leadership of the Party.

+ Non part-time regime

As members of a constitutionally independent institution, the Electoral Council members shall not concurrently hold office in any Party and state organizations or political and social organizations. Once appointed as members of the National Electoral Council, they have to resign from position at other organizations. Council members shall not have any activities beyond the work at the Electoral Council that can affect the independence of the Electoral Council.

+ Term of office

Members of the Electoral Council have a 5-year term in office and can be re-elected once. The office term of the Council members shall not be the same as the term of NA deputies and PC deputies to ensure the normal and independent operations of the Electoral Council in the elections of NA and PC deputies.

With a view to enhancing the independence of the Electoral Council members, an office term of a council member can be 9 years without re-election. However, with a view to ensuring the normal and continuous operation of the Electoral Council, one third of members shall be replaced every 3 year.

+ Reporting regime

Established by the NA, the Electoral Council shall be responsible for reporting to the NA at request. The Electoral Council shall not report to any other state agencies like the NASC, the Government, and the State President.

The Electoral Council only reports to the NA at request, meaning that the former does not have to report periodically but only when it is requested with regards to issues related to activities of the Electoral Council. When problems arise, the Electoral Council may prepare reports.

+ Administrative apparatus

The Electoral Council established specialized units to assist the council in exercise of its mandate. The number and mandate of each supporting unit shall be stipulated by law and regulations of the Electoral Council.

The Electoral Council has the authority to establish an administrative mechanism to assist the council in election-related work as stipulated by law. The autonomy by the Electoral Council in its decisions over a supporting mechanism is to increase the independence by the council in its leadership and administration of elections.

The Electoral Council shall have its own budget and budgetary autonomy for its activities.

- *Mandate of the National Electoral Council*

The Electoral Council leads and manages elections of NA and PC deputies to ensure that elections are free and fair. For that purpose, the Electoral Council and its supporting mechanism shall have conduct fundamental tasks and authorities as follows:

- Determining voters' eligibility;
- Receiving and approving candidates' list;

- Organizing votes;
- Counting votes, tabulating votes;
- Settling complaints and disputes related to elections;
- Announcing electoral results.

With a view to exercise the above-mentioned mandate, the Electoral Council shall have the authority to issue legal normative documents to conduct its activities of election leadership and management as stipulated by law.

Furthermore, the Electoral Council shall have additional authorities related to elections such as issuing national electoral policy, planning electoral service, training election staff, conducting information, education and communication for voters and people, delineating constituencies, planning and deploying election software, verifying and registering voters, developing and organizing national elections, registering party nominated candidates and non-party candidates, participating in election consultative process, training vote-counting monitors, regulating and recognizing the participation by civil society organizations, the media and election watchdogs, inspecting and assessing the accuracy of the electoral system and activities of electoral bodies etc.

As a broad-based approach to the authorities of the Electoral Council, powers related to organizing and managing elections by the NASC, the Government, the Viet Nam Fatherland Front, and local governments shall be transferred to the Electoral Council and its subordinate agencies. Other state agencies shall coordinate and support the Electoral Council as assigned by their mandates.

- Operational method of the National Electoral Council

The National Electoral Council works on a collective basis and makes decisions by majority through the issue of resolutions to implement its mandate as stipulated by the Constitution and law.

The Electoral Council holds closed door meetings to discuss and make decisions. Decisions by the Electoral Council shall be conveyed to relevant organizations and individuals and shall be published on official gazette.

At request or by implementing its mandate, the Electoral Council can assign a member in charge, who shall have responsibility to coordinate with other members and specialized units to implement the assignment. The Electoral Council shall review issues at the council meeting upon examining the report by the member in charge and the review report by a specialized unit. The Council will then discuss and issue resolutions.

- Legal consequences and validity of decisions made by the National Electoral Council

Decisions made by the National Electoral Council shall be legally binding on all organizations and individuals. The Electoral Council may issue advisory opinions with regards to law-making on elections.

c) National Electoral Council as a constitutional institution

As an important institution, many Constitutions in the world stipulate a national electoral body to increase the stability and independence by reducing the possibility of executive and legislative interference through arbitrary changes in related laws. According to a research on 550 Constitutions promulgated in the world between 1880 and 2000, 24% (136 Constitutions) stipulate an Electoral Council/commission, 6% (35 Constitutions) stipulate an electoral court. By 2000, about 40% of Constitutions in the world have regulations related to an Electoral Council/commission in comparison with 5% in 1945. The proportion is highest in South Asia (about 70%), Latin America and Sub-Sahara region (about 45%)¹⁴.

In a general trend, the draft constitutional amendment for public consultation for the first time has an article on the Electoral Council as follows:

Article 121 (new)

1. The National Electoral Council is established by the National Assembly and has a Chairperson, Vice Chairpersons and members.

2. The National Electoral Council organizes elections of NA deputies; directing and guiding elections of People's Council deputies at all levels.

¹⁴ Dr. Vu Cong Giao, ref above, p. 109-110.

3. The organization and mandate of the National Electoral Council, the office term and number of members of the Council are stipulated by a law.

A constitutional article on the National Electoral Council is a progressive step in the constitutional history of the country, indicating a commitment to democratizing political life and building a rule by law state of the people, by the people and for the people in a sense that state powers are united, coordinated, and controlled among state agencies in exercise of legislative, executive and judiciary powers.

However, regulations in the draft constitutional amendment should be changed in terms of both the presentation and content.

In terms of presentation, Article 121 of the Draft Constitutional Amendment is too short about the Electoral Council. It lacks foundational principles on the legal status, role, organization, authorities and operational method of this constitutionally independent institution.

According to IDEA, despite differences, Constitutions in the world usually have fundamental principles on an electoral body as follows:

- The independent status of the electoral body;
- Structure and composition of the electoral body;
- Office term of members;
- Mandate of the electoral body etc.

Thus, the Constitution should have more detailed regulations on foundational principles for related laws.

In terms of the content, Article 121 of the Draft Constitutional Amendment should also be changed to ensure orientations as proposed above, especially with regards to enhancing the its independence.

Based on orientations as analyzed above, the Constitution (amended) shall have regulations on the National Electoral Council as follows¹⁵:

Article...

¹⁵ Refer to proposals in article by Dr. Vu Cong Giao, ref, p. 112.

1. The National Electoral Council is a constitutional independent institution including eleven (11) members elected by the National Assembly and has the mandate of leading and managing elections of National Assembly and People's Council deputies and referendum to ensure all of these events take place in a free and fair manner.

2. Members of the National Electoral Council shall be thirty (30) years old or more, have at least a bachelor, be qualified and prestigious and ten (10) years of working experience in the political, administrative and legal fields.

3. Chairperson and Vice Chairpersons of the National Electoral Council are elected by the National Electoral Council.

4. The term in office of the National Electoral Council is ten (10) years and not the same as the term of the National Assembly and members shall not be re-elected (or the term in office of the National Electoral Council is five (5) years and not the same as the term of the National Assembly and members shall be re-elected once).

Article...

The National Electoral Council has the mandate as follows:

- 1. Determining voters' eligibility;*
- 2. Receiving and approving candidates' list;*
- 3. Organizing votes and counting votes;*
- 4. Settling complaints and disputes related to elections and referendum;*
- 6. Announcing results of elections and referendum;*
- 7. Promulgating resolutions, decisions and rules on organizing and managing elections and referendum in accordance with the Constitution and laws;*
- 8. Leading local electoral bodies;*

...

Article...

Members of the National Electoral Council shall not concurrently hold office in other state agencies.

Members of the National Electoral Council shall not conduct activities beyond the mandate of the Council that can affect the operation and decisions of the Council.

Article...

The National Electoral Council establishes specialized units to assist the Council in exercise of its mandate.

The National Electoral Council has its own budget and an administrative apparatus as stipulated by the National Assembly.

Article...

The National Electoral Council is accountable to the National Assembly and reports to the latter at request.

Article...

Resolutions and decisions by the National Electoral Council shall be legally binding on all state agencies, concerned organizations and individuals.

CHAPTER II: CONSTITUTIONAL PROTECTION BODY

I. THEORY AND PRACTICE FOR THE ESTABLISHMENT OF THE CONSTITUTIONAL PROTECTION BODY IN VIET NAM

1. Theory for the establishment of the constitutional protection agency in Viet Nam

The establishment of a professional constitutional protection body in Viet Nam comes from the requirements of the socialist state ruled by law and the viewpoints related to constitutional protection of the Communist Party of Viet Nam.

1.1. Requirements of the socialist state ruled by law in constitutional protection

First: the socialist state ruled by law is organised and operated as provided by the Consitution, and has a proper mechanism to ensure the highest validity of the Constitution.

The Viet Nam socialist state ruled by law has the characteristics of the ruled by law state as the consitutional supremacy; people is the entity of the state power; human rights and citizen rights are respected and protected; proper method for the organisation of state power; development of democracy, etc. Of the mentioned characteristics, "the consitutional supremacy is seen the most important of the rule by law"¹⁶.

In term of the concept, the state ruled by law is the organ that runs the society with its rights. The state ruled by law requires to have a consitution, and the consitution is the most important tool regulating rights: rights of the citizens, of the state, and powers of the legislative, executive and judiciary branches. In relations, when the consitution defines rights of the entities, and the consitution defines obligations of other entities. "Constitution is the soul of the legislation and the most important social contract"¹⁷.

¹⁶ Nguyen Dang Dung, Truong Dac Linh, Nguyen Manh Hung, Luu Duc Quang, Nguyen Van Tri (2010), *Constitutional building and protection – national and international experiences*, Viet Nam Education Publisher, p.73.

¹⁷ Nguyen Dang Dung (2005), *Limitations of the state power*, National University Publisher, Ha Noi, p.86.

In some countries, constitution is the political legal document to define sufficiently the characteristics and requirements of the state ruled by law. The confirmation that the people are the entities of the state power; human rights and citizen rights are respected and protected; proper method for the organisation of state powers, etc are the basic and integral contents of a constitution.

The state of Viet Nam will not be the socialist state ruled by law if its organisation and operation are not based on provisions of the constitution. The status, nature, tasks, powers, relations of highest organ of the socialist state ruled by law shall clearly be regulated in the constitution. Its operation shall also be regulated in the constitution. In the socialist regime, the state ruled by law itself shall be constitutional. The constitution lays the legal foundation for the development of the socialist state ruled by law, but the constitution must be respected as the direct and highest law to meet requirements of the socialist state ruled by law. This means regulations of the constitution must be stable, legal, sufficient and capable to create the highest legal safety for the the socialist state ruled by law and the people.

The constitution in Viet Nam socialist state ruled by law has an important role, and constitutional protection is of prime importance. Constitutional protection is to protect the will of the people, the sovereignty of the nation, and the standards and values of the society. Therefore, to meet this important requirements of Viet Nam socialist state ruled by law, it is required to develop and implement an effective mechanism for the detection, assessment and decisions on constitutional violation. The constitutional protection mechanism "shall take regulations of the constitution as bases for the assessment and decisions; be objective, comprehensive and true; regard the national interests, legitimate rights, freedom and interests of the people as the only ruler"¹⁸. Constitutional protection principles are not only the constitutional statements, which have the highest validity, but require that the constitution be made through a certain legislative process; obtains principles and normatives revealing that it is the highest legal document which needs to be respected and implemented. The constitutional protection mechanism is properly organised, sufficiently authorised, and its operation method is appropriate and strong enough to deal with all acts of constitutional violation.

¹⁸ Dao Tri Uc (chief editor) (2007), *The organisation and operation of Viet Nam socialist state ruled by law*, Judicial Publisher, Ha Noi. p.249

Second: requirements on ensuring people's sovereignty; value of democracy; the state respects and protects human rights and citizen rights.

The idea of the rule of law and constitution has one common point, which is to heighten the people's sovereignty, democracy; respect the human rights and citizen rights. "The constitutionalism is the idea which values democracy, the will and legitimate presentation for the aspiration of the people; understands and exercises rightly the highest sovereignty of the people which is reflected in the constitution, constitutional principles and regulations, and all rights and freedom of the people"¹⁹.

In Viet Nam socialist state ruled by law, the will of the people and political selection are defined concentratively through the constitution. If the existence of the constitution is the necessary condition to legally confirm the people's sovereignty and democracy, the existence and operation of the constitutional protection institution is the condition to truly ensure the highest people's sovereignty, political stability and materialisation of the socialist democracy. The constitutional protection mechanism in the socialist state ruled by law greatly contributes to ensuring the state power of the people, and interests of the people.

Ensuring the human rights, citizen rights is the requirements and objectives of the socialist state ruled by law. The constitution is one of the tool that the socialist state ruled by law uses to ensure the human rights, citizen rights. Constitutional protection is to ensure the perfect and effectiveness of an important tool. The socialist state ruled by law requires the constitution and laws to directly acknowledge the human rights and citizen rights; clearly regulate rights and freedom of the people; ensure the feasibility of the rights and freedom. When the rights and freedom of the people are violated, there are measures to punish the violators (regardless of the entities) and to recover the rights and freedom. This requires the constitutional protection institution to operate independently and professionally; the institution has sufficient authority and is entitled to take legal and effective measures.

Third: requirements on ensuring the highest status of laws in social life.

The Viet Nam socialist state ruled by law governs the society by law, ensures the highest status of law in the social life. This raises certain requirements for the constitutional protection mechanism. The organisation and operation of the

¹⁹ Dao Tri Uc (2006), "Constitutional review and development of constitutional review in Viet Nam ", *State and Law Magazine*, (10), p.3.

constitutional protection mechanism in Viet Nam socialist state ruled by law shall base on regulations of the constitution and law. Law related to the constitutional protection has the nature of laws in the socialist state ruled by law. These are the natures of people, society, class, objectiveness, normatives, popularity, equality and equitability, etc. Constitutional protection law reveals the will, aspiration of the people; it is proper with the reality and for the social progress. The law is also equal, popular and equitable. It is also an integral part of the legal system of the socialist state ruled by law. Such law must be a standards for *all people to be equal before the law* and a ruler of relations among power institutions. State agencies and political institutions abide by regulations of the constitution and laws with regard to the functions, tasks and authority based on the principles *equality before the law*. In the elements of the constitutional protection mechanism, principles and operation methods of the mechanism shall represent strongly and deeply the requirement of ensuring the principle of *equality before the law*.

The legal framework of the constitutional protection is seen by a consistent and feasible legal system, which is developed through a democratic, scientific legislative process.

The existence of a system of principles, legal normative documents on constitutional protection which lays the foundation for the organisation and operation of the constitutional protection mechanism is also necessary for the Viet Nam socialist state ruled by law.

Heightening the constitution and law on constitutional protection shall be in line with methodology so that constitutional protection law comes into life and is the habit of people and organisations to respect the constitution; to encourage them to fight against any acts of constitutional violation.

Fourth: Requirements on ensuring that the state power is consistent, divided, coordinated and controlled among state agencies in the implementation of legislative, executive and judicial rights.

If it is required that Viet Nam socialist state ruled by law is organised and operated within the framework of the constitution to ensure the constitutional bases of state power, the constitutional compatibility of the state, the requirement that the state power is consistent, divided, coordinated and controlled among state agencies in the implementation of legislative, executive and judicial rights is to define the mechanism of state power organisation and implementation. This requires the consistency of the

state power, the division and coordination among state agencies in implementation of legislative, executive and judicial rights, and these rights should be in a consistent system; it is needed to define legal status of the implementing agencies. The constitutional protection mechanism shall contribute to ensuring the right authority and implementation of implementing agencies, and that no agencies centralise or abuse powers. Moreover, the socialist state ruled by law requires a mechanism to control the implementation of legislative, executive and judicial rights. This is to internally and externally control the three branches. To control effectively and comprehensively, besides controlling and monitoring mechanisms, the socialist state ruled by law should have an independent and professional constitutional protection institution. This is an integral important component of the organisation and implementation mechanism of state powers to decide and handle constitutional violation by the legislative, executive and judiciary branches and to ensure the consistency of the state powers.

Fifth: Requirement on ensuring the leadership of the Viet Nam Communist Party to the socialist state ruled by law.

That the Party leads and perfects Viet Nam socialist state ruled by law is indispensable in the renovation and development process of the country, ensuring that the state is of the people, by the people and for the people and oriented to the socialism.

In term of politics, it is the objective requirement to develop the state ruled by law. The Party's leadership should be in line with the formation, development of the rules of the state. The objective can not be reached if such requirement is not met²⁰.

In Viet Nam, the Communist Party is the pioneer and representative for the interests of both workers and laborers and the nation. "The origin, contents, leading rights of the Party are of the people, by the people and for the people"²¹. The legal status and role of the Party is acknowledged by the society and legalised in Article 4 of the Constitution. To ensure the leadership of the party over the Viet Nam socialist state ruled by law, and the socialist society selected by the people, on the one hand the Party itself must be organised and operated within the frame work of the Constitution

²⁰ Nguyen Phuoc Tho (2009), "Directive principles of the Party in building Viet Nam socialist state ruled by law", *Legislative Studies Journal*, (2+3), p.60.

²¹ Nguyen Phuoc Tho (2009), "Directive principles of the Party in building Viet Nam socialist state ruled by law", *Legislative Studies Journal*, (2+3), p.61.

and law and reform of its leadership, and on the other hand the state is required to have capacity to implement its assigned tasks by the society. The State of Viet Nam will not fulfil its mission without a constitutional protection mechanism.

A constitutional protection mechanism under requirements of the socialist state ruled by law is to prevent the risks that the State abuse powers and is corrupted by power. The state fully implements its functions and tasks so the Party is not necessary to directly intervene in the state's activities. By doing this, the Party will concentrate its intellectuals and strength to develop its political program and plans to lead the State, improving the quality and effectiveness in the Party's leadership to the socialist state ruled by law.

1.2.The special characteristics of a professional constitutional protection body in the Viet Nam socialist state ruled by law

In general, the professional constitutional protection body in the socialist state ruled by law is proper with the nature of the socialist state, expressing the nature of nation and age, and obtaining popular values of the state; proper with the organisation and operation principles of the socialist state ruled by law. The professional constitutional protection body in the socialist state ruled by law has the following special characteristics:

First: the professional constitutional protection body in the socialist state ruled by law is an independent institution which has its own functions and tasks and is organised and operated under special principles

To protect the constitution and meet requirements of the Viet Nam socialist state ruled by law, the constitutional protection institution must be independent from state agencies, and it has its own functions and tasks.

Constitutional protection is a special activity which is expressed in its objectives, nature. Therefore, it requires to be implemented by a special institution. Constitutional protection is to protect the people's sovereignty, political regime, legal foundation of the state, noble and lasting values in the society. Constitutional protection is to protect not only the principles, regulations of the constitution but also the spirit of the constitution. To this end, the constitutional protection includes both

legal and political activities. The activities are defined based on contents of the Constitution of the Viet Nam socialist state ruled by law. Such contents dominate the scope of functions and tasks of constitutional protection institutions. In the socialist state ruled by law, the constitutional protection institution is a professional body with its functions and tasks to implement the following groups of activities: 1/ examine, rule on documents which violate the constitution; 2/ settle constitutional disputes and constitutional violation by organisations and implement state power; 3/ interpret Constitution; 4/ protect human rights, rights, and freedom of people as provided by the Constitution; 5/ activities related to senior state officials and political party.

In the State apparatus, the two activity groups of examining, ruling on documents which violate the constitution, and settling constitutional disputes and constitutional violation by organisations and implementing state power require the independence of the constitutional protection institution. The special characteristics of the constitutional protection body (interpreting Constitution; protecting human rights, rights, and freedom of people as provided by the Constitution; and activities related to senior state officials and political party) require the political nature and constitutional review of the agency. Without the political nature, it is hard for the agency to interpret the Constitution; handle cases related to the constitutional violation by senior state officials and political party. Without the constitutional review, the constitutional protection body can not rule on and handle documents violating the Constitution and protect human rights, rights, and freedom of people as provided by the Constitution.

The special independence of the constitutional protection body from other state agencies, and political party in the socialist political system will be defined by the constitution and special principles. The organisation and operation principles of the constitutional protection mechanism are legal and political ones, reflecting objective requirements on the constitutional protection activities, ensuring the effectiveness and efficiency of the constitution in the Viet Nam socialist state ruled by law. The directive principles affect the formation and organisation of the constitutional protection body, and ensure that constitutional protection institutions implement fully their assigned functions and tasks.

Second: The professional constitutional protection body in the Viet Nam socialist state ruled by law is operated on the basis of abiding by a special system of

regulations including legal and political principles, constitutional regulations, and special legal documents

Constitutional protection is a special activity in the Viet Nam socialist state ruled by law, and the activity is directed and adjusted by a special system of regulations. The system includes principles, consistent legal documents which define the objectives, orientations, and lay legal ground for the establishment and operation of the constitutional protection mechanism in the socialist state ruled by law.

Regulations on constitutional protection are constitutional ones of the Socialist Republic of Viet Nam. For instance, Article 2 of the Constitution (amended and supplemented in 2001) reads: "The State of the Socialist Republic of Viet Nam is the ruled by law state of the people, by the people and for the people". This has defined the most important directive principle to the constitutional protection mechanism in Viet Nam. The Constitution amended and supplemented in 2001 has set out the new orientation for the development of a constitutional protection mechanism in Viet Nam. The mechanism in the Viet Nam socialist state ruled by law is substantively different from that of the 1946 Constitution, 1959 Constitution, 1980 Constitution and 1992 Constitution. The Constitution also defines other important principles dominating the constitutional protection activities, they are: ensuring the state powers are of the people; constitutional supremacy; respecting and protecting human rights, citizen rights; consistent state powers; ensuring the Party leadership to the State, etc. These principles are deeply legal and political. They reflect legal requirements to ensure the rule of law and the political requirements to ensure the democratic and class nature of the Viet Nam State. In other words, constitutional protection body abide by principles and requirements of the ruled by law state (constitutional supremacy; respecting and protecting human rights, citizen rights), and of the Viet Nam socialist state ruled by law (consistent state powers; ensuring the Party leadership to the State). The aforementioned legal and political principles are to orient the constitutional protection objectives, and have directive values on the contents and expressing methods of other regulations in the constitution and special legal documents on constitutional protection.

Besides the aforementioned legal-political principles, regulations of the constitution and other special legal documents on constitutional protection are the integral part of the constitutional protection institution. This part lays the legal ground

for the constitutional protection activities. For instance, examining and handling of constitutional violation rely on the legal basis which are regulations of the constitution, but not of the Law on the Organisation of the NA, or others, etc. Regulations of the constitution also include the legal status, nature, tasks, and powers of the professional constitutional protection body.

To adjust the legal relations arising during the implementation of constitutional protection activities, it is required to have special legal documents on constitutional protection. These documents are issued by the NA and appropriate with principles and regulations of the constitution. They are concretised and legalised from principles and regulations of the constitution on the constitutional protection mechanism. Contents of these documents shall be proper with principles and regulations of the constitution on the legal status, functions, tasks and powers of the professional constitutional protection body. Legal documents on constitutional protection of the Viet Nam socialist state ruled by law shall fully adjust all contents related to constitutional protection; functions and authority of constitutional protection body; ways of establishment, organisational structure of the constitutional protection body; subjects to be constitutionally reviewed; methods and procedures for the implementation of constitutional protection activities; legal measures that the constitutional protection body can apply to those violating the constitution, etc. In addition, the constitutional protection body of the Viet Nam socialist state ruled by law is organised and operated on the legal bases which are the internal principles and regulations of the constitutional protection body.

Third: The constitutional protection body of the Viet Nam socialist state ruled by law has the organisation and operation which is proper with the legal status, nature, functions, tasks and authority of the constitutional protection body as provided by the constitution and law

To implement constitutional protection activities particularly making decisions and handling acts of constitutional violation, the constitutional protection body in the socialist state ruled by law shall be organised and operated under a special mode, which is different from that of the legislative, executive and judicial activities. The NA legislative activities are political; the executive activities of the Government are both political and administrative; the judging mode of the Court is the judicial proceedings

and individualisation of acts of legal violation. The constitutional protection mode is special so as to protect the constitution, expressing the important role of the constitutional protection body in the Viet Nam socialist state ruled by law. The mode is proper with the legal status, nature, functions, tasks, and authority of the constitutional protection body. The professional constitutional protection body is independent, political, and of constitutional judge. Therefore, its operation mode is different from the constitutional protection mode of the NA and judicial proceedings of normal courts. The constitutional protection tools through political agencies is just to consult, recommend with few regulations and it is not proper to the constitutional judge of acts of constitutional violation. The mode of judicial proceedings of normal courts can lead to decisions and sentences which apply serious regulations. These modes are not suitable with objective, nature and contents of constitutional protection. Moreover, constitutional violators are often civil authorities, and the responsibility may be applied to these entities. These are the legal-political responsibilities. The constitutional protection activities in the Viet Nam socialist state ruled by law are implemented under a special mode.

In addition, the constitutional protection in the Viet Nam socialist state ruled by law shall be in line with the tradition and the legal culture of Viet Nam to ensure the feasibility of the mode.

The operation of the constitutional protection body in the Viet Nam socialist state ruled by law is concretised through forms, methods, procedures, rules to implement constitutional protection activities.

To the ruling, handling of constitutional violation documents in line with the constitutional review, and authority of the constitutional protection body, the constitutional protection is applied through a special introduction of instance, but not the exception. Given this, only authorised entities request constitutional review from the constitutional protection body. If the agency confirms that the legal document violates the constitution, it will decide that the document is invalid (depending on the legal validity of the documents, the constitutional protection body apply regulations to annul the document. Decision of the constitutional protection body is the final judgement, which takes effect to all entities.

The constitutional review is implemented by the constitutional protection body. there are two types of oversight: abstract oversight and concret oversight, and these types of oversight are implemented once the legal documents take effect.

For the decision of the constitutional protection body: the constitutional violation of senior state officials and party organisations, decisions of the constitutional protection body take effect to the violators. To legal documents which violate the constitution, decisions of the constitutional protection body are retroactive effect to all people.

Methods, forms and measures, etc are taken under certain rules and procedures of law to ensure the openness, transparency, accuracy, objectiveness, timeliness and effectiveness of the constitutional protection activities.

Fourth: Constitutional protection body of the Viet Nam socialist state ruled by law abide by the principle of consistent state power divided, coordinated and controlled among state agencies in excersing legislative, executive and judicial rights

In many states ruled by law, the state powers are organisation under the separation of power. The legislative, executive, and judiciary branches are independent. The organisation and operation of the constitutional protection mechanism in the rule of law state are also under the separation of authority. To the Viet Nam socialist state ruled by law, one of its special characteristics is the principle of consistent state power. The constitutional protection body of the Viet Nam socialist state ruled by law is the integral part of the mechanism to organise and exercise the state power and to ensure the consistency of the state power. Through handling constitutional disputes and constitutional violation related to the implementation of state power, shortcomings, ideological errors affecting the political regime and national sovereignty, the constitutional protection body contributes to ensuring the principle. In addition, the constitutional interpretation including the interpretation of the state power and exercising of state power also lays legal ground for state agencies to consistently exercise the state power.

The organisation and operation of the constitutional protection body of the Viet Nam socialist state ruled by law is under the principle of consistent state power divided, coordinated, and controlled among state agencies in exercising the state power

but not under the separation and limitation of power. In some rule of law states under the separation of power, and the relations among the legislature, the executive and the judiciary are the checks and balances. The checks and balances are in line with the separation of power, and the mechanism has positive effects to organise and exercise state power. However, the checks and balances have some limitations. For instance, the president – the one leading executive agency has the presidential veto over bills of the parliament, may delay legislative activities; on the contrary the parliament is entitled to approve budget which may also delay executive activities. The separation of power and checks and balances can cause the resist, leading to the opposition among state agencies.

The constitutional protection body in the Viet Nam socialist state ruled by law operates under the mechanism of division, coordination and control among state agencies in exercising state power. The agency itself is delegated by the people to protect the constitution. Like the National Assembly, Government, Supreme People's Court, Supreme People's Procuracy, the constitutional protection body participates in exercising the state power as assigned by the people. This is regulated in the constitution. Besides the checks and balances among the National Assembly, Government, Supreme People's Court, Supreme People's Procuracy, in the Viet Nam socialist state ruled by law there is a professional constitutional protection body which controls the aforementioned agencies. The constitutional protection mechanism is effective to control state agencies in exercising legislative, executive and judicial rights, and its ultimate objective is not to hinder legislative, executive and judicial activities. The constitutional protection mechanism prevents the power abuse or insufficient implementation of rights by state agencies. If the situation occurs, the constitutional protection body may decide, define constitutional responsibility and take certain measures. Therefore, the constitutional protection mechanism in the Viet Nam socialist state ruled by law ensures the constitutional compatibility of legislative, executive and judicial activities, and that state agencies implement rightly and sufficiently the tasks and powers assigned to them.

The coordination between the constitutional protection body and other state agencies: the National Assembly, Government, Supreme People's Court, Supreme

People's Procuracy may participate in protecting constitution through proposal of constitutional review, and the handling of acts of constitutional violation by senior state officials, etc. The professional constitutional protection body is independent but not opposite to the legislature, the executive and the judiciary. The constitutional protection body coordinates with these agencies to exercise state power and ensure the consistency of state power. For instance, some activities of the constitutional protection body are constitutional review, constitutional interpretation, etc. These activities facilitate the legislature, the executive and the judiciary.

Fifth: The constitutional protection body in the Viet Nam socialist state ruled by law abide by the leadership of the Communist Party as provided by the constitution

The Constitution in the Viet Nam socialist state ruled by law is the most important political document of the nation, expressing the people's sovereignty, will and aspiration. The will and aspiration are in line with the guideline and goal of the Communist Party. Therefore, like other institutions in the political system, the Communist Party of Viet Nam also respects and heightens the Constitution, and its organisations operating within the constitutional framework. The Communist Party of Viet Nam leads the socialist state ruled by law. It is constitutional and in line with ideology and goals selected by the people. Being a part of the Viet Nam socialist state ruled by law, the constitutional protection mechanism is subject to the leadership of the Communist Party of Viet Nam as provided by the Constitution.

The leadership of the Communist Party of Viet Nam over the constitutional protection mechanism is seen in the Party's documents, resolutions, which set out guideline on the constitutional protection and improvement of the mechanism. For instance, Resolution No. 48 of the Politbureau on the Strategy for the development and improvement of the legal system reads: "to define the constitutional protection mechanism, to clearly define the mechanism, method so as to ensure the constitutional supremacy". The Document of the Xth Party Congress also reads: "to define the constitutional protection mechanism, to clearly define the mechanism, method so as to ensure the constitutional and legal supremacy", "develop, improve the mechanism to

check and control the constitutional and legality of activities and decisions of state agencies”²²; “develop a mechanism to rule on acts of constitutional violation in legislative, executive and judicial activities”²³. The aforementioned viewpoints have the values of orientations and comprehensive guidance on the development of constitutional protection elements, constitutional protection institutions, operation modes of constitutional protection, ensuring the effective operation of the constitutional protection mechanism.

In particular, the Communist Party of Viet Nam leads the institutionalisation of its political program and guidance into the constitution and law. The Party thus leads the legislation work in general and lays legal ground for the constitutional protection mechanism in particular. The Party leadership ensures that the principles and documents on constitutional protection obtain sufficiently and rightly with the Party’s viewpoints on the constitutional protection, and that these principles and documents express truly and comprehensively the will and aspiration of the people. Through public participation in legislation on constitutional protection, the will and aspiration of the people are expressed and respected in the constitutional protection mechanism. The Communist Party of Viet Nam takes the leading role to legislative agencies, so that the public consultations of legal documents on constitutional protection are open, transparent and democratic.

The Party leadership over the constitutional protection body is also seen in the nomination of qualified Party members to be members of the constitutional protection body.

The leadership over the constitutional protection body in particular and the socialist state ruled by law in general is that Party members and party organisations actively participate in educating thus raising the public awareness to self-respect the Constitution and live within the framework of the Constitution and law.

²² Communist Party of Viet Nam (2006), *Document of the Xth National Party Congress*, National Politics Publisher, Ha Noi, p.126

²³ Communist Party of Viet Nam (2006), *Document of the Xth National Party Congress*, National Politics Publisher, Ha Noi, p.127.

2. Practical bases for the establishment of the professional constitutional protection body in Viet Nam

2.1. Current situation on regulations on constitutional protection bodies in Viet Nam

In pursuant to the 1992 Constitution (amended and supplemented in 2001), authorised agencies and individuals to protect constitution in Viet Nam include: the National Assembly, NASC, State President and Prime Minister.

a) The National Assembly's tasks and power to protect constitution

According to Article 83 of the 1992 Constitution, the National Assembly is the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam. The National Assembly is the only body vested with constitutional and legislative powers. The National Assembly decides on fundamental domestic and foreign policies, on national socioeconomic, defence and security tasks and on the main principles governing the organisation and functioning of the State apparatus and the social relations and activities of citizens. The National Assembly exercises the right of supreme oversight of all State activities. The National Assembly is thus not the professional constitutional protection body.

The NA's tasks and powers to protect the Constitution include:

1/ To exercise the right to supreme oversight over observance of the Constitution, laws and resolutions of the National Assembly, to examine the reports of the State President, the Standing Committee of the National Assembly, the Government, the Supreme People's Court, the Supreme People's Procuracy on their respective activities (Clause 2, Article 84);

2/ To abrogate texts adopted by the State President, the Standing Committee of the national Assembly, the Government, the Prime Minister, the Supreme People's Court, and the Supreme People's Procuracy which is incompatible with the Constitution (Clause 9, Article 84);

3/ To ratify or annul international agreements that have been signed or participated in on the proposal of the State President (Clause 12, Article 84).

b) The NASC's tasks and powers to protect the Constitution

The tasks and authority of the NASC on constitutional protection are regulated as follows:

1/ To interpret the Constitution (Clause 3, Article 91);

2/ To supervise the constitutional implementation; the activities of the Government, the Supreme People's Court; to suspend the implementation of texts adopted by the Government, the Prime Minister, the Supreme People's Court, the Supreme People's Procuracy which is incompatible with the Constitution; to report the matter to the National Assembly to rule on the abrogation of such texts (Clause 5, Article 91);

3/ To annul improper resolutions by the Provincial People's Councils and centrally-run cities; to disband Provincial People's Councils and centrally-run cities if they cause serious harm to the interests of the people (Clause 6, Article 91);

c) The State President's tasks and powers to protect the Constitution

As provided at Article 101, the state president is the Head of State and represents the Socialist Republic of Vietnam internally and externally. As provided in the Constitution, the State President has the following tasks and powers to protect the Constitution: To recommend to the National Assembly Standing Committee to review ordinances within ten days of their approval; if these ordinances are still passed by the National Assembly Standing Committee but the State President does not concur, they can be submitted by the State President to the National Assembly for decision at the nearest session (Clause 7, Article 103);

d) The Prime Minister's tasks and powers to protect the Constitution

According to Article 110 of the 1992 Constitution, the Prime Minister is the Head of the Government. As provided by the Constitution, the Prime Minister has the following tasks and powers to protect the Constitution:

1/ To suspend the implementation or to abrogate decisions, instructions and circulars of Ministers and other Government members; decisions and instructions of

People's Councils and Chairmen of Provincial People's Committees and centrally-run cities that contravene the Constitution (Clause 4, Article 114);

2/ To suspend the implementation of resolutions of Provincial People's Councils and centrally-run cities that contravene the Constitution; and to propose to the Standing Committee of the National Assembly to annul them (Clause 5, Article 114).

From the aforementioned tasks and powers to protect the Constitution, it can be seen that:

First: Of the agencies, individuals, the National Assembly, NASC, State President and Prime Minister, the National Assembly is an important institution which is assigned the highest authority to finally rule on constitutional protection activities.

That the National Assembly is assigned the highest authority to protect the Constitution comes from the concept that the National Assembly is the highest body of the State power. No agencies is at a higher or equivalent status with the National Assembly to judge laws issued by the National Assembly. In the constitutional protection mechanism of Viet Nam, the constitutional protection functions are assigned to the National Assembly – a political agency. The highest authority of the National Assembly in protecting the constitution is as follows:

+ First, to serve the NA in protecting the Constitution, there are some tasks and powers of the NASC that are implemented by the State President and Prime Minister. For instance, for the National Assembly to issue a resolution on annulling documents of the Government, the Prime Minister, the Supreme People's Court, the Supreme People's Procuracy that contravene the Constitution as provided in clause 5, Article 91 of the Constitution, the NASC suspends the execution of the documents and submit to the National Assembly to rule on the abrogation of such documents; or as provided at clause 2 of Article 114, the Prime Minister submits to the National Assembly the proposals on the removal or dismissal of Deputy Prime Ministers, Ministers and other members of the Government (Clause 2, Article 114);

+ Second, results of the constitutional protection by the NASC, State President, Prime Minister create bases, and provide evidences for the NA to protect the Constitution. For instance, as provided at clause 2, Article 91, the NASC exercises the right to supreme oversight over observance of the Constitution, activities of the Government, the Supreme People's Court, the Supreme People's Procuracy. This is not the regular activity. The National Assembly holds two sessions every year, and its

agencies hold sessions monthly. Thus, they can not supervise the mentioned activities timely, regularly and effectively. The NASC is the permanent agency of the National Assembly with the composition of NA chairman, NA vice-chairmen and members working on a full-time basis. Given this composition and operation, the NASC is capable and of good conditions to supervise activities of the Government, the Supreme People's Court, the Supreme People's Procuracy. The oversight results (oversight reports) of the NASC over the mentioned activities will be the useful source of information for the National Assembly to examine reports of the Government, the Supreme People's Court, the Supreme People's Procuracy at its sessions. In addition, the Constitution also provides regular reporting regime of the NASC to the National Assembly on activities in the intervals between sessions. For example, according to clause 8 of Article 91, in the intervals between sessions, the NASC ratifies Prime Minister's proposals on the removal or dismissal of Deputy Prime Ministers, Ministers and other members of the Government and report to the National Assembly at its nearest session.

+ Third, the National Assembly creates the legal framework for the constitutional protection activities of the NASC. State President, and Prime Minister For instance, according to clause 4, Article 103 of 1992 Constitution, the State Preseident is authorised to propose the removal and dismissal of the Deputy Prime Ministers, Cabinet Ministers and other members of the Government based on resolutions of the National Assembly.

Second: There exist the hierachy, coordination and reciprocal activities among agencies and individuals assigned to protect the Constitution

The agency with higher legal status is assigned with more important tasks, and the agency decides the legal consequences with serious regulations over those affected by the constitutional protection activities. The National Assembly is the body to exercise the right to supreme oversight over the observance of the Constitution.

+ Those subject to the supreme oversight of the National Assembly are of highest legal status of the State apparatus (except for the National Assembly): the State President, Government, the Supreme People's Court, the Supreme People's Procuracy, National Assembly Chairman, NASC (Article 84, the 1992 Constitution).

+ The National Assembly is entitled to handle acts of constitutional violations through serious regulations such as the dismissal of highest potision of the

State apparatus, or suspension, abrogation of documents issued by State agencies (except for the National Assembly) which are incompatible with the Constitution.

There is the coordination among constitutional protection institutions. For instance, the suspension or abrogation of documents issued by the Ministers, Government members, Provincial People's Committees which are incompatible with the Constitution is of significance to facilitate NA's activities leading to the abrogation of these documents.

Third: To the decentralised and unprofessional constitutional protection body, the authority to protect the constitution is assigned to many institutions and individuals; the division is not clear; some terms used to define the tasks and powers of constitutional protection institutions lack interpretation, which leads to the hesitation, avoidance in constitutional protection activities.

To the 4 institutions: the National Assembly, NASC, State President, Prime Minister, the check, oversight over the constitutional compatibility of legal documents, oversight over the constitutional implementation, constitutional interpretation are not their regular activities. These institutions focus on professional and important activities like legislation, making decisions on important issues of the nation, administration, governance, coordination, national representation in external relations, etc. Therefore, these institutions do not pay sufficient attention to the constitutional protection. Whereas, the division of tasks and powers among these institutions is not clear. For instance, according to clause 1, article 84, the National Assembly exercises the right to supreme oversight over the observance of the Constitution, and clause 5, article 91 provides that the NASC supervises the constitutional implementation. Thus, what are the differences between the supreme oversight over the observance of the Constitution and oversight over the constitutional implementation? Is the oversight over the constitutional implementation by the NASC is part of the supreme oversight over the observance of the Constitution by the National Assembly? Are there any differences in the contents and modalities? Some constitutional protection activities are assigned to many institutions, but only one institution does not implement the assigned tasks, leading to long delay or even no implementation for a long time.

2.2. Results of the constitutional protection over the past time

Results of the constitutional protection activities in Viet Nam over the past time are as follows:

a) Check and oversight of the constitutional compatibility of legal documents

Over the past years, the examination of the constitutional compatibility of legal documents has been done by the National Assembly and NASC. On December 3rd 2004, the National Assembly issued Resolution No. 40/2004/QH11 on the Oversight Program of the National Assembly in 2005, there was one oversight content on the promulgation of legal documents of the Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy at NA's session. Implementing this Resolution, the NASC issued Plan No. 324/UBTVQH11 dated 02/4/2005 and organised a conference to implement this Plan. At request of the NASC, the Government, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy have had reports on the promulgation of legal documents in the period from the beginning of the XIth NA to 30/4/2005 and guiding documents on the implementation of some laws, ordinances, and resolutions approved in Xth NA as per contents of the Plan No. 324/UBTVQH11 to send to the Ethnic Council and committees of the National Assembly.

The NASC's Report No. 401/UBTVQH11 dated October 6th 2005 reviewed and assessed the quantity and quality of legal documents issued by the Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy. One of the assessments reads "in general, legal documents issued by the Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy are appropriate with the principles and regulations of the Constitution, laws and ordinances".

The incorporating report on the oversight activities of the NA and NASC from August 2003 to October 2008 (dated January 8th 2009) has general assessment on the promulgation of legal documents by the Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy. It assessed that the activity has regularly been implemented by NA's agencies, but the results are not very clear. In 2005, at 8th session of the XIth NA, the NA had a special topic on the oversight of the promulgation of legal documents by the *Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy*; the oversight revealed that few legal documents are incompatible with the Constitution, laws, resolutions of the NA, but regulations of by-laws are not consistent with laws, or overlapped. These documents have not been timely detected, reviewed and handled.

In fact, it can be seen that the NA has not paid proper attention to the constitutional review over documents issued by the Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy. The topical oversight at the 8th session of the XIth NA is actually the constitutional review. This is not only the constitutional review but also the examination of the appropriateness of these documents to the laws and resolutions of the NA. The constitutional review is part of the oversight activities of the NA's session. Through the oversight, the NA has partly implemented its tasks of constitutional protection. However, for a long time, since the amendment and supplementation of the 1992 Constitution in 2001, the NA has organised only one oversight activity over the legal documents at its sessions. Reports by the NASC indicate some legal documents that are incompatible with the Constitution, but it has not reflected the current situation on the constitutional compatibility of documents issued by the Government, Prime Minister, Ministries, ministerial agencies, Supreme People's Court, Supreme People's Procuracy.

Moreover, there are acts of constitutional violation by authorised agencies as regulated by the Constitution which have not been detected by the NA, or detected but have not been handled thoroughly, decisively and timely. According to Report No. 401/UBTVQH11 dated October 6th 2005, from the beginning of XIth NA to April 30th 2005, to implement tasks and powers as provided by the Constitution, the Government needed to promulgate 196 legal normative documents, but the Government promulgated only 120, reaching 61%. The remaining of 39% has not yet promulgated. According to the oversight results of the Ethnic Council and NA committees, the Judge Council of the Supreme People's Court needed to issue 20 resolutions, but it issued 15 reaching 75%; the Procurator General of the Supreme People's Procuracy needed to issue 7 decisions, 2 instructions, 1 circular, but 6 decisions, 2 instructions, and 1 circular were issued reaching 90%; the Supreme People's Court needed to chair, coordinate with concerned agencies to issue 15 joint circulars and 1 regulation, but it issued 13 joint circulars, and 1 regulations reaching 87.5%; the Procurator General of the Supreme People's Procuracy needed to issue 31 decisions, 7 instructions, 13 circulars, but 27 decisions, 7 instructions and 5 circulars were issued reaching 76%. The remaining number has not yet promulgated.

Therefore, the oversight could only list the number of legal documents which have not been issued by authorised agencies. It has not mentioned the objective and

subjective causes, cases which the promulgation of legal documents was delayed and the consequences (quantitative and qualitative consequences) of the delay, measures of handling, responsibility of agencies and individuals, etc. This shows the limitations in constitutional review by the NA and NASC.

Besides the NA and NASC, the State President and Prime Minister are authorised to the constitutional review, but the two institutions have not exercise their right of constitutional review over the past years. Up to now, the State President has not exercised the right to recommend the NASC to review the ordinance within 10 days since the approval of the ordinance. The Prime Minister has not signed any decisions to suspend or abrogate legal documents issued by Ministers, other Government members, Provincial People's Committees or centrally-run cities which are incompatible with the Constitution; resolutions of Provincial People's Council and centrally-run cities which are incompatible with the Constitution have not been suspended.

b) Oversight of the constitutional implementation by agencies and individuals as provided by the Constitution

The NA has seriously and regularly assessed the work reports by agencies who are subject to its oversight, of which there are tasks to implement the Constitution.

With the support of the NA supporting agencies, the verifying agencies have effectively developed oversight skills and supervised the constitutional implementation.

The positive results from examining reports by agencies have improved the effectiveness of the supreme oversight of the NA at its sessions. Through the activity, the NA is in good conditions to assess results of concerned organisations, agencies, and individuals; and the submission of reports to the NA is to remind executive agencies of their assigned tasks.

The NA has over the past time been determined to express its opinions, persuading reporting agencies to supplement documents and clearly explain unclear issues. Through the examination of reports and summons, responsibilities of some titles have been defined.

However, the oversight over the constitutional implementation by agencies and individuals as provided by the Constitution has some limitations as follows:

First: Agencies and individuals who are subject to the oversight of the constitutional implementation have not seriously implemented regulations on the time

to send reports to NA agencies; time for verification and examination is short leading to limited quality of verification.

Second: Due to the lack of the independent, objective and sufficient channel of information, and the participation of inspectors, auditors, and experts, the quality of verification depends much on the examination and assessment of reports by submitting agencies; many NA deputies have not spent sufficient time on studying and examining reports or lacked of consultancy on reporting field.

Third: In some cases, the verification has not been decisive and lack of scientific bases, the decisions are not accurate and practical.

Fourth: After discussion, there have been no documents expressing the behaviors of the NA over the activity results of submitting agencies.

Fifth: The NA has not fully implemented its tasks and powers to supervise the constitutional implementation, not made full use of tools and measures as provided by the constitution. Therefore, there are cases that the NA has sufficient evidences and legal ground to rule on the legal consequences of dismissal of titles elected and ratified by the NA, but the NA did not do. The division of removal and dismissal of titles elected and ratified by the NA is unclear, and the NA has not removed from office any titles which diminishes the effect of oversight activities implemented by the NA.

Sixth: The supervision over the constitutional implementation has not been equal to those subject to the oversight. Realities in oversight activities of the NA over the past time show that the NA focuses much on the constitutional implementation by the Government, Prime Minister, Supreme People's Court, Supreme People's Procuracy. The oversight over activities of the NASC and State President has not been paid sufficient attention by the NA, and the activity has not been implemented regularly. Recently, at its session on November 20 2009, for the first time the NASC submitted its written work report for 2009 to the NA. The examination of the work report by the State President is done at final session of the NA legislature. That is, the NA only examines the report for the whole term of the State President.

Though the State President and Prime Minister are authorised to ensure the constitutional implementation by agencies and individuals as provided by the constitution, they have not fully implemented their tasks and powers. The results on constitutional protection by the two institutions are limited.

c) Constitutional interpretation

In general, the constitutional interpretation in Viet Nam has not been paid proper attention. According to statistics, up to now the NASC has conducted two times of legal interpretation, but not the constitutional interpretation. In fact, there are many documents with legal interpretation though they are not legal documents. These can be notifications of state administrative agencies, or joint resolutions/circulars of Judge Council of the Supreme People's Court with concerned agencies to interpret and guide the implementation of laws. This reflects the need of legal interpretation in state management and application of laws in trials. Its also shows that the mechanism of constitutional and legal interpretation in Viet Nam is not appropriate, and needs reforming.

Some issues have arisen when the NASC has not officially interpreted the constitution, they are as follows:

- *First*, inconsistent awareness on contents and spirits of principles and regulations of the constitution.

- *Second*, authorised agencies are not active in constitutional interpretation. For instance, due to the lack of official interpretation of supreme oversight by the NA, the distinction between supreme oversight of the NA and oversight of the NASC, Ethnic Council and Committees of the NA, the activity has not regularly implemented. Article 83 of the 1992 Constitution reads "The National Assembly shall exercise supreme oversight over all activities of the State". Article 94, clause 2 concretises the oversight of the NA: "To exercise the right to supreme oversight over the observance of the Constitution, laws and resolutions of the NA; to examine the work report of the State President, the NASC, Government, Supreme People's Court and Supreme People's Procuracy".

- *Third*, the lack of constitutional interpretation leads to the lack of clear and official evidences to rule on a document or act which violates the constitution. There are cases that a document violates one regulation of the constitution, but the authorised agencies ward off responsibilities and blame for the constitutional interpretation.

In sum, the constitutional protection has over the past time gained some positive results. Through the oversight over the constitutional implementation by agencies and individuals as provided in the constitution, the constitutional protection

institutions have grasped at the constitutional implementation, timely recommended agencies and individuals to adjust their activities to be in line with the constitution. The constitutional review is valued and implemented. Some legal documents which are incompatible with the constitution have been detected, and the delay of agencies and individuals in promulgating legal documents is also uncovered.

However, the operation of the constitutional protection institutions is still limited. Constitutional protection activities are not implemented regularly, which has not met requirements. The constitutional review has initially implemented and focused on the oversight of the promulgation of legal documents. The constitutional interpretation has not been conducted. The oversight over the constitutional implementation is conducted more regularly, but the effectiveness is not high. The implementation of directive principles to protect the constitution, and the use of powers have been defined in constitutional protection institutions. The use of constitutional protection tools by constitutional protection institutions has not been consistent and regular. As to implement professional functions, most of the constitutional protection institutions have not been active, even not participated in the activity. The NA itself is the institution which takes the leading role in constitutional review, oversight over the constitutional implementation, but the legal framework for the NA to conduct these activities is in absence, and inappropriate. The NA's resources are not enough to fully protect the constitution. The operation of the constitutional protection bodies is political, and of consulting values, recommendations and low effects. Though as provided by law, some constitutional protection institutions may apply strong regulations, but the capacity of these institutions are inappropriate to implement these regulations. Such regulations have not thus been applied.

II. EXPERIENCES IN CONSTITUTIONAL PROTECTION BODIES OF SOME COUNTRIES IN THE WORLD

1. Constitutional protection in some countries in the world

The constitutional protection mechanism has been formed and developed in many countries. Depending on the political regime, state structure, social-economic conditions of each country, the mechanism is organised under different models. This part will study the constitutional protection mechanism of the following countries:

1.1. Constitutional protection mechanism in the US

- Constitutional protection principles

Constitutional protection principles of the US exist in both written and unwritten ones, but the direct origin of the US constitutional protection body is the legal precedent in the case of *Marbury v. Madison*. Besides common principles as ensuring the constitutional supremacy, protecting human rights, citizen rights and freedom, the US also defines the judicial supremacy. After a “tour” in the US from 1831 to 1832, Alexis de Tocqueville – the person who was considered to understand the US more than its people said that the organisation of judicial powers in the US is “unique” and concluded that: “judicial power is a great political power”. When saying “judicial power is the most important power of the nation”, he wanted to speak about the judicial review of courts in the US. He wrote: “the greatest political power” of the US court is the judicial review”, and that “the US people have delegated the power to their judges based on the constitution but not the bills to make decisions, permitting them not to apply bills which are incompatible with the constitution”. Though the court authority to protect constitution does not come from the empowerment as provided by the constitution, it is the court’s inherent responsibility. The system admits the constitutional supremacy, and when the court faces issues related to legal application, the court will handle the issue compatibly with the constitution, but not apply laws that are incompatible with the constitution. The respect and priority in applying the constitution compared to other documents of the legal system is the fundamental task of the judicial system. Alexis de Tocqueville wrote: “the Constitution is the first bill of all, and it can not be amended with only one bill. When courts abide by the constitution, they abide by all bills. This is the virtual nature of judicial power: it can be said that the natural right of magistrates is the selection of legal tools for which to bind the judicial power”.

The constitutional protection mechanism of the US defines the authority of constitutional protection body as follows: 1/ at national level: courts decides on the effect of parliamentary bills under the federal constitution; 2/ at federal level: courts give priority to the federal constitution compared to articles and state constitutional bills when the constitutional incompatibility occurs; 3/ at state level: courts decides on the effect of documents issued by state legislative agencies under the state constitution.

Constitutional protection activities vary and include: judicial review of legal document, constitutional interpretation, handling of constitutional complaints, handling of constitutional disputes among branches, between federal government and state governments, handling of disputes among parties and disputes related to elections and referendums.

- Constitutional protection mechanism

In the US, the constitutional protection mechanism includes all courts in the system, they are district court, court of appeal and federal supreme court. There are no professional agencies or courts established to protect the constitution. This function is implemented by all courts. This means all courts in the US court system: state courts, federal courts, federal supreme court are authorised to protect the constitution. Issues and cases related to the constitution are settled by courts when they arise at the courts.

In the US court system, the district court is authorised to hear and try first case of all criminal and civil disputes under the US laws, disputes among citizens of states, cases in which the federal state is the petitioner or defendant, and cases arising from violation of the public rights and freedom by staff and public servants. Of the disputes, constitutional disputes are also on trial.

Decisions by district courts can be appealed, and the settlement of these appealings is the authority of the court of appeal. However, to important cases, the federal supreme court will review. In cases related to constitutional issues, the federal supreme court will come as the most important magistrate of the US judicial system". The federal supreme court is assigned to review all decisions of the court of appeal. In addition, the federal supreme court is authorised to review all decisions of highest state courts under the federal bills, including the review of cases related to federal bills and international treaties of the federal state based on the federal constitution. Finally, the federal bill enables any persons concerned to directly appeal to the federal supreme court on issues related to the acceptance or refusal of the application of a bill of the state or federal state on the basis of the compatibility or incompatibility of that bill.

In sum, the right to protect the constitution is exercised by all courts in the US judicial system, and the federal supreme court can make the final decision. In other

words, constitutional protection is the jurisdiction of courts under the consistent leadership of the federal supreme court.

1.2. Constitutional protection mechanism in Germany

The constitutional protection mechanism of the Germany belongs to the European model or called the concentrated model, that is, not all courts are authorised to protect the constitution. It is the right of the constitutional court.

- Constitutional protection principles

Constitutional protection principles are found in the 1949 Constitution, Law on the Organisation and Rules of the Federal Constitutional Court (FCT Law) dated March 12th 1951. According to Article 93 of the Constitution, the Federal Constitutional Court is the highest court to protect the constitution, and is empowered with a large number of rights by the Constitution. These rights include: 1/ protection of the constitution – politic order; 2/ separation of state power; 3/ rights related to representative attributes in the political system; 4/ protection of basic rights; 5/ interpretation of the constitution; 6/ constitutional review.

- Constitutional protection body

Under the German Constitution, the federal constitutional court is the high body to protect the constitution. To this end, the formation and organisation of the federal constitutional court is regulated in the federal law which is compatible with the constitution. The federal constitutional court is the constitutional body of the federal state with its jurisdiction of self-determination, activeness and independence from other state agencies. Selected members of the federal constitutional court are both members of the Council and Federal Government. All members of the federal constitutional court are judges of the federal state though only some of them are elected among on-power judges of the federal state.

With regard to the organisational structure, the federal constitutional court includes two Senats. The jurisdiction, organisation and personnel of each Senat are independent. Each Senat has eight judges. Half of them are elected by the Bundestag

and half by the Bundesrat. They may be judges of other courts, lawyers, professor of law, specialists from other state agencies.

The Senat is the acting agency of the constitutional court, but there are till the council of judges and system of boards which protect the constitution. The council of judges includes 16 judges of the two Senats. The council of judges works only when there appear disagreements on one issue between the two Senats.

It is noted that in addition to the organisation of the constitutional protection body under the concentrated model, there is also a “limited non-concentrated system”. Each German state has its own constitutional court. The court is assigned to constitutionally review and handle constitutional disputes of the state.

1.3. Constitutional protection mechanism in France

France has a professional constitutional protection body, but it is different from constitutional protection mechanisms of other countries. The French constitutional protection mechanism takes the pre-review task.

- Constitutional protection body

The 1958 Constitution of the Republic of France regulates the establishment of the constitutional council, the highest body of political jurisdiction to conduct judicial review of legal documents and regulations on election of the President and Parliament. The term "political jurisdiction" does not clearly express the nature of the constitutional council. It is because, member of the constitutional council is a judge but implements political tasks.

The Constitutional Council shall comprise nine members. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate (Article 55, Constitution, Article 1, Organic Law No. 58/1067).

Activities of the constitutional council members are different from those of the Government and Parliament members. Constitutional council members are judges and independent magistrates, but they are recruited and appointed. They will not be appointed in any administrative agencies during their term of office. They are

not allowed to hold any leading positions in parties or political groups, and to give viewpoints which may influence decisions of the constitutional council. Moreover, they are prohibited to disclose their positions in any documents published by a state or private publishers.

- Constitutional protection body

The constitutional protection body in France can be found in 1958 Constitution (Chapter VII); Organic Law No. 58- 1067 dated November 7th 1958 on the constitutional council (amended and supplemented by Law No. 59 - 223 dated February 4th 1959 and Law on the Organisation of the Constitutional Council No. 95 - 63 dated January 19th 1995; Decree No. 59 - 1292 dated November 13th 1959 on the obligations of the constitutional council members; Decree No. 59-1293 dated November 13th 1959 on the organisation of the administrative organ of the constitutional council; articles 136, 151, 152, 296 and 297 of the Electoral Law of the Republic of France; Law on Referendum No. 62-1292 dated January 6th 1962 on the election of the President of the Republic by direct universal suffrage.

The Organic Law No. 58/1067 provides that the Constitutional Council is authorised to consult, examine the constitutional compatibility of legislative activities, elections and referendums.

The first group of jurisdiction is related to consulting functions and of political significance. The constitutional council may decide when the President of the Republic does not fulfill assigned tasks and give viewpoints on the situation and measures in special circumstances. The Constitution does not define the “ineligibility”. Therefore, the assessment jurisdiction of the constitutional council is limitless. If the constitutional council announces the incapacity or ineligibility of the State President, a new election is needed in between 20 and 25 days since the day of the decision. However, the constitutional council can also identify the majority of opinions that resist the new election, and in this case the State President may temporarily be ineligible and be replaced by the President of the Senate – the one who exercises all powers of the former State President except for the dissolution of the parliament or organisation of a referendum.

The constitutional council may also give consulting opinions at request of the State President when it is necessary to announce emergency that threatens the republic regime, national independence, etc. When the State President consults the Prime Minister and Presidents of the two Houses, the opinions are announced. If the State President consults the constitutional council as provided at Article 16 of the Constitution, the opinions of the constitutional council will not be announced.

As the Supreme Electoral Tribunal, the constitutional council may rule on parliamentary elections, election of State President and referendums. In parliamentary elections, the constitutional council may decide the appropriateness of elections of National Assembly delegates or Senators, and it may thus cancel any elections, change the announced electoral results or even announce another candidate elected. In the constitutional protection system of France, all parliamentary elections can be examined by the constitutional council within 10 days.

With regard to the supervision of the elections of State President, rights of the constitutional council are to examine the constitution compatibility of electoral regulations and actively control electoral irregularities. The constitutional council is assigned to approve and announce the final electoral result.

In referendums, the constitutional council is firstly consulted in term of techniques to organise activities. The constitutional council also controls the activities, counts votes and announces the result. In case of disputes, the constitutional council will check and rule on all disputes. The Law on the organisation of the constitutional council regulates those who are entitled to petition in referendums, but referendums are like public consultations through direct voting, so all voters may require decisions of the constitutional council. If the council confirms that there are errors, it may decide whether to continue the votes or cancel part of the referendum.

Finally, the constitutional council is entitled to supervise the constitutional compatibility of legislative activities. This can be the effective tool to prevent violation of authority of state agencies, particularly to hold parliamentary activities within the constitutional framework. Under the constitutional protection body of France, the constitutional review is conducted to documents issued by the National Assembly, but

not promulgated by the State President. This is the difference between the constitutional protection body of France and those of other European countries.

The constitutional review is divided into two groups: 1/ pre-oversight over documents which have not been promulgated; and 2/pre-overisght over the separation of power between laws and documents of executive agency.

The first group is conducted by the constitutional council through two tools: 1/ obligatory oversight over documents of the parliament and oganic laws; and 2/ no obligatory oversight over laws and international treaties.

For obligatory oversight: Under Article 61 of French Constitution, organic laws and working regulations of the parliaments shall be submitted to the constitutional council before being promulgated. The constitutional council shall rule on their constitutional compatibility. To organic laws, they must be submitted to the constitutional council by the Prime Minister, and the Prime Minister shall point out the time for constitutional review in case of urgency. To working regulations of the parliament, or amendments of these working regulations have been adopted by one of the houses, they must be submitted to the constitutional council by the President of the National Assembly.

For the no obligatory oversight, laws can be submitted to the constitutional council by the State President, Prime Minister, or President of one of the two houses enables 60 NA deupties or Senators to submit the constitutional compatibility to the constitutional council.

This oversight tool is also applied to international treaties. At request of the State President, Prime Minister or President of one of the two houses, the constitutional council shall decide if the international treaties obtain articles which are incompatible with the constitution.

Another point in the French constitutional protection body is the preamble of the Constitution, which is referred as bases for the constitutional review. During the constitutional review process, the constitutional council may refer to the preamble to protect rights and freedom of the citizen. We can see that the Constitution of France does not have any clear statements or list of basic citizen rights. The only statement

related to the citizen rights is found in the preamble, which referred to the French Statement on human rights and civil rights. As can be seen in activities of French constitutional protection body, in 1971 the agency referred to the preamble to protect the rights and freedom of the people. Therefore, there have been documents which are announced constitutional violation as they are incompatible with the preamble. The constitutional council has created its own rights and obligations to review legal documents which are incompatible with the constitution and its preamble. Rights and freedom of French people are thus fully ensured and more effective.

2. Some lessons learnt in constitutional protection of countries in the world

- First: The importance of a nation when studying and selecting a model of constitutional protection is to define theory which dominates the organisation of state power; to define its legal system belongs to or affected by which type of law.

Based on researches and comparisons on the constitutional protection mechanism of some countries, the structure and operation of a constitutional protection mechanism depend on the theory dominating the organisation of state power and the type of law that the legal system belongs to.

To countries applying the theory of rigid separation of power and common law, it is proper to assign the function of constitutional protection to the court system (including Federal Supreme Court). The separation of power among the legislature, the executive and the judiciary is clear. The court system, particularly the federal supreme court is independent from the legislature and the executive. In addition, in these countries, the constitution, legal documents and legal precedents are the main sources of law. The application of legal precedents of these countries has provided judges with more legal knowledges and experiences. This can be the condition for them to review the constitutional compatibility of different documents.

To countries applying the civil law and flexible separation of power, the establishment of a professional constitutional protection body is proper. The constitution and legal documents are considered the obligatory and popular source of law. The application of law by judges in these countries is based on cases, therefore, their knowledge and experiences are not sufficient to embrace all regulations of one field. Court is not the agency to rule on the constitutional

compatibility of laws. This function should be conducted by authorised and prestigious people compared to the judges. Therefore, it is necessary to establish a professional constitutional protection body.

Therefore, the importance to a country when studying and selecting the model of constitutional protection body is to define theory which dominates the organisation of state power; to define its legal system belongs to or affected by which type of law.

- Second: Regulations on constitutional protection activities and nature of constitutional protection body of each country are based on its political regime and structure of the state.

To countries of multi-party political regime, constitutional protection activities are various. Of which, there is the activity of handling disputes over authorities of federal state and states, and between the rulings on constitutional compatibility in activities of political parties. To countries of unitary system, constitutional protection does not include activities that handle disputes between the federal state and states. In addition, the application of the principles of aggregation, dispersal of power, de-concentration, or the combination of these principles in relations between central and local government influences activities of the constitutional protection body, and the rules and procedures applied by the agency and the effect of constitutional protection tools.

Therefore, to each country, when regulating constitutional protection activities of the constitutional protection body and its operation should base on its political regime and structure of the state.

- Third: To ensure the respect of the Constitution, the constitutional protection mechanism shall be a consistent, feasible and transparent constitutional protection body, and the body is independent from sufficient necessary authorities to conduct proper tools.

The constitutional protection mechanism will not operate smoothly and effectively without feasible, clear and consistent principles and legal documents. The most basic constitutional protection activity is the constitutional review. The activity is

based on the clarification of constitutional spirit of legal documents, identification of the objectives and adjusting contents to rule on where necessary. This is the assessment on the appropriateness of legal documents and behaviors of authorized agencies and individuals in the State apparatus with the constitution. To assess and rule on, the constitutional protection body shall compare documents and behaviors to regulations of the constitution, and compare the principles and requirements of the democracy and other legal principles. Therefore, the entities shall have profound prospective and legal knowledge in a consistent system. On the other hand, the rules are to assess the constitutional compatibility of laws and decisions on issues of different agencies and the relationship between authorized state agencies or individuals. The rules shall be agreed by all sides. These requirements are similar to those of the judicial activities, and thus they can only be implemented when the constitutional protection activities are conducted through proceedings, and the independent constitutional protection body is provided with necessary powers to take strong political measures.

- Fourth: Reform of thinking about the Constitution, ensure the direct effect of the Constitution, education on constitution is necessary to countries which expect to change their political constitutional protection body to constitutional review.

Elements like concept, thinking about the Constitution, tradition, legal culture, political awareness of human rights, citizen rights in each country also influence the effect of the constitutional protection mechanism.

The application of constitutional protection mechanism through the system of judicial courts or establishment of constitutional court will be difficult and improper. Once the court is established, its effectiveness and efficiency will not be as expected, particularly to those countries where the legal culture of their citizens is limited. In such countries, citizens are often indifferent with politics, and not active to participate in the legal and political life of the nations. In addition, the people are reserved and not brave to fight abuse of power, violation of democracy, violations of human rights, citizen rights. Constitutional review can only be proper with countries where the Constitution is understood as the political legal document and positive document for direct application.

Therefore, reform of thinking about the Constitution of the civil authorities and individuals to regard it as a legal tool is necessary to countries which expect to change their political constitutional protection body to constitutional review. The education on Constitution and enhancing the awareness of officials and people will contribute to ensuring the feasibility of solutions to perfect the constitutional protection mechanism.

III. RECOMMENDATIONS FOR THE ESTABLISHMENT OF CONSTITUTIONAL PROTECTION BODY MEETING REQUIREMENTS OF BUILDING THE SOCIALIST STATE RULED BY LAW IN VIET NAM

1. Overview on recommendations and proposals related to constitutional protection in researches over the past time

Recommendations for the establishment of the constitutional protection body in Viet Nam:

Option 1: Establishment of the constitutional council

The constitutional council is the independent agency which is set up by the NA, and accountable to the NA. The constitutional council ensures the constitutional compatibility of the laws and by-laws issued by the NA, NASC, State President, Government, Prime Minister, Supreme People's Court, Supreme People's Procuracy, and local governments. Activities of the council are pre-oversight (giving opinions on the constitutional compatibility of laws and resolutions promulgated by the NA, ordinances and resolutions by the NASC); post-oversight (judicial review of documents issued by State President, Government, Prime Minister, Supreme People's Court, Supreme People's Procuracy, and local governments); oversight for recommendations (when detecting documents which are incompatible with the Constitution, the council requests authorized agencies to suspend or annul these documents); detailed oversight (oversight conducted under authority or at request of other state agencies).

- *Legal status and role:* The constitutional council is the new mechanism in the state apparatus. The constitutional council is independent and accountable to the NA. Authority of the council is regulated by the NA's documents. The council plays the role of a constitutional protection body, ensures the observance of the

constitution by state agencies, political organizations, political-social organizations, social organizations and the public.

- *Authority:* The constitutional council takes responsibility to the judicial review of legal documents issued by the NA, NASC, State President, Government, Prime Minister, Supreme People's Court, Supreme People's Procuracy submitting to the NA for examination and decision; give opinions on the constitutional compatibility of draft laws and resolutions promulgated by the NA, draft ordinances and resolutions by the NASC at request of the NA Committee on Law; give opinions on the constitutional compatibility of international treaties signed or joined by Viet Nam at request of the Government or NA committees; give opinions on the constitutional compatibility of legal documents issued by the People's Councils of provinces and centrally-run cities at request of the NA Committee on Law based on the NASC opinions; assist the NASC in handling the complaints of the constitutional compatibility of elections of deputies to the NA and People's Councils at all levels; assist the NASC in constitutional interpretation.

- *Organizational structure:* The constitutional council includes at least 9 members: 1/3 of its members is elected by the NA, another 1/3 appointed by the State President, and the other by the Government. Members of the council shall satisfy requirements of age, professional knowledge, seniority, etc as regulated by the NA. Former Party Secretary General, State President, NA Chairman are members ex officio of the council, and their office term is 10 years without being re-elected. These members are not allowed to work on a part-time basis, and they are not members of the NA or Government. Chairperson of the constitutional council is elected with 5 year term.

The constitutional council may set up sub-committees. The number of sub-committees and number of Vice-Chairpersons are regulated by law.

- *Operation:*

The constitutional council works on the collective basis and through its sub-committees.

The sub-committees are accountable to check, supervise and examine acts of constitutional violation. Based on reports of sub-committees, the council holds its plenary session to examine and decide. Decisions of the council are made by the

majority of votes. Chairperson of the council does not cast the vote but has a decisive voice in case of equal voting.

The establishment of the constitutional council ensures the independence, transparency in the organization and operation of the constitutional protection body; ensures the profession in constitutional protection activities, and the appropriateness with the Party guidelines on the development of a judging mechanism on acts of constitutional violation in the socialist state ruled by law.

The establishment of the constitutional council requires the supplementation of a chapter regulating the institution in the Constitution. Based on provisions of the Constitution, the NA promulgates a legal document on the organization, authority and operation of the constitutional council.

Option 2: Establishment of the constitutional court

To protect the constitutional supremacy, handle constitutional violations of public authorities, it is necessary to have judicial review. This is the common tendency of democratic states. In Viet Nam, if the constitutional court is established, this will be a new institution in the state apparatus. The constitutional is established to protect the constitutional supremacy. The Chief and Judges of the constitutional court are appointed by the State President, and then ratified by the National Assembly. Their only term of office is 10 or 15 years without being re-appointed. The constitutional court works independently and under the Constitution when deciding whether acts violate the constitution or not in legislative, executive and judicial activities (the court does not abide by laws as the people's court). The independence of the constitutional protection agency ensures the balance of powers among the legislative, executive and judicial rights.

2. The professional constitutional protection body in Viet Nam – legal status, nature, functions, tasks, powers, establishment, term of office of the constitutional protection body

Based on the aforementioned theory, practice and experiences in constitutional protection, we recommend to establish an independent and professional constitutional protection body with clear, consistent organisation and operation.

2.1. Name, legal status, nature of the professional constitutional protection body:

Constitutional provisions on an independent and professional constitutional protection body are necessary under requirements of the socialist state ruled by law. If the body is the constitutional council, it will be hard to decide and handle acts of constitutional violations of legislative, executive and judicial agencies. It is because the constitutional council only examines and checks the constitutional compatibility of documents, behaviors of public authorities, and makes consultative and recommending decisions. The independent and professional constitutional protection body can be called constitutional court. This court does not belong to judicial courts, and is independent from legislative, executive and judicial agencies. The constitutional court, a political judicial review agency, has the task of protecting the constitution.

To regulate in the constitution a system of directive principles and regulatory framework so as to adjust the constitutional protection activities which are in line with requirements and attributes of the socialist state ruled by law. Principles to ensure that state powers are of the people; the constitutional supremacy; respect protection of human rights and citizen rights; state powers are consistent, divided, coordinated and controlled among the legislature, the executive and the judiciary; principle to ensure the Party leadership. To legalise the viewpoints in the constitution *“to develop a mechanism to rule on acts of constitutional violations in legislative, executive and judicial activities”* which can be constitutional framework for the new constitutional review in Viet Nam.

Constitutional provisions on the constitutional protection shall include: 1/ rule on the constitutional compatibility of legal documents and handle acts of constitutional violations; 2/ Handle disputes and constitutional violation related to the organisation and implementation of state powers; 3/ Constitutional interpretation; 4/ Protect human rights, rights and freedom of the people as provided by the constitution; 5/ Activities related to senior state officials and political party.

The legislature, the executive and the judiciary are neutral with their special status in the state apparatus.

With regard to the legal status, the constitutional court is a political and constitutionally judicial agency. The procedures of establishment, composition and nature of handled cases are provided by the constitution, and the constitutional court is a political body. Moreover, the ruling on acts of constitutional violations may apply regulations on constitutionally responsibility under a special procedure of proceedings. The constitutional court is a constitutional agency.

2.2. Functions and tasks of the constitutional court:

Functions of the constitutional court depend on contents of the constitution and attributes of the Viet Nam socialist state ruled by law. The research team think that the constitutional court of Viet Nam in its early stage of establishment shall have the following tasks and functions:

First: To examine and rule on and constitutional compatibility of legal documents;

Second: To examine and rule on the constitutional compatibility of international treaties signed and joined by Viet Nam;

Third: To interpret constitution;

Fourth: To handle disputes over constitutional violation.

2.3. Organisation of the constitutional court

+ *Qualifications of constitutional court judges :*

Citizen status: Judge of the constitutional court must be citizen of the Socialist Republic of Viet Nam.

Age: Judge of the constitutional court needs to be a senior person with deep knowledge, it is thus necessary to regulate the minimum age but not the maximum age. The minimum age of a constitutional court judge can be 50.

Professional knowledge and experiences: Judge of the constitutional court shall be a senior legal expert who works for long in the field. He/she possibly used to be a judge or prosecutor, senior officials of the State, lawyer, professor, doctor of laws

working at institutes or law training facilities. The judge of the constitutional court shall also have at least 15 years working experiences in legal field.

Full-time working basis: Judge of the constitutional court works on a full-time basis. To ensure the independence, it is needed to prohibit the judge to work on part-time basis for different positions. Those who are working in the administrative agencies and after being appointed as the judge of the constitutional court shall quit that position. However, the judge of the constitutional court may participate in researches, deliver lectures at institutes and law training facilities. In addition, the judge of the constitutional court may not participate in businesses.

Number of judges: To ensure the principle of decision by majority of the constitutional court, the number of judges must be the odd number. Normally, the number judges varies between 7 and 19. In Viet Nam, the expected number is from 13 to 15 judges.

Office term of the judge of the constitutional court : The judge of the constitutional court often has a long term of office and rarely be re-elected or re-appointed. The regulation is to ensure the independence of the judge of the constitutional court, preventing the possible influences by authorised agencies and individuals in the election and appointment of judges. The term of office for judges of the constitutional court in Viet Nam could be 10 years, and they will not be re-elected or re-appointed. To ensure the stability and inheritability, the law on constitutional court should regulate that the election, appointment and change of judges do not concurrently take place to all judges.

Selection of judges of the constitutional court : At present, there are three methods of selecting judges of the constitutional court depending on the organisation model of state power in each country. They are: electoral model, appointment model or mixed model (combination of electoral and appointment model). Given the political regime of Viet Nam, the judge of the constitutional court should be selected through the electoral model. To this end, all judges of the constitutional court are elected by the National Assembly based on the introduction of the State President.

+ *Organisation of the constitutional court:*

The constitutional court shall include the following units:

Council of judges – is the agency including all judges of the constitutional court, working on collective basis and decisions by majority.

The tasks and authority of the judge council of the constitutional court are to: rule on the constitutional compatibility of legal documents; interpret constitution; handle constitutional disputes; examine the constitutional compatibility of elections and referendums; rule on personnel issues of the constitutional court, issues related to the suspension, removal and dismissal of judges of the constitutional court; approve the working regulation and financial and budgetary issues of the constitutional court.

Chief of the constitutional court : is elected by the National Assembly, represents and is accountable to activities of the constitutional court. The chief organises, operates, checks and controls all activities of judges and public servants of the constitutional court. The chief is authorised to prepare, convene and chair meetings of the constitutional court; submit issues to be handled to the council of judges; raise requirements to all relevant sides, organise investigations, subpoena witnesses, ensure the implementation of procedures during handling of cases; represent the constitutional court in relations with other organisations and agencies; be accountable to manage and operate the constitutional court.

Deputy-chief: is accountable to assist the Chief to implement assigned tasks and represent the constitutional court upon the absence of the Chief.

General Secretary of the constitutional court: is the leader of the administrative system of the constitutional court. The general secretary assists the Chief of the constitutional court in administrative and paper work and archives; be accountable to researches, investigation, external relations, notification of documents, preparation of constitutional court meetings.

In addition, the constitutional court may establish other administrative and professional units such as professional divisions, boards to take charge of authorised fields of the constitutional court, its Office, Library, Center for information and research services, etc.

- *Operation of the constitutional court*

Rules and procedures of the constitutional court: Law on the constitutional court regulates rules and procedures to examine and handle cases at the constitutional

court. Normally, the constitutional court has two types of procedures: common procedure and special procedure

Common procedure at the constitutional court includes:

- + To lay a petition to the constitutional court;
- + The constitutional court preliminarily examines the possibility to accept or refuse to handle the petition;
- + To organise meetings between representatives of the petitioner and defendant;
- + To collect necessary information and evidences;
- + To involve witnesses and appraise;
- + To examine the case and cast a vote on the court decisions;
- + To announce court decisions;
- + To re-examine the case where necessary;
- + To handle issues related to the legal costs and other issues.

The special procedure related to entities under the law on constitutional court requires the constitutional court to examine and handle an issue which is authorised by the constitutional court, the procedures to examine that issue and special consequences of the court decisions.

In general, each case is handled at the constitutional court under three steps: 1/ to handle the case; 2/ to try; 3/ to make decisions.

During handling the case, the constitutional court checks the right to petition, trial authority, legal ground of the petition. The case will then be assigned to a small council or prepared by the court chief to submit to the council of judges for examination at meetings.

The trial is conducted by a council, in which judges discuss openly and collectively and decide by majority. Depending on nature of the case, the constitutional court may conduct the trial and decide based on the case files or proceedings.

Normally, to examine the constitutional compatibility of legal document, the constitutional court makes decisions based on the file examination. The judicial review is conducted under the post-oversight and at request of authorised entity. This tool is one of the element to limit the arbitrariness of the constitutional court, and ensure the checks and balances. Those subject to the post-oversight are laws and other legal documents which are in effect.

To constitutional complaints, the handling of the constitutional court requires the participation in proceedings of relevant sides.

After making decisions, the constitutional court conducts the following activities: notify the court decision to state agencies and the persons concerned, announce the court's decisions on the mass media, etc.

Constitutional procedures:

Constitutional procedure can be understood as a legal process to handle a case related to the constitution. The nature of constitutional procedure is as follows:

- + Petition on an act of constitutional violation is the first step of the constitutional procedure. Constitutional violation is the activity or non-activity which violates regulations and principles provided by the constitution. Constitutional sue is the obligatory condition and the first step of the constitutional procedure. Without constitutional sue, there will be no constitutional procedure.

- + A constitutional case arising at the constitutional court is the center of the constitutional procedure.

- + Entities participating in constitutional procedure as “defendant” are authorised state agencies and individuals.

- + The institution which has the jurisdiction in constitutional procedure is the constitutional court but not judicial court. Rules, procedures and decisions made by the constitutional court are based on the constitution and justice.

2.4. Legal consequences and effect of decisions by constitutional court

+ *Constitutional compatibility of legal documents:* the constitutional court may make one of the following decisions:

First, to legal documents issued by the National Assembly, the constitutional court may rule on a law or resolution which is incompatible with the constitution and voids the document.

Second, to legal documents issued by authorised state agencies and individuals, the constitutional court is entitled to decide that the document is incompatible with the constitution and voids that document.

In the case that the law is passed through referendum, in principle the constitutional court is not permitted to announce that the law is incompatible with the constitution. However, it is necessary to regulate that if a law is passed through referendum and incompatible with the constitution, the constitutional amendment will concurrently take place.

+ *Interpretation of constitution:* When the constitutional court interprets the constitution, regulations of the constitution are examined. The constitutional court will explain contents of the regulations and define which acts are considered constitutional violation. The explanation will clarify contents and regulatory spirit of the constitution, and the regulations are obligatory.

SECTION 2
RESEARCH REPORT
**“INNOVATING THE ORGANIZATION AND OPERATION OF LOCAL
GOVERNMENTS”**

A. INTRODUCTION

Innovating the organization of local government to help further improve the political system in general and the state apparatus following the spirit of building a socialist state of the rule of law. In order to meet the requirements of the new development stage, our Party pays special attention to innovating the political system from central level to grass-roots level in terms of contents and modes of working and organizational structure. The objective is to increase the effectiveness of the leadership and management of the political system. The current situation, causes and solutions to improve the operational effectiveness and the combativeness of Party organizations and socio-political organizations, and to innovate the operation and organization of the state apparatus have been mentioned in documents of the Party National Congresses. The 2011 Platform for national building in the transitional period to socialism has a separate part on guidelines for the political system and the leadership role of the Party. The 5th meeting of the 9th Party Central Committee made a topic resolution on innovating and enhancing the quality of the political system at grass-roots level (communal level). As part of the apparatus and an integral part of the political system, local governments need to be innovated to keep up with the general requirements of the political system in the new development stage of the country. For the past years, the operation and organization of local governments have been studied for innovation. However, weaknesses in the organizational model and working procedures of local governments still remain. Resolution No. 17-NQ/TW dated March 18th 2002 of the 5th meeting of the 9th Party Central Committee includes this observations: functions and tasks of different units in the political system have not been well defined, their responsibilities are not clear, their working contents and modes have been slow to be innovated. Many manifestations of the bureaucratic and centralized mechanism still remain.

In the context of building a Vietnamese socialist state of the rule of law, the organization of local government has always been an important issue which needs to be thoroughly studied. It needs to be closely attached to the organization of the state apparatus, the relationships between the centre and localities, representative democracy and ensuring the smoothness and unity of the executive apparatus.

Innovating the organization of local governments to implement administrative reform policy. One of the important issues of administrative reform is innovating the organizational structure of the apparatus. The overall goal is to build a simplified apparatus with a suitable model, meeting the governance needs of the current context. Innovating the organization of local government apparatus, improving the institutionalization, organization and operation of people's councils, people's committees and specialized agencies of people's committees is one among the tasks put forth in the Overall Program for state administrative reform for the period 2001-2010. This program is being implemented and the said goal is still being realized.

Aiming at the administrative reform goal and a rationale organization of local governments, the Resolution of the 5th meeting of the 10th Party Central Committee on accelerating administrative reform and increasing the governance effectiveness and efficiency of the state apparatus sets out the policy of organization of no people's councils at urban district, rural district and ward levels. This policy is being implemented following resolutions of the National Assembly and National Assembly Standing Committee. After reviewing the implementation of this policy, scientific grounds and recommendations for amending legal documents on the organizational models of local governments need to be provided.

Innovating the organization of local governments to increase the effectiveness of local governance supporting the task of socio-economic development. People's councils and people's committees have an important role and responsibility in ensuring the local enforcement of law and deciding and coordinating the implementation of local socio-economic development policies. This is strengthened especially in the context of the current increased decentralization of governance for local governments. These organizations in order to fulfill their functions and tasks need an organizational model suitable and compatible with the workload assigned to them by law. Therefore the organizational model of local governments needs to be further studied and innovated to on the one hand ensure the unity of and on the other hand the compatibility with local characteristics in terms of scale, governance levels, the nature of an urban areas, special urban areas or rural or island areas, etc.

The Constitution is a legal document providing for fundamental issues on the relationship between the central and local governments and major principles of the organizational model of local governments. Therefore innovating the organization of local government in our country is closely linked to constitutional provisions on this issue. For this reason, in order to comprehensively innovate the organization of local governments as required by Party resolutions (a resolution of the 5th meeting of the 9th Party Central Committee, a resolution of the 5th meeting of the 10th Party Central Committee and the 11th Party National Congress documents), it is necessary to first study to amend and supplement the 1992 Constitution to provide legal basis for the organization of local governments and the basis for a comprehensive amendment of the Organic Law of People's Councils and People's Committees. As such the constitutional amendment is timely not only to institutionalize guidelines of the Party for the organization of local governments but also is the legal basis for the organization and operation of local representative bodies and state administrative bodies, contributing to further improving the Vietnamese legal system under the Strategy for building and improving the Vietnamese legal system.

For the above said reasons, a study on the organization and operation of local governments is very necessary, contributing to further improving the institution of local governments and laying legal basis for the implementation of the policy of innovating the organizational model of people's councils and people's committees in the new context of our country.

2. Study purposes:

- Study theoretical issues on the organizational models of local governments, relationships between central and local governments, between the people's council and people's committee, operational principles of local state agencies.

- Systematize guidelines and policies of the Party in the 2011 Platform and other Party instructions and resolutions on the organization and operation of local governments.

- Reviewing the experience and lessons in building local governments for the past 20 years of 1992 Constitution implementation, the pilot of organization of no people's councils at urban and rural district level and ward level.

- Study the experience in the organization of local governments of some countries in Europe, Asia and Latin America, the design and content of constitutional provisions on local governments then draw suitable factors which we can learn from.

- Develop scientific grounds on the urgency and guiding principles for the amendment of the 1992 Constitutional provisions on the organization and operation of local governments.

- Make recommendations relating to issues of the 1992 Constitution on the organization and operation of local governments.

3. Study contents:

Chapter I. Theoretical bases for the organization of local governments in our country

1.1. Concepts of local governments

1.2. Division of power between central and local governments

1.3. The Party views and the institutionalization of Party guidelines for the organization and operation of local governments

1.4. Organizational models of local governments of some countries, applicable experience for Vietnam

Chapter II. The current situation of local government organization in our country

2.1. Organization of local governments in our country since 1946

2.2. The pilot organization of no people's councils at urban and rural district levels and ward level, experience and lessons

2.2.2. Weaknesses and shortage in the current organization of local governments in our country

Chapter III. Viewpoints and solutions to innovating the organization and operation of local governments in our country

3.1. Viewpoints on innovating the organization and operation of local governments in our country

3.2. Solutions and recommendations for the organization and operation of local governments in our country

3.3. Recommendations for the amendment of the 1992 Constitutional provisions on local governments

B. RESEARCH RESULTS

Chapter I

THEORETICAL BASES FOR THE ORGANIZATION AND OPERATION OF LOCAL GOVERNMENTS IN OUR COUNTRY

1. Concepts of local governments

In our country, the term “local governments” is used fairly widely and popularly in Party documents, state legal documents, political-legal books and magazines as well as in speeches by Party and State leaders at central and local levels. But actually what are local governments? What are agencies included in the organizational structure of local governments? Is it true that local governments consist of only people’s councils and people’s committees as often understood in our country now?

There are many different concepts of local governments in our country. Although this term appears in many legal documents, there has been no legal document providing a clear and comprehensive explanation of the term “local government”.

Although the term “local government” is used widely and popularly in our country, this term does not appear in *Từ điển Tiếng Việt (Vietnamese Dictionary)* and *Từ điển giải thích các thuật ngữ pháp luật thông dụng* (Dictionary of popular legal terms). For example: Although *Từ điển tiếng Việt* (editor Hoàng Phê) published in 1995 by the Institute of Linguistics of the National Centre of Social Sciences and Humanity has 38,410 words and phrases, it does not have the term “local government” but only “government”. The term “government” (page 157) has two explanations. “1. *The power to control the state apparatus* and 2. *The apparatus directing and managing the work of the State*”. If we take the general explanation of the term “government” as in the dictionary, the term “local government” will consist of all local state agencies established to direct and manage local state work. There is not a term of “local government” in the *Sổ tay thuật ngữ pháp lý thông dụng (manual of popular legal terms)* published by the Education Publishing House in 1996 (chief editor Nguyen Duy Lam) or in *Từ điển giải thích thuật ngữ luật học (Dictionary of Jurisprudence)* published by Hanoi Law University in 1999 (chief editor Associate Professor Nguyễn Ngọc Hòa), or

in *Từ điển Luật học (Dictionary of Jurisprudence)* of the Institute of Jurisprudence published by the Judicial Publishing House in 2006.

The understanding of local government as a system of state agencies established locally to direct and manage the work in the locality is divided into two concepts: the concept of local government with narrow meaning and the concept of local government with broad meaning.

1.1. Narrow concept of local government: Local governments consist of people's councils and people's committees (or administrative committees).

The Constitution and legal documents often mention local government in our country as people's councils and administrative committees (people's committees).

For example the 1946 Constitution (chapter V) and the 1959 Constitution (chapter VII) have provisions on "*People's councils and administrative committees*". The 1980 Constitution and 1992 Constitution (amended 2001) have a chapter on "*People's councils and people's committees*". In specifying constitutional provisions we have laws with the same names as those of these two bodies. For example the *1962 Organic Law of the People's Councils and Administrative Committees*, the *1983, 1989, 1994 and 2003 Organic Laws of People's Councils and People's Committees*. However we have an exception. After peace was re-established in the North, on April 29th 1958 the 1st National Assembly at its 8th sessions made a law No.110 with the name "*Law on the organization of local governments*".

It can be confirmed that from the chapter names of the four Constitutions of 1946, 1959, 1980 and 1992 to the names of laws on local governments (except for the one of 1958), local governments are often understood mainly as consisting of people's councils and people's committees (or administrative committees).

The understanding of local governments as consisting only people's councils and people's committees emanates from legal practice on organization and operation of local governments in our country in the early years after the August Revolution of 1945. Article 1 of Order No.63 dated November 22nd 1945 on the organization of people's councils and administrative committees at communal, district and regional levels reads "*The local people's government in Vietnam shall consist of people's councils and administrative committees*". Article 3 of Order

No.77 dated December 21st 1945 on the organization of people's government in urban provincial districts and cities reads: In cities the three following bodies shall be established: "*the people's council of the city, the administrative committee of the city and the administrative committee of city areas*". As such, under Order 63 and Order 77 of 1945, the local people's governments consist of the people's councils and administrative committees. After peace was re-established in the North, on April 29th 1958 the 1st National Assembly at its 8th sessions made a law No.110 with the name "*Law on the organization of local governments*". Article 1 of this Law also stipulates that local governments consist of *people's councils and administrative committees*.

1.2. Broad concept of local government:

Under this concept, local governments even with a broad meaning do not include the courts and procuracies, which are judicial bodies. They do not either include local bodies established by central ministries (such as public security departments, military bodies, custom departments, taxation departments, etc.). Because these locally based institutions belong to ministries. They are not established by the local people either directly or indirectly but by ministries. The heads of these institutions are appointed by ministries and their work is directed by ministries.

If local governments are understood as consisting of only people's councils and people's committees like what they are in the name of the constitutional chapter ("People's councils and people's committees) or the name of the law (the Organic Law of the People's Councils and People's Committees), it is understood with a narrow meaning and this does not reflect the reality of the development of legal provisions on local government in our country in the past years. The 1962 Organic Law of People's Councils and Administrative Committees as well as the 1994 Organic Law of People's Councils and People's Committees and the 2003 Organic Law of People's Councils and People's Committees does not directly use the term "local governments". But these laws have been added with many provisions on the organizational structure of people's councils and people's committees. For example, the 1962 Law for the first time stipulates that people's councils of different levels establish their *specialized boards* and that administrative committees of different levels can establish and remove specialized

agencies which are *under* the administrative committees not *beside* the administrative committees as in the past. Specialized agencies of the administrative committee is under the leadership of the administrative committee of the same level; the directors of these agencies are responsible before and report their performance to the administrative committee of the same level (see articles 28, 29, 30, 55 and 56 of the 1962 Organic Law of People's Councils and People's Committees). The amended 1989 Organic Law of People's Councils and People's Committees has a new provision on the establishment of the *standing board of the people's councils* from district to higher levels (which consists of the chair, vice chairs and secretary of the people's council). The 1994 Organic Law of People's Councils and People's Committees stipulates that even the people's councils of communal level have a chair and vice chair. And by the 2003 Organic Law of People's Councils and People's Committees, it stipulates that people's councils of all levels have their own standing boards. Although commissions and the standing board of people's councils are called "*organs*" of the local representative bodies, they are actually not state bodies with the right meaning of the term because they do not have the mandate of state power nature, they cannot unilaterally make binding decisions. However commissions of the people's council have an important role in assisting the people's council to appraise reports and plans submitted to the meetings of the people's council; assisting the people's council to examine and supervise the enforcement of the Constitution, laws and resolutions made by the people's councils; and making recommendations relating to the areas of their responsibility to the people's council. Standing boards of the people's councils started to be established in our country in late 1980s to ensure the work of the people's council, coordinate the work of different commissions of the people's council; urge and examine the work of the people's committees and other local state bodies relating to the implementation of the people's council's resolutions; urge and examine the handling of the people's petitions, complaints and denunciations, etc. We have discussed the theoretical and legal bases as well as the reality and necessity of the establishment of standing boards of the people's council before the National Assembly approve a resolution on June 30th 1989 amending

some provisions of the 1980 Constitution and the 1989 Organic Law of the People's Councils and People's Committees²⁴.

According to this viewpoint, the understanding of local government as consisting of only people's councils and people's committees is narrow and not compatible with the reality of the development of legal provisions on the organizational structure of people's councils and people's committees, reducing the significance of the establishment of commissions and standing boards of the people's council and their role in enhancing the effectiveness of the work of local governments in general and the enforcement of the Constitution and laws locally in particular. Local governments therefore should be understood more broadly, consisting of not only people's councils and people's committees but also organs and organizations established on the basis of people's councils and people's committees (specialized agencies of the people's committees, commissions and the standing board of the people's councils)²⁵.

In order to clearly define the legal nature and organizational model of local governments and to make a distinction between the concept of "local government" under our current Constitution and laws and the concept of "local government" or "local autonomy" in other countries, it should be stressed that:

First, local governments in our country now are understood as an integral organic part of the unified national government, a legal form through which the people execute their sovereignty locally. Article 6 of the 1992 Constitution (amended in 2011) stipulates: "*The people exercise State power through the National Assembly and the People's Councils, bodies representing the will and aspirations of the people and which are elected by and accountable to the people*". The National Assembly is defined as "*the highest state power body of the Socialist Republic of Vietnam*" (Article 83 of the 1992 Constitution), and the people's councils of different levels are defined as "*the local state power body*", "*representing the will and sovereignty of the local people*" (Article 119 of the 1992 Constitution and Article 1 of the 2003 Organic Law of people's councils and people's committees).

²⁴ See: Truong Dac Linh, *Issues on establishment of People's Council Standing Commission, State and Law Magazine, No. 1 - 1989*, page 29-34.

²⁵ See: Truong Dac Linh, *Issues on establishment of People's Council Standing Commission, State and Law Magazine, No. 1 - 1989*, page 29-34.

The people's committees under the current Constitution and laws are defined as "the executive bodies of the respective people's councils, the local state administrative bodies" (Article 123 of the 1992 Constitution and Article 2 of the 2003 Organic Law of people's councils and people's committees). Therefore the quality of state power of people's councils and the quality of being state administrative of people's committees under our country's current Constitution and laws are an attribute of local governments in our country, not the nature of being "non-state" (local autonomy) like that of local autonomous agencies of many other countries.

Second, not all state agencies established and operating locally, and addressing local issues belong to the organizational structure of local government. This does not mean that not only local law protection agencies (courts and procuracies), other agencies established locally by ministries (such as public security departments, military bodies, custom departments, taxation departments, etc.). Because these locally based institutions belongs to ministries. They are not established by the local people either directly or indirectly but by ministries. The heads of these institutions are appointed by ministries and their work is directed by ministries.

Third, under the 1992 Constitution and the 2003 Organic Law of people's councils and people's committees, local governments in our country are organized at 3 administrative unit levels:

1. *Provinces, centrally governed cities* (commonly known as provincial level);

2. *Rural districts, urban districts, urban provincial districts and provincial cities* (commonly called district level);

3. *Commune, wards and communal towns* (commonly called communal level).

In all the said administrative units of different levels regardless of position, characteristics, role, being rural or urban, etc. they all are defined as complete government levels. In all these administrative units, people's councils and people's committees are established (Article 118 of the 1992 Constitution; Article 4 of the 2003 Law).

On August 15th 2008, at its 4th session, the 12th National Assembly approved Resolution No. 26/2008/QH12 on *“Pilot organization of no people’s councils at rural district, urban district and ward levels”*. On January 16th 2009, the National Assembly Standing Committee made Resolution No. 724/2009/UBTVQH12 on *“List of rural district, urban districts and wards of provinces and centrally governed cities under the pilot program of no people’s councils at rural district, urban district and ward levels”*. According to this list, currently 67 rural districts, 32 urban districts and 483 wards of 10 provinces and centrally governed cities of the country have no people’s councils. However there are still different opinions on this pilot program and it is still not clear whether this pilot model can be applied for all rural districts, urban districts and wards nationwide or not.

Fourth, under the 1992 Constitution and the 2003 Organic Law of people’s councils and people’s committees, local governments in our country are organized and run following *the principle of democratic centralism* (Article 6 of the 1992 Constitution, Article 3 of the 2003 Law). Local governments fulfill functions and exercise power as provided for by the Constitution and laws, address arising local issues on the basis of and in order to enforce the Constitution, laws and documents issued by state bodies of higher levels, taking into consideration the interest of the local people and that of the whole country.

Under the principle of democratic centralism, local governments are organized in a hierarchical order. Local governments of lower levels must comply with bodies of higher levels, local governments must comply with the central government. People’s committees and their specialized agencies have a two way relationship ("dual subordination"). Horizontally, a people’s committee belongs to the people’s council of the same level. Vertically it belongs to the people’s committee of one level higher. Provincial level people’s committees belong to the Government. Specialized agencies horizontally belong to the people’s committee and to some extent to the people’s council of the same level. They vertically belong to specialized agencies of one level higher. Under this principle, a people’s council of higher level has the power to repeal resolutions made by the people’s councils of one level lower. The National Assembly Standing Committee has the power to repeal resolutions made by provincial people’s councils. The Prime Minister and the Chair of people’s committees of higher levels have the power to suspend

resolutions made by people's council of one level lower and request the people's council of the same level to repeal the resolutions (for resolutions made by provincial people's councils, the Prime Minister has the power to suspend and request the National Assembly Standing Committee to repeal them). The Prime Minister, chairs of people's committees of higher levels have the power to repeal documents issued by the chair of the people's committee and the people's committee of one level lower; have the power to move, dismiss the chair, vice chairs of people's committee of one level lower, etc. This is completely different from the principle of local government autonomy of other countries in the world. Autonomous local governments are independent without a hierarchical relationship. They are independent and proactive in exercising their power as provided for by the Constitution and laws.

1.3. Concepts of local governments and levels of local governments of some countries

In foreign legal books and publications, due to the fact that the organizational principles and models of local autonomy are different in different countries, the following terms are often used "*local governance*", "*local self-government*" in European-American countries and "*local Soviet*", "*local state power bodies and state governance bodies*" in the former Soviet Union and other former socialist states. Although there are differences in the organizational principles, structures, mandate and relationships among agencies and organizations in the work of local governance in different countries, the terms "*local governance*", "*local self-government*" or "*local Soviet*", etc. in capitalist and former socialist countries do not include all state bodies established and run locally such as courts, prosecution agencies or procuracies, etc. After the collapse of the Soviet Union, the Russian Federation and other former independent states of the Soviet Union made their constitutions and organic laws of local government based on the principle of local autonomy, replacing local Soviets.

The term "*local governance*", "*local self-government*" of other countries and the term "local government" of our country are totally different in terms of organizational principle and legal nature of local government bodies. Because the term "*local governance*" in other countries is understood as a form of

administrative work performed by state bodies appointed by higher state body (the Government) and by local self-government elected by the local people²⁶.

The common trend in the world now is that local governments are organized on the basis of *autonomous principle*. The European Union in 1985 passed a charter of local self-government and one of the conditions for countries to join the Union is that they need to be a party to this charter. Since 1998, the United Nations has drafted a United Nations charter on local autonomy and opinions and comments of countries on this draft document are being collected before it can be passed by the United Nations.

Different from local governments of various levels in our country under the 1992 Constitution and the 2003 Organic Law of people's councils and people's committees, local governments in other countries such as the United Kingdom, the United States, European countries, the Russian Federation and other former independent states of the Soviet Union, some Asian countries such as Japan and South Korea, etc. organize their local governments based on the principle of local autonomy. The organization of local governments in these countries has the following common characteristics:

First, only basic natural administrative-territorial units (such as commune, provinces or cities) which are called "local collectives" of the local people can be given local autonomy and have local autonomous power. Local autonomous power is not contrary to state power (legislative, executive and judicial power) of the central government. Administrative of middle level are not given local autonomy.

Second, local self-governments have their own power, assets and budgets as provided for by constitution and local autonomy law. They have independent and proactive power in deciding on matters under their responsibility as provided for by constitution and local autonomy law.

Third, members of the communities of the local autonomous administrative unit are those who have autonomous power and directly exercise autonomous power through referendum or their representative bodies (autonomous councils)

²⁶ See :K.B.A-ra-nôp-xki, *Oversea State Law*, "Pho-rum--Inpha-M" Publishing House, Moscow, 1999, Page 460-483 (in Russian).

elected by the people, through executive bodies of which the heads are elected directly by the people or by the autonomous councils.

Fourth, officers of local self-governments get their salaries from local budget. They are not state employees. Local self-governments have the power to organize their governance apparatus and recruit officers for local self-government based on their workload; and to decide on the salary for officers of local self-governments based on the availability of local budget.

Fifth, local self-governments have the power to provide for local tax rates and local tax and fee collection; and to issue normative documents applicable locally. Local normative documents issued by local self-governments must not be contrary to constitution but within the mandate of local self-governments as provided for by the local autonomy law.

Sixth, when a local self-government issues a document or takes an action which is contrary to constitution or laws, representatives of central state bodies can request that this document be repealed or the action be stopped. When the request has been made but the local self-government does not take action, the representative can bring the issue to a court of law. Local self-governments also have the right to sue central state bodies if these bodies issue a document or take an action contrary to constitution and local autonomy law.

As such, concepts of local governments in other countries are reflected in two aspects:

1. The people of the local community are the main players of local autonomous power;

2. Local autonomous bodies include representative bodies (autonomous councils) and local executive bodies headed by mayors who are elected by the people or by local representative bodies.

This seems to be the most outstanding difference in the concepts of local governments of other countries and those of Vietnam.

In many countries the constitutional chapter on local government is not named after the name of local government bodies, but the chapter name is often a generalization of the organizational principle of local government, such as “Local

autonomy” (for example chapter VIII of the Japanese Constitution of 1947 and the Korean Constitution of 1987, chapter XI of the Constitution of the Russian Federation of 1993, etc.) or the chapter is named after the name of administrative-territorial units such as Region, province or commune, etc. (for example chapter V of the Italian Constitution of 1947). This term is not understood as consisting of only elected bodies and executive bodies like the constitutions of our country.

1.4. Proposed concept of local governments in our country now

The said characteristics of local autonomous governments in other countries may not be immediately applicable to the context of our country. But the general policy of our Party and State is to increase the decentralization for local governments, foster local democracy and other bases that ensure the sovereignty of the people. To some extent, this represents some aspects of local autonomy.

From the above analysis, the concept of local governments according to the current Constitution and laws in our country can be summarized as:

Local governments in our country is an integral part of the people’s unified state government, which include local representative state power bodies (people’s councils) and other agencies and organizations established on the basis of local representative state power bodies as provided for by the Constitution and laws (people’s committees, specialized agencies of people’s committees, the standing boards of people’s councils, commissions of people’s councils) to govern different fields of local social life on the basis of the principle of democratic centralism and the harmonization of the interest of the local people and that of the whole country.

If we can agree to this said concept, when we amend the 1992 Constitution, chapter XI named *"People’s councils and people’s committees"* should be changed to *"Local governments"*

2. Division of power between central and local governments

2.1. State organizational structure and the issue of division of power and decentralization

In terms of state organizational structure, there are two models of state structure in the world now, which are federal state and unitary state.

In a federal state, the relationship between the federal government and other bodies of the state is established based on the principle of power decentralization. In their early days, federal states apply the doctrine of Dualistic Federalism. The content of this doctrine is the balance of state power between the federal government and other bodies of the federal state through a clear demarcation of the power of the federal government and the power of each state. The federal government and the states are independent in exercising their power without interference in the area of the other's responsibility. The US Constitution of 1787 follows this model. Later most of federal states apply the doctrine of Co-operative Federalism as the basis for the relationship between the federal government and other bodies of the federal state. The main content of this doctrine is that the federal government cooperate and assist states for development. The demarcation of the power between the federal government and the states are made on the following bases:

- The federal constitution enumerates issues belonging to the federal power and those belonging to states (Argentina, Canada, Switzerland, Venezuela, etc.). This is a vertical decentralization of power.

- The federal constitution enumerates issues belonging to the federal power, issues belonging to states and those belonging to the joint power of the federal government and the states (India, Germany, Malaysia).

- The federal constitution enumerates issues belonging to the federal power and those belonging to the joint power of the federal government and the states. Other issues which do not belong to the said two type of issues belong to the states.

There are also various models of power division and decentralization in a unitary state:

First, the central unitary state: This model is used in socialist states and in some other states. Under this model, local governments have to comply with the constitution, laws, decisions and documents made by state bodies of higher levels. When dealing with issues under their responsibilities, local governments still need to ask for directions from state bodies of higher levels. This model was used for a long time in Vietnam (in the period of centralized and state subsidized economy). In this model very bulky working procedures were created, or in other words an

“ask for direction” civil service. Some of the working habits of this period still exist today. The advantage of this model is that the State can focus all resources on implementing major and urgent tasks of the country in certain historical periods. This model is suitable for periods of war or post-war national reconstruction. But its continued use until the time of peace and of building a state of the rule of law and a market economy has become increasingly unsuitable. Countries on their way to build a state of the rule of law and a market economy all have to gradually abolish the model of governance;

Second, the decentralized unitary state: under this model, the relationship between the central government and local governments is established on the basis of the power decentralization principle. Under this principle, the central government establishes its bodies in local territories or transfer certain independent power and mandate to the highest level local governments (provinces or regions). The provincial level government will then decentralize its power to governments of lower levels;

Third, the relative decentralized unitary state: under this model, the central government gives local government certain autonomy. The local governments elected by the local people have the power and tasks of governing local issues. These local governments are legal entities, having their own budget and local staff pool. These staff members are not state employee but local civil servants.

2.2. Centralization, deconcentration and decentralization of power and administrative decentralization

Centralization of power

Centralization of power is a principle of state apparatus organization in which all power is centralized in central bodies. Central bodies direct and control all the work of local government bodies and these local government bodies can only comply with decisions made by bodies of higher level. In case of the full use of this principle, only central government bodies can issue legal normative documents, can be legal entities, which means they have their own budget and legal capacity. In the years after the Second World War, this model existed across Europe. This model is used for certain periods of time in certain developing countries as well. However, in the trend of democratization and decentralization for development, the model of

people-elected local government model has become popular. Every country tries to make a law on local government to provide for clear power, tasks and mandates as well as responsibilities of local governments of different levels.

Deconcentration of power

Deconcentration is in fact a form of centralization. Under this principle, state power is still centralized in the central government, but the central government sends (appoints) its representatives to territories to exercise state power. Representatives from the central government not only do the work of local oversight but also exercise state power through the staff or agencies they establish or appoint. Under the principle of deconcentration, decision making power is divided for various agencies and individuals. Among these agencies, there is a lead agency. Deconcentration is *“the policy through which central civil servants sent by the central government to the locality are assigned with mandates which in the past directly belonged to Ministries”*²⁷.

Deconcentration is considered an efficient measure to prevent centralized bureaucracy and fragmentation. Some of the visible features of deconcentration are: state power is still centralized in the central government and the central government not only does the work of local oversight but also exercise state power locally through the staff or agencies it appoints or establishes; deconcentrated agencies only perform tasks assigned to them by the Government, they cannot interfere in the work of local governments; deconcentrated agencies have their power through delegation; they are organized in a hierarchical administrative order, including their document hierarchy (documents issued by a higher agency have higher value and effectiveness than those issued by lower agencies) and personnel hierarchy (staff or agencies of higher level are higher than those of lower levels). Examination work is done by agencies of one level higher through an administrative order. Examination work is effective administratively (higher level agencies, staff can repeal, suspend or amend documents issued by lower agencies either because these documents are illegal or unreasonable).

²⁷ Philippe Marchand, *Speed in Workshop on October 1,2 and 3 2001 on division of power between central and local governments and special statute for big cities at Vietnam-France Law House.*

Decentralization

Is the principle of power organization according to territorial level in which the central government transfer (by constitution and laws) to local people elected councils independent and comprehensive power and mandate (including material, financial and human resources, etc) and within the power and mandate given, local governments operates proactively, independently and self-responsibly.

In the Western understanding, decentralization means the self-government of local governments. In a comprehensive manner, “decentralization” has three meanings: 1. The principle of division of power (legislative, executive and judicial powers); 2. Division of power according to territorial demarcation; 3. Horizontal division of power to agencies and staff.

In a decentralized system, there is not a hierarchy. Decentralized agencies are elected by the people. The central government recognizes the self-government of local governments to a certain extent (local governments have their own legal capacity, assets, budget and human resources and they can by themselves decide on local issues and have capacity to sue).

Decentralization is a model of state governance originating from European and American countries. It is a popular model of state apparatus organization now.

The system of decentralization has the following major features: local governments are public legal entities (having their own assets and territories) decentralized agencies (councils) are elected by the people; local executive agencies (if any) belong only to the councils; in a decentralized state apparatus, there is not a hierarchy among administrative-territorial units; state agencies are highly equal, independent and autonomous and are only responsible before the people and the courts.

Centralization, deconcentration and decentralization of power all in fact represent the dependence of localities on the central government. Each of them has their own features, advantages and disadvantages. It is therefore necessary to know how to rationally organize state power so that the advantages can be mobilized in the chosen model.

Administrative decentralization

A number of researchers equate erroneously decentralization or deconcentration with administrative decentralization²⁸. The reason is that they often translate the English word “decentralization” or the French word “deconcentration” as administrative decentralization. Decentralization means to move parts of the government from a central place to several different smaller ones, which is totally different from administrative decentralization. Meanwhile deconcentration has some similarity with administrative decentralization but it is not totally so. Because administrative decentralization is the concept of Vietnam only, like deconcentration of the French administrative system.

Division of administrative levels is a term which has appeared for a long time in the study of law and state governance. However, there remain different viewpoints on this term. In terms of historical origin, there are 4 major models of administrative level division: the French model, the British model, the Soviet model and the traditional model. With this approach, a number of researchers hold that this type of classification is too simple and weak for analysis. There is another viewpoint holding that “this approach is meaningful to us in the sense that Vietnam is still following the Soviet model of administrative level division. We are even more Soviet than the Soviet Union. The feature of the Soviet model is the absolute power of Soviet, which is represented in the organization of central and local apparatus as well as in the division of power and mandate. There is other approach which is the division of level according to functions. Besides, there is a narrow concept of level division based on the experience of some countries. It is the transfer of responsibility, human resources and other resources by the central government to local governments. In fact, in a right manner division of administrative levels only takes place when local government bodies: (1) are established by law, (2) are within clear boundaries defined by an authority, within which the people share a sense of community..., (3) are governed by officers and representatives elected by the local people, (4) are allowed to make and enforce

²⁸ See : J.M. Cohen and S.B.Peterson, *Administrative Decentralization: Strategies for Developing Countries* retrieved from www.undp.org/governance/decentralization.htm.

local regulations..., (5) are allowed to legally collect tax... (6) have the right to manage budget, costs...

There are other viewpoints on division of administrative levels according to areas of state governance: (1) division of administrative levels is a method of governance in which functions, tasks and power of agencies in the system of agencies exercising executive power are divided and assigned specifically by a system of legal document and on the basis that decision making power is given to lower level agencies and the work of lower agencies are supervised through a system of reporting. Division of administrative levels is an administrative reform process to clearly define the functions, tasks, power and responsibilities of state administrative bodies from central to grass-roots levels to enhance the effectiveness of administrative governance; and the mechanism for the transfer of tasks to non-state organizations; (2) Division of levels is the assignment of functions, tasks and power to each administrative level. From a governance perspective, division of levels is the action of higher bodies giving their tasks and power to lower bodies to perform on a regular and continuous basis by issuing legal documents or by specific decisions.

In Vietnam, after a long time of division of administrative levels, there have emerged many different viewpoints on this term. Due to the diversity of terms and contents, there has been no unified term of division of administrative levels by now. This is totally dependent on historical conditions and the nature of the organization of state power in each country. The concept of division of administrative levels therefore should be made in accordance with the reality of the organization and operation of the country in question. In terms of law and administrative governance study, this is a very broad concept, which includes both division of state governance and state administrative work into levels. From the above analysis, division of administrative levels can be understood as *“the rational division of territorial – administrative units and division of power and mandate among various government levels by law or legal documents in accordance with the functions, tasks, power and characteristics of each level to effectively execute state power”*²⁹.

²⁹ See: Nguyen Cuu Viet, *Administrative decentralization in the relationship between central and local governments*, Legislative Study Review No. 7/2005.

2.3. Classification of deconcentration, division of power and division of administrative levels.

Classification of deconcentration

Deconcentration of power can be classified into: Deconcentration of functions of state agencies; deconcentration of public work; and deconcentration of power according to administrative boundaries of different levels.

+ *Deconcentration of functions*: it is the transfer and delegation of part of the functions and power by central agencies to their representatives in local territories to execute state power.

+ *Deconcentration of public work*: This is a quite popular form of deconcentration in which part of the public work of central government agencies is marginalized or transferred to localities. With this form of deconcentration, the right to make decisions is given to various agencies and individuals so that they can manage local work. In order for these agencies and individuals fulfill well their responsibilities, part of the public work must be transferred to them.

+ *Deconcentration of power according to administrative boundaries*: is a measure through which power is shared between central government and local government through representatives sent by the central government to the localities. This is a form of power division in which the central government has to recognize certain autonomous power of localities. The representatives are those who prepare draft decisions to be submitted to local councils, chair the discussion, implement the decisions and direct local administrative agencies. However deconcentrated agencies only perform tasks and power assigned to them by the Government. They cannot interfere deeply in the work of local governments. Deconcentrated agencies of lower levels have their power but it is delegated power, not independent power.

The deconcentration of power in the organization of governments is very important. It is helpful especially in countries with a large territory and huge population. The key issue is to reduce the workload for the central government and facilitate the work of governance and economic development. Countries can choose a suitable model of deconcentration of power to organize their government

apparatus from the above analyzed types depending on their cultural, economic, etc. conditions

Classification of division of power

Division of power can be classified as horizontal division and vertical division of power.

a. Horizontal division of power

Horizontal division of power is actually the allocation of functions, division of power and responsibility among state bodies of the same level, thus creating a mechanism of check and balance to prevent the misuse of power. That is the division into legislative, executive and judicial power. The horizontal division of power originated from the theory of “*division of power*”. This is one of the fundamental theories of state power organization of capitalist countries. The thought of power division was mentioned the first time in the ancient time of Greece by Aristotle (384 – 322, BC). This theory was expanded by John Locke and later comprehensively developed into a complete theory by Montesquieu (1689 - 1715), the great French Enlightenment philosopher. In his “*Spirit of the laws*”, when discussing power division, Montesquieu divided state power into legislative, executive and judicial powers. Legislative power is the power to make, amend or repeal laws and supervise the enforcement of laws. The executive power is the power to enforce legal documents, the right to declare war, to propose negotiation, to send or receive ambassadors, maintain security and prevent invasion. Judicial power is the power to punish crimes or adjudicate disputes among individuals. The horizontal division of power has been applied in many countries, especially Western countries like Britain, France, United States, Germany, etc.

Besides, in some countries the constitution includes “four powers”: legislative power, executive power, judicial power and the power to vote. There are also concepts of “five powers”. In addition to the said four powers, there is the power to examine executed by the Inspector General and his staff. There is other thinking of dividing power into smaller powers: ‘six powers’. Under this thinking, the political power belongs to the ruling Party; legislative power vested in the Parliament; executive power is in the hand of the State President and the Government; Judicial power is in the hand of the courts; the examination power belongs to other bodies;

the organization power belongs to the body in charge of making and amending the Constitution³⁰.

In brief, in many countries, horizontal division of power has been used for the organization of state power apparatus. The division of power has helped reducing the misuse of state power or dictatorship to ensure democratic rights of the people.

In our country, although the division of power is not directly recognized, the allocation and coordination of power have been used. Since the 1946 Constitution, besides affirming that “All the power of the land belongs to the entire Vietnamese people...”, the Constitution also reflects the thinking of division of power in its provisions on state apparatus organization, aiming at developing a “democratic Constitution” and preventing the dictatorship and misuse of state power. There was a clear division of legislative, executive and judicial functions and these functions were given to three independent bodies: the people’s parliament with legislative power, the Government with executive power and the Courts with judicial power. Later constitutions (the constitutions of 1959, 1980, 1992) selectedly inherited suitable factors of the theory of power division. Article 2 of the 1992 Constitution stipulates: “State power is unity with the allocation and coordination of state bodies in executing legislative, executive and judicial powers”. This is a manifestation of horizontal division of power. The three powers according to horizontal division of power theory: legislative, executive and judicial powers are for the first time officially embedded in the Constitution.

b. Vertical division of power

Vertical division of power is actually the division of functions, tasks and power among state bodies of different levels. Each level has its own functions, tasks and power. Each level does not interfere in the others’ work but state bodies of higher levels can examine and inspect the work of bodies of lower levels as provided for by laws.

On the division of power between central and local governments – vertical division of power is a limitation of power of central government and the transfer of autonomous power to local governments. Local governments are public legal

³⁰See “*Inspectorate, supervise, oversight and division of state power*”, Dr. Le Manh Luan.

entities, having the power to decide on local issues as provided for by laws. The division of power not only stem from the need to ensure the freedom and autonomy of local governments as independent legal entities but also to ensure the efficiency and effectiveness of state governance.

With the vertical division of power, the central government transfer part of its power to local governments. Under this division, the central government will decide on major national issues and local government's operation is not contrary to provisions of the constitution and laws. As such the general principle is that central government can only do things that local governments cannot. The vertical division of power must ensure that "public work must be assigned to lowest level agencies in the state apparatus, which can undertake the assignment"³¹.

It can be said that the nature of division of power between central and local governments is the transfer of autonomy and self-government and responsibility before the law to local governments the delegated power is executed by a n apparatus suitably established to do so.

In our country, for the purpose of organization of power, the territory is divided into different administrative levels from central go grass-roots levels with the vertical allocation and divisions of power. Under Article 118 of the 1992 Constitution, administrative units of central level are called provincial level (provinces and centrally governed cities), district level (rural, urban districts, provincial urban districts and provincial cities) and communal level (communes, wards and communal towns). Administrative units of each level have their own power according to a hierarchical order to fulfill well the task of local governance. Local governments have a unified organizational structure, including people's councils and people's committees. The people's council is the local state power body, representing the will of the local people and being elected by the local people. The people's committee is elected by the people's councils, the executive body of the people's council and the local state administrative body.

³¹ See Nguyen Dang Dung, *Limitations to state power*, Hanoi National University Publishing House. 2005, p. 296.

Types of division of administrative levels (administrative decentralization)

The division into administrative levels is actually the transfer of tasks and power to deal with certain issues to government bodies of each level in the state apparatus. Governments of each level have tasks and power depending on their own local capacities to fulfill the tasks assigned to them.

Division into administrative levels can be classified as: *political decentralization, administrative decentralization, fiscal decentralization and economic decentralization.*

+ *Political decentralization* can be understood as the transfer part of the political power and tasks of central government to local government. The effect of this process is to make local government strong and allow the people and political group take part in and influence on making and implementation of central and local government policies. Political decentralization is normally (but not always) attached to a multi-party and representative system. However political decentralization often requires constitutional or institutional reforms. Political decentralization is often stipulated in the Constitution and laws and this cannot be arbitrarily changed.

+ *Administrative decentralization* is understood as the allocation of power and tasks to ensure the provision of public services among different state body levels. It is the transfer of power and tasks to fulfill public functions (including the planning, management and spending) of governments of higher levels to those of lower levels. Administrative decentralization is made in three main levels: (i) decentralization; (ii) delegation) and (iii) division into different administrative levels, of which decentralization is considered the lowest level.

+ *Fiscal decentralization* is understood as the allocation of managerial responsibility and budget among state bodies of different levels. Fiscal decentralization is done in various forms, including (i) *self- financing or cost recovery through user charges*; (ii) *co- financing*; (iii) allowing local governments to collect certain types of tax or fees or to use all or part of their local revenues; (iv) transfer part of the tax revenues collected by the central government to local governments; (v) the guarantee or loans given to local government, etc.

+ *Economic decentralization* is understood as the transfer of the power to control and decide on business activities from the public to the private sector. This decentralization is often attached to economic liberalization in a market economy, abolishing centralized and state subsidized mechanism. In countries which are in the process of a market economy development, integration and opening up, especially in developing countries, economic development is extremely necessary.

3. Viewpoints of the Party on the organization and operation of local government

3.1. The Party views and policies and the institutionalization relating to the organization of local governments in the 1946 Constitution period

The 1946 Constitution period is understood as the period from the August Revolution of 1945 to when the National Assembly of the Democratic Republic of Vietnam passed the 1959 Constitution.

The leadership role of the Communist Party in the revolutionary state in general and local governments in particular had been considered a principle. From late 1945 to early 1952, because of the historical conditions, in order to unite all patriotic forces in the resistance war against the French, the Communist Party of Vietnam had to operate in secret. However the Communist Party headed by President Ho Chi Minh still took the leadership role in the governments of all levels. President Ho Chi Minh and the standing board of the Central Party Committee decided and directed the work of the State. The Instruction on the resistance war and national construction (November 25 1945), the Instruction on the situation and policy (March 3 1946), the Instruction Peace to move forward (March 9 1946) of the standing board of the Central Party Committee gave timely directions for the organization and operation of governments of all levels.

Reviewing the years under the leadership of the Party to regain state power since the August Revolution, the 2nd National Party Congress reaffirmed the class and revolutionary nature of our government: “It was a government, a revolutionary state led by the working class and its political party.”³²

³² See Communist Party of Vietnam: Compendium of party documents, Volume 12. National Politics Publishing House), Ha Noi, 2001, p. 221.

The viewpoints and policies of the Party and President Ho Chi Minh on organization of local governments have been studied and used in constitutions and laws. In the period after the August Revolution and the resistant war against the French colonialists, due to the situation of war, all political power is highly centralized in the standing board of the Central Party Committee and the Government. President Ho Chi Minh was the Head of the Party and State, the Chair of the constitution drafting committee, the one who signed orders of the Government (including orders on the organization of local governments). It is easy to see that in this period, our State paid due attention to institutionalizing local governments through laws. The first two orders to be mentioned on the organization of local governments is Order No. 63 _SL dated November 22, 1945 on the organization of people's councils and administrative committees of communes, districts, provinces and regions and Order No. 77 _SL dated December 21 1945 on the organization of people's councils and administrative committees of cities and urban areas. The 1946 Constitution inherited the organizational model of local governments defined in the said two Orders. In the 1946 Constitution, there is a separate chapter of 6 articles (among the total 7 chapters of 70 articles) on local governments. It is chapter V – People's councils and administrative committees, from article 57 to 62.

In the resistant war against the French colonialists, to stress the key tasks of local governments, administrative committees were changed into administrative cum resistant committees (Order No.9-SL dated October 1 1947), and then renamed as resistant-administrative committee (Order No. 149-SL dated March 29 1948).

After the victory over the French colonialists, the North was completely liberated it started enjoying peace and reconstruction. Based on the change of the situation and revolutionary tasks, the Government issued Order No. 004 – SL dated July 20 1957 on elections of people's councils and administrative committees of all levels. Order No. 110 – SL/L was promulgated by the State President on May 31 1958 and then approved by the National Assembly. Many provisions of these two documents were inherited by the 1959 Constitution. These two documents were issued in the 1946 Constitution Period in terms of timing but in terms of contents, they can be classified as belonging to the 1959 Constitution period.

In brief, the 1946 Constitution period is the early period of building a State of new type in general and local governments in particular. It was a period full of socio-political changes caused by the resistant war against the French colonialists. Organization of local governments of this period had many unique characteristics and success, leaving good lessons and experience. The success of the organization of local governments was one among many factors contributing to the victory of the people's war against the French colonialists.

3.2. The Party views and policies and the institutionalization relating to the organization of local governments in the 1959 Constitution period

After the victory of the resistant war against the French colonialists, the Vietnamese Revolution moved to a new stage of fulfilling two concurrent strategic tasks of building carrying out the socialist revolution in the North and fighting the invasion war against the American to protect the North, liberate the South and reunify the country. The very situation and strategic revolutionary tasks provided for the characteristics, tasks and methodologies of organization and operation of the government system of this period.

In September 1960, the 3rd National Party Congress reviewed and reaffirmed the direction of the Vietnamese revolution and the socialist orientation of the State. The viewpoints and policies of the Party on State building in general and organization of local government in particular in the 1959 Constitution period were mentioned in the Documents of the 3rd National Party Congress³³. The documents of the Congress affirmed: "The people's democratic state in the North in this period is the main tool of the working class to carry out a revolution in all fronts, gaining victory for socialism and national reunification." On the policy on organization and operation of the local government system, the Congress documents reads "Consolidating and strengthening of state agencies, bringing into play the role of the National Assembly and people's councils of all levels... strengthening the centralized and unified leadership of the central Government, doing well the division of administrative levels, mobilizing the creativeness of agencies of all fields and all levels". "the power of the National Assembly, people's councils and State leadership bodies is the power of the people". The Party

³³ Vietnam Communist Party: Collection of Party's documents. Volume 21, page 922, 933, 934.

affirmed its role of leadership over the State, and educate and forge the pool of state employees and officials. The Congress documents clearly reads “Consolidating and strengthening of state agencies, bringing into play the role of the National Assembly and people’s councils of all levels, and encouraging the people to take part in the work of state governance”. “All state officers in any positions have to be highly responsible before the people, whole-heartedly serve the people, and be hard-working, economical, impartial and clean-handed”. In brief, in the spirit and contents of the 3rd National Party Congress, our Party continued affirming the leadership role of the Party, the democratic nature of the State, the enhanced responsibility of the pool of civil servants in general. For local government in particular, the outstanding content of the viewpoints and policies of the Party in this period is to consolidate and improve the local government system, strengthen the role of people’s councils and initial administrative decentralization.

The 1959 Constitution was passed by the National Assembly, marking a new stage of development of the state apparatus in general and local government in particular. The Organic Law of People’s councils and Administrative committees was later passed by the National Assembly on October 28, 1962, specifying constitutional provisions on the organization of local governments.

There were outstanding changes in the division of administrative units.

First, the 1959 Constitution officially abolishes regional administrative levels which were regional level or inter-regional level existed in the period of resistance against the French. The 1959 Constitution prescribes 3 local administrative levels: provincial, autonomous regional or urban area level, communal level and communal town level.

Second, with the provision that people’s council and administrative committees are established at each administrative level, the law makers of this period did not differentiate between basic administrative units and intermediary administrative units as existed in the 1946 Constitution period.

Third, in the 1959 Constitution period, administrative units were the basis not only for the organization of the local government system, but also for the organization of judicial bodies. The system of people’s courts and people’s procuracies were established in different levels according to administrative units.

In brief, the 1959 Constitution is the constitution of the period of building socialism in the North and fighting the resistant war against the American to reunify the country. There had been major changes in the viewpoints and policies of the Party in the institutionalization relating to the organization of local governments. The organizational model of local governments was maintained and inherited by later Constitutions.

3.3. The Party views and policies and the institutionalization relating to the organization of local governments in the 1980 Constitution period

The 1980 Constitution period was the period of national peace, unification and moving toward socialism. It was the period of centralized bureaucratic and state – subsidized mechanism.

The viewpoints and policies of the Party on State building in general and organization of local government in particular in the 1959 Constitution period were mentioned in the Documents of the 4th National Party Congress (in 1976) and the 5th National Party Congress (in 1982). Based on the direction of the socialist revolution of Vietnam for this period “Strengthening proletarian dictatorship, bringing into play the collective sovereignty of the working people, and concurrently conducting the three revolutions...”³⁴. The 4th Party Congress made the policy “further develop the national socialist State, increase the effectiveness of the State in terms of economic cultural and social organization and management, quickly build and consolidate state bodies of all levels in the South, further improve the state apparatus in the North. Our state of proletarian dictatorship must be a state of the people, for the people and by the people”³⁵. The 5th Party Congress³⁶ stated “Being the master of the State, our people exercise their sovereignty through the National Assembly and people’s councils of all levels... Being the master of the State, our people exercise their sovereignty through the Council of Ministers and people’s committees of all levels – the bodies doing the work of political, economic, cultural, social, security and defence governance”. “Enable people’s councils of all levels act in their right capacity as local state power bodies, decide on important issues of local development. Members of the

³⁴ Vietnam Communist Party: Collection of Party’s documents. Volume 37, page 998

³⁵ Vietnam Communist Party: Collection of Party’s documents. Volume. Volume 37, page 1024

³⁶ Vietnam Communist Party: Collection of Party’s documents. Volume 43, page 113-114

National Assembly and members of people's councils need to fulfill their full responsibility and power, maintain close and regular relations with their voters, reflect the people's opinions and aspirations in a timely manner to state agencies, making thorough opinions of the people be quickly received and realized”.

It can be said that, the institutionalization of the Party views on the organizational model of local governments for the 1980 Constitution period have the following outstanding features:

First, the 1980 Constitution and laws on the organization of local governments specially held high the role of elected bodies of all levels (the National Assembly and people's councils of all levels), strengthened the supreme position and comprehensive power of people elected bodies in their relationship with other state bodies of the same level. The 1980 Constitution not only stipulates that the people exercise their power through the National Assembly and people's councils of all levels, but also defines the National Assembly and people's councils as the political basis for the system of state bodies. People's councils not only are defined as local state bodies but its power is also enlarged to deciding on policies and measures for comprehensive local development. People's councils from district levels can establish their standing board to increase the effectiveness of the operation of people's councils – the local state power bodies.

Second, from the viewpoint of the Party on “the collective sovereignty of the working people”, the 1980 Constitution and laws on the organization of people's councils and people's committees have provisions strengthening the collective work regime of local government bodies. For example, there is a provision that all issues under the responsibility of the people's committee must be collectively discussed and decided with a view to mobilizing collective intelligence. Actually this provision is not very much suitable because the people's committee is an executive – directive body which require quick decisions on daily arising local issues. With such provision, it is difficult to clearly identify the role and responsibility of the chair and other members of the people's committee.

Third, different from previous periods, the 1962 and 1983 organic laws of people's councils and people's committees have neither separate provisions on the organization of provincial or city governments nor a division of local government

levels. Although the 1989 Organic Law of People's councils and People's committees assigns the State Council to provide for specific power and tasks of the people's council of each level, this had not been done until when the 1994 Organic Law of People's councils and People's committees was made.

In brief, although there were some changes in the organization of local governments in the 1980 Constitution period, the organizational model of the 1959 Constitution period was basically maintained. It can be said that the organization of local governments of the 1980 Constitution period had little reform or change compared to previous periods. Due to the deep influence of previous periods and being not suitable as a result of the centralized, bureaucratic and state subsidized mechanism, the organizational model of local government of the 1980 Constitution period has in it inevitable weaknesses and shortage, especially in the organization and operation and the working regime as discussed above.

3.4. The Party views and policies and the institutionalization relating to the organization of local governments in the 1992 Constitution period

The 6th National Party Congress (in 1986) opened up the renewal era in our country. Since then through National Party Congresses, based on the changes in the thinking and practice, the national renewal policy in general and the renewal policy on the organization and operation of the state apparatus including the organization and operation of local governments have been improved and realized.

The 7th National Party Congress documents read: "further streamline the state apparatus towards: the State is really of the people, for the people and by the people. The State governs society by laws under the leadership of the Party. It is organized and run under the principle of democratic centralism, unity of power with a clear allocation and coordination"³⁷. For local governments, "Re-define the functions and tasks of provincial, district and communal levels to reorganize each level, hold high the local proactiveness and responsibility and at the same time ensure the unified direction of the central government."

³⁷ Vietnam Communist Party: documents of the 7th Party Congress. Truth Publishing House, Ha Noi, 1991, p. 91-92.

Although under the 1992 Constitution (amended in 2001), the 2003 Organic Law of People's councils and People's committees and other related legal documents, efforts have been made to renew local governments towards a clear division of power among the people's councils and people's committees of different levels, the differentiation between the power of local government of rural areas and those of urban areas, the legal basis of people's councils and people's committees have not been fundamentally changed and a vertical division of power in the relationship of central and local governments have not been made. Under the Organic Law of People's councils and People's committees, there have not fundamental reforms in the organization and operation of the local government apparatus. Specific solutions given by the Law such as strengthening the organizational structure of people's councils or reducing the number of members of people's committees of communal level, increasing the oversight function of people's councils or strengthening the collective principle in the work of people's committees, etc. are not strong enough to renew the organization and operation of local governments. In legal terms, people's councils are given important power, including the power to "decide on important policy and measures" to bring into play local potentials. However, in practice people's councils does not use up their power (their meetings are formalist, their oversight or discussion are not highly effective) or people's councils tend to delegate more power. Especially, there have been tangles in the relationship between people's councils and the Government as these are the bodies of two different systems. Also in legal terms, people's committees are subject to the oversight of people's councils. However, in reality, the people's councils cannot closely control the people's committee. In the capacity as a state administrative body, the people's committee is under the unified direction of the Government and administrative bodies of higher levels. It is hard for the people's committee to fulfill both the tasks of an executive body and ensure the centralized and unified direction of the state administrative system. In general Vietnam is still using the model in which local governments are the extended hand of the central government. This model helps ensure a high unity but cannot mobilize the local creativeness and proactiveness and cannot reflect the stature of the local people's power.

Under the spirit of the 1992 Constitution (amended in 2001), the 2003 Organic Law of People's councils and People's committees, the renewal of local government just focuses on two major issues which are the organizational model and division of power among governments of different models. Although these two issues are not simple, renewal relating these two issues only cannot be complete and comprehensive. The requirement is that it is needed to make a clear division in the scope of power of central government and local governments on the spirit of the principle of people's sovereignty, ensuring the local interest, the national interest and national sovereignty.

To continue the program of local government reform, in November 2008, the National Assembly passed a resolution on the pilot organization of no people's councils in some rural districts, urban districts and wards³⁸. The most important purpose of this pilot program is to foster democracy and increase the capacity and effectiveness in the operation of the state apparatus. For the ward level, the pilot started on April 1st 2009 in 483 wards of 67 rural districts and 32 urban districts of 10 provinces and cities. For the pilot time, the chairs of people's committees of communes of which the people's councils are removed will be appointed or dismissed by administrative bodies of higher levels. The Government also submitted to the National Assembly a pilot program for the people to directly elect the chairs of people's committees of communes of which the people's councils are removed. However the National Assembly did not approved. For provincial cities, provincial urban districts and communal towns, their people's councils are not removed due to their unique characteristics and their highly independent nature.

The 9th National Party Congress documents reads:³⁹ "Our State is a socialist law-governed state of the people, for the people and by the people under the leadership of the Party". On local governments, "Further renew the organization and operation of local government; enhance the efficiency in the work of people's councils and people's committees of all levels; continue the pilot program of organization of no people's councils of some rural districts, urban districts and

³⁸ Resolution No. 26/2008/NQ-QH12 dated 28/11/2008.

³⁹ Communist Party of Vietnam: Documents of the 11th Party Congress). National Politics Publish House, Hanoi, 2011, page 52 and 54.

wards; study the organization of urban governments and governments of islands”. The 9th National Party Congress (April 2001), the Party reaffirmed the goal of building a democratic, clean, strong and modernized administrative services. On September 17 2001, the Prime Minister signed Decision No. 136/2001/QĐ-TTg approving the comprehensive Program on State administrative reform for the period 2001-2010 with four major contents: institutional reform, administrative apparatus reform, enhancing the capacity of the pool of civil servants, and public finance reform.

For the reform of the administrative apparatus, one of the very important issues is: *By 2005, basically new provisions on the division of power between central and local governments are made and applied, conducting the divisions of administrative levels, increasing the power and responsibility of local governments, enhancing the relationship and responsibility of the local governments before the local people. The division of administrative levels is attached to the division of financial and human resources levels. Define clearly issues under the complete local decision, issues that need the opinions of the central government before the local governments can decide on, and issues that need to be decided by the central government. And reforming the organizational structure of local government.*

4. Organizational models of local governments of some countries, applicable experience for Vietnam

There are 4 major organizational models of local governments. They are the British model, the French model, the Germanic model and the Soviet model. These four models are used quite differently in different countries. The United States uses the British model of local governments. But while the heads of the executive bodies in Britain are elected by councils, those in the US are elected by the people. The tradition, culture and historical conditions of each country have a huge influence on the organization of local governments of that country. In addition, all countries now consider administrative reform, including the reform of the local government system a key task. This affirms a fact that we are living in an incomplete world and there is not an ideal model of local government. Following is a preliminary analysis of the features of each model of local government.

4.1. The British model: functional regulation

This is a very special model. The special features of this model include:

a) The independence of the local government system

A loose relationship and a distance between governments of different levels is one of the most fundamental features of the British model. Under this model, the central government is not a superior body managing and directing local governments. Local governments of different levels are independent with one another. Administrative territorial units of Britain are called “county”, “borough” and “district”. There are 146 counties, 318 boroughs and 998 districts. None of them is a body of subordinate level. These bodies operate according to their functions, not administrative orders. For this reason, countries following the British model do not establish a ministry of home affairs to govern and coordinate the work of the local government system. Some of the coordination work in Britain is done by the Department of Environment.

b) The complete function of the council

The local governments of countries following the British model are councils elected by voters. With a model in which the people’s committees dominate people’s councils like in Vietnam, it is very difficult to organize a system of local governments without bodies of “people’s committee” nature. Under the British model, local councils fulfill both the function of people’s councils and that of people’s committees.

Local councils in Britain often establish many committees. For this reason, local governments in Britain are called by some scholars “state of committees” or “governance by committees”. Committees study every local issue and make recommendations to the councils for the latter’s decisions. The chairs of the committees have substantive power. Some specialized departments or divisions are established and they all belong to the councils.

4.2. The French model: dual oversight

In the French model, the central government plays a very important role. This model is also called dual oversight. The Ministry of Home Affairs supervises in administrative terms and other ministries supervise in technical terms.

This model has its inheritance from the ancient Roman empire, when the Roman empire invaded large territories and sent representative of central government to local areas to take care of these areas. The main features of this model include:

a) Representatives of the central government at local levels

All local government bodies from above communal level have a representative body of the central government, which is prefecturate established and directed by the Ministry of Home Affairs. In inter-communal administrative units (arrondissement), there is not a local government but representative bodies of the central government to coordinate the work among communes.

This is a very complicated organizational model of local governments. To take the case of Vietnam for comparison, it is like there are a people's council and a people's committee together with a representative body of the Government existing at all local levels.

b) Dual oversight

All local levels are dually supervised. Representatives of the Ministry of Home Affairs do the work of administrative oversight. Local services are basically provided by ministries. Central ministries have their offices or representative bodies at all local levels to do this work. Local governments have fewer functions than those in Britain.

Local governments in France are divided into the following levels: Region, De'partment, Arrondissement and Commune. Local government of each level has its own council elected by the people and an executive body.

It can be seen that the government system of France is very complicated and has in it a huge number of "officials holding positions". However this system is recognized by the French people and it just exists. French civil servants are well trained to provide services to the people.

4.3. The Germanic model: areal subsidiarization

In this model, the federal government is supported by state governments and state governments are supported by local governments to do the work of governance and to provide services to the people.

The most visible feature of the Germanic model is the division of power. In this system, power is divided following the principle: things that can be done well by local governments shall be given to local governments. The central government only performs tasks that local government cannot do better. The important thing in the Germanic model is that there is a very clear division of responsibility for each level. Things that are done at one level shall not be done at other level. Together with the division and assignment of tasks is the allocation of budget. It means that each level can have its own revenue source for the performance of their tasks.

Like the French model, the Germanic model has 5 levels of which one level called *Regierungsbezirke* does not have a representative body. In Germany there is a federal government, states under the federal government, *Regierungsbezirke* under states, *Kries* under *Regierungsbezirke* and *Gemeinde* under *Kries*.

4.4. The Soviet model: dual subordination

The Soviet model has a very outstanding feature which is when a level of government exists, there must be a council existing too. There is not a division of governments into different levels. All government bodies are integral parts of a unified state system. Under the Soviet model, local budget can exist but it is approved within the budget of the whole state.

The principle of this model is dual subordination. State bodies are subordinate to higher state bodies vertically and to executive committees horizontally.

In this system, Soviets (equal to people's councils in Vietnam) are considered power bodies, but substantive power is often in the hand of executive committees. The actual functions of Soviets include:

- Approve decisions prepared by executive committees (equal to people's committees in Vietnam);
- Ensure the people's support for and participation in policies.

In this model, the Party leadership is very important. Under the Soviet model, the executive power is executed by both the Party Committee Secretary and the chair of the executive committee and other members of the standing board of the

Party Committee. In the system of the former Soviet Union, people do not elect a chair of their local Soviet but for each meeting of the Soviet, people elect a person to take the chair and that person is often the chair of the executive committee. For this reason, in Vietnam the chair of the people's committee also chaired the people's councils for a long time.

Another feature of this model is that the executive committee often has both the party organization and the head of vertical subordinate body. For example the Director of the Department of Finance is also a member of the executive committee and has to comply with the order of both the Committee and the Ministry of Finance. So any issues to be decided by the Committee need the agreement of both the committee itself and the Ministry of Finance.

4.5. Applicable lessons for Vietnam

From the above presentation of local government models, it can be seen that the organization of local governments is very diverse. Each model has its own advantages and disadvantages. The lessons from them that can be applicable to the Vietnamese context may include:

First, in other countries, the term local government is used as a system of bodies doing the work of local governance. Depending on the law of each country, some of these bodies are state bodies (representing the state) in the locality, some are local bodies (which do not belong to the state body system-local self-government).

Second, in the local government system, there are two types of bodies: representative bodies and administrative bodies. Representative bodies (councils) are elected by the people of the territorial-administrative units, representing the people to decide on local issues. However, there are certain cases where the council directly does the work of governance (in Britain).

Third, in recent years, the trend of local administrative decentralization is accelerated. Local governments are given certain power on the basis that a local government will do things which it can do better. In European countries, self-

government becomes a compulsory criterion for member countries. Local self-government is a popular trend in the world now.

Fourth, together with the acceleration of local administrative decentralization, the mechanism to support and supervise the work of local governments in countries is further improved. Central government supports local governments financially to do the work that local governments do not have enough budget to do; carries out activities proposed by local governments; and provides technical support and facilities to local governments, etc.

CHAPTER II

THE CURRENT SITUATION OF LOCAL GOVERNMENT ORGANIZATION IN OUR COUNTRY

1. Organization of local governments in our country in different periods since 1946

1.1. Organization of local governments from 1945 to 1959

1. Organization of administrative units

After the success of the August Revolution, in order not to create major changes, our State decided to keep old administrative units with some changes for a national unity. In this period, administrative units in our country are divided into 4 levels: region, province, district and commune.

- The Northern Region had 29 provinces, which were: Bắc Giang, Bắc Kạn, Bắc Ninh, Cao Bằng, Hà Giang, Hà Nội, Hà Đông, Hải Dương, Hòa Bình, Hưng Yên, Kiến An, Lạng Sơn, Lào Cai, Móng Cái, Nam Định, Ninh Bình, Phú Lý, Phúc Yên, Phú Thọ, Quảng Yên, Sơn Tây, Sơn La, Thái Bình, Thái Nguyên, Tuyên Quang, Vĩnh Yên, Yên Bái.

- The Central Region had 20 provinces which were: Thanh Hoá, Nghệ An, Vinh, Hà Tĩnh, Quảng Bình, Quảng Trị, Thừa Thiên, Huế, Đà Nẵng, Phú Yên, Quảng Nam, Quảng Ngãi, Bình Định, Khánh Hoà, Kon Tum, Plei Ku, Đắk Lắk, Đồng Nai...

- The Southern Region had 7 provinces which were: Sài Gòn - Chợ Lớn, Châu Đốc, Long Xuyên, Cần Thơ, Sóc Trăng, Bạc Liêu, Rạch Giá.

In the Northern Region, by November 1946, 128 districts and provincial urban districts among 227 districts and provincial urban districts officially established administrative committees. On November 25 1946, the Government decided to divide the whole country into 12 war zones.

The war zones later were rearranged. On January 25 1948, the Government President issued Order No.120/SL establishing inter-war zones⁴⁰. Under this Order

⁴⁰Vietnam People's Nation Gazette, No.1-1948.

Under this order, the 7 war zones in the Northern Region were combined to become 3 inter-war zones. War zones in the Central Region were combined to become inter-war zones 4 and 5. War zones in the Southern Region were combined to become inter-war zones 7, 8 and 9. The names of inter-war zone commands were changed. In each war zones, there were command members. On September 24 1948, President Ho Chi Minh ordered to establish a Southern military committee which was called the South Command.

During the entire period of resistance against the French, there was no change in administrative units except for the combination into an inter-provincial Hai Kien (Hai Phong and Kien An) by an Order dated November 26 1946 and the combination of Vinh Phuc and Vinh Yen provinces into Vinh Phuc province (decree dated February 12 1950). Except for provinces of temporarily controlled areas, the role of governments of provincial level was very limited. The role of governance was mostly undertaken by governments of zone or inter-zone level. In other words, the most visible feature of this period was the role of administrative bodies above the provincial level: zone and inter-zone levels.

After 1954, although our country had moved to a new stage of revolution, in the North in particular and the whole country in general remained the same. There was no change in the boundaries of inter-zones, zones and districts.

The Democratic Republic of Vietnam in 1954 had 30 provinces, 2 centrally governed cities (Hanoi and Hai Phong), 1 special zone (Hon Gai) and the Vinh Linh zone.

- The Northern Region had 26 provinces: Bac Giang, Bac Can, Bac Ninh, Cao Bang, Ha Dong, Ha Nam, Hai Duong, Hai Ninh, Hoa Binh, Hung Yen, Kien An, Lai Chau, Lang Son, Lao Cai, Nam Dinh, Ninh Binh, Phu Tho, Quang Yen, Son La, Son Tay, Thai Binh, Thai Nguyen, Tuyen Quang, Vinh Phuc, Yen Bai, Hon Gia and 2 major cities: Hanoi, Hai Phong.

- The old Central Region had 4 provinces: Thanh Hoa, Nghe An, Ha Tinh, Quang Binh and Vinh Linh area (formerly belonging to Quang Tri).

In this period, there existed autonomous zones. In the North there were 2 autonomous zones established in 1955-56: the North-West autonomous zone (initially called Thai Meo autonomous zone) and the Viet Bac autonomous zone.

The North-West autonomous zone initially had district level and communal level. There was not a provincial level. But provincial level was re-established in 1963.

In centrally governed cities in the 1954-58 period, there were administrative bodies of district level (both in the old town and in the outskirts). Below the district level were the urban area level (in the old town) and communal level (in the outskirts). Besides, there was a not very popular level: street level such as Gia Lam street level in Hanoi). In 1958 the district level was replaced with urban area level. Below the urban area level was urban residential block level. For the outskirts, there was urban district level (changed to rural district level in 1961) and communal level. In 1974 the urban residential block level was changed to sub-area level.

In 1955 Quang Yen province and special zone Hon Gai was combined into Hong Quang. Thai Meo autonomous zone was established on the dissolution of Lai Chau and Son La Provinces. By 1955 the Government had only issued Order No.230 dated April 29 1955 on the establishment of Thai Meo autonomous zone. This zone consisted of 16 districts including Son La, Lai Chau and Phong Tho (Lao Cai), Than Uyen, Van Chan (Yen Bai). Regarding the administrative function of autonomous zones, autonomous zones were the local government under the direct leadership of the central government. The local government had three levels: Area, district and commune. It means provincial level was abolished (order No. 230 of the Government President). The administrative boundaries could be changed somehow based on the aspiration and interest of ethnic groups. Order dated October 27 1962 changed the name of this autonomous zone to North West autonomous zone.

One year later, the Viet Bac autonomous zone was established under Order No.268 dated July 1 1956 of the Government. The Viet Bac autonomous zone consisted of provinces Cao Bang, Bac Kan, Lang Son, Tuyen Quang (except for Yen Binh district), Thai Nguyen (except for Pho Yen and Thai Binh districts) and Huu Lung district (Bac Giang). Different from Thai Meo autonomous zone, the Viet Bac autonomous zone still kept provincial level. On March 23 1955 Ha Giang was added to this autonomous zone.

1. Organization of state bodies in administrative units

The legal basis for the development and initial consolidation of the local government system are Order No. 63/SL dated November 22 1945, Order No. 10/SL dated January 23 1946, and Order No. 22a/SL dated February 18 1946. Orders No. 77/SL dated December 21 1945, No. 68/SL dated May 14 1946, No.76/SL dated May 29 1946 and No. 11/SL dated January 14 1946 promulgated by President Ho Chi Minh and some other documents issued by the Ministry of Home Affairs provided for the regulations of the elections of people's councils and people's committees of all levels. Under those legal documents, the local administrative apparatus consisted of people's councils (at provincial, city, communal and communal town levels) and people's committees (at all administrative units).

People's council in a locality was elected but the people in that locality on the basis of popular, direct and secret vote. The people's council represents the people, making decisions on all local issues, which are not contrary to decisions of higher bodies. The people's council elected and dismissed members of administrative committees, repeal improper decisions made by the administrative committee of the same level. Voters had the right to re-decide on and take a vote of confidence of people's council. If more than half the voters had no confidence in the people's council and its members, the people's councils needed to dissolve and resign.

The administrative committee was the administrative body representing both the people and the Government. The administrative committee had the task of implementing orders of higher bodies and resolutions of the people's council of the same level; controlling people's councils and administrative committees of lower levels; dealing with other issues within its territory. The administrative committee had the task of "in the capacity as the standing body of the people's council, convening the people's council". Administrative committee is elected by the people's council of the same level. At levels where a people's council does not exist, administrative committee is elected by the people's council of one level lower. Administrative committees of urban areas in big cities and provincial urban districts) are elected by the people in those areas.

There were specialized agencies of the local administrative apparatus. In the early times, these agencies are appointed by governments of higher levels. Although these specialized agencies were not agencies of administrative committees, but when appointing staff of these agencies, bodies of higher levels always consulted with the administrative body of the same level as that of the agencies and the staff of these specialized committees always reported on their work to the administrative committee of the same level.

It can be seen that there existed local governments well organized in all localities of the country with two major bodies: people's council and people's committee at communal and provincial levels. At district and regional levels, only administrative committees existed. The organization and definition of functions and tasks of the administrative apparatus in this period were based on the combination of the principle of decentralization and deconcentration of administrative power. The use of this principle on the one hand helps government bodies of provincial level know well the situation of localities to address local issues in a timely manner, and on the other hand helps local governments be proactive in their work serving the needs of the local people.

In October 1947, in order to build a simple mobile and unified apparatus, focusing on the main task is to fight the resistant war, President Ho Chi Minh issued an order combining the administrative task with the resistance task. Under this Order, the resistance committee and the administrative committee at each level were combined with the new name resistance – administrative committee. In the early days of the resistance war, the people's councils could not work in due dates. The work therefore was focused on the resistance – administrative committees. These committees worked closely with the people, got opinions of the people on important local work. These committees often invited representatives of the military, militia forces, women's union, associations of farmers, religions, patriotic intellectuals, etc. to discuss important issues.

It can be said that the organization of local governments in this period was fairly flexible to fit the situation. Local governments had a simple and unified organizational structure to meet the revolutionary requirements in a timely manner.

1.2. Organization of local governments from 1959 to 1980

1. Organization of administrative units

Under the 1959 Constitution:

Administrative units are divided as follows:

The country is divided into provinces, autonomous regions and centrally-governed cities;

Provinces are divided into districts, cities and towns;

Districts are divided into communes and communal towns.

Administrative units in an autonomous region are provided for by law (chapter VII, article 78).

In this period, organization of provincial level administrative units had the following changes:

In 1962 Bac Giang and Bac Ninh provinces were combined into Ha Bac province. Kien An province was added to Hai Phong city. Lai Chau and Son La provinces were re-established. Nghia Lo province was established, belonging to the North-West autonomous zone.

In 1963 Hai Ninh province and Hong Quang area were combined to become Quang Ninh province under an order dated October 30, 1963.

In 1965 Bac Kan and Thai Nguyen provinces were combined to become Bac Thai province; Nam Dinh and Ha Nam provinces were combined to become Nam Ha province under a decision of the Standing Committee of the National Assembly on April 21 1965.

- Hai Duong and Hung Yen provinces were combined to become Hai Hung province (decision of the Standing Committee of the National Assembly on January 26, 1968).

- Son Tay and Ha Dong provinces were combined to become Ha Tay province under a decision of the Standing Committee of the National Assembly on April 21 1965.

- Vinh Phuc and Phu Tho provinces were combined to become Vinh Phu province under a decision of the National Assembly on May 22 1968.

Totally in the North there were 24 provinces, 2 centrally governed cities and 1 zone (Vinh Linh).

After the reunification of the country, in 1976 in the whole country there were 38 administrative units of provincial level (35 provinces and 3 centrally governed cities). This was the time when there was the lowest number of provinces in the whole country. In other words, the area of administrative units of provincial level was the biggest.

- The Northern Region had 13 provinces and 2 cities: Bac Thai, Cao Lang, Ha Bac, Ha Nam Ninh, Ha Son Binh, Ha Tuyen, Hai Hung, Hoang Lien Son, Lai Chau, Quang Ninh, Son La, Thai Binh, Vinh Phu, and two cities: Ha Noi, Hai Phong.

- The Central Region had 10 provinces: Thanh Hoa, Nghe Tinh, Binh Tri Thien, Quang Nam – Da Nang, Nghia Binh, Phu Khanh, Thuan Hai, Gia Lai – Kon Tum, Dac Lac, Lam Dong.

- The Southern Region had 12 provinces and 1 city: Song Be, Tay Ninh, Dong Nai, Long An, Dong Thap, An Giang, Tien Giang, Hau Giang, Kien Giang, Ben Tre, Cuu Long, Minh Hai, and Ho Chi Minh city.

There were two small changes: Cao Lang province was divided into Cao Bang and Lang Son provinces (in 1978) and special zone Vung Tau – Con Dao (equal to provincial level) was established (in 1979). 40 administrative units of provincial level (36 provinces, 3 centrally governed cities and one special zone) existed stably for 10 years.

2. Organization of state bodies in administrative units

Under articles 78 and 79 of the 1959 Constitution, administrative units in the Democratic Republic of Vietnam are divided as follows:

- The country is divided into provinces, centrally-governed cities and autonomous regions.

- Provinces are divided into districts, provincial cities and towns.

- Districts are divided into communes and communal towns.

Autonomous regions are divided into provinces. Provinces are divided into districts, provincial cities and towns. Districts are divided into communes and communal towns. Cities can be divided into urban quarters in inner areas and districts in outskirt areas.

According to article 79 of the 1959 Constitution, people's councils and administrative committees are organized in the above mentioned administrative units. This is really an innovation in the 1959 Constitution. Because in the 1946 Constitution, although administrative units of our country are divided into 4 levels (regional, provincial, district and communal levels), people's councils are organized in 2 levels only (provincial and communal levels).

**** On the relationship between the people's councils and administrative committees***

This issue is provided for in articles 84, 85, 86, 90 and 91 of the 1959 Constitution and the 1962 Law as follows:

- An administrative committee is responsible to the people's council of the same level and the state administrative body of one level higher. A local administrative committee is under the direction of higher administrative body and the unified direction of the Government Council.

- A people's council has the power to amend or repeal improper decisions made by the administrative committee of the same level; amend or repeal improper decisions made by the people's council of one level lower and those of the administrative committee of one level lower.

- A people's council has the power to dissolve the people's council of one level lower when the latter causes serious damage to the people's interest. Resolutions of dissolution made by people's councils of provinces or centrally governed cities or autonomous zones must be approved by the National Assembly Standing Committee before being effective. Resolutions of dissolution made by people's councils of rural districts, provincial cities or provincial towns must be approved by people's councils of provinces or centrally governed cities before being effective.

- An administrative committee has the power to suspend the implementation of improper decisions made by the people's council of one level lower and requests the people's council of the same level to amend or repeal such decisions. An administrative committee has the power to repeal improper decisions made by administrative committees of lower levels.

+ Elect the administrative committee and the people's court of the autonomous zones and dismiss members of those bodies.

+ The people's councils of provinces, districts, provincial cities, provincial towns, urban quarters, communes and communal towns have the same tasks and power as those of the people's councils of the same respective levels.

**** The tasks and power of people's councils and administrative committees***

***** Tasks and power of people's councils***

Articles 82, 83, 84, 85 and 86 of the 1959 Constitution and 11 articles from 9 to 19 of the 1962 Organic Law of People's councils and People's committees provide for the tasks and power of people's councils of all levels. Compared to the 1946 Constitution, the tasks and power of people's councils have been increased, including:

Under the 1962 Organic Law of People's councils and People's committees (from article 9 to 14), people's councils have the following major tasks and power:

- The people's council ensure the respect for the law and enforcement of the law in the locality, maintain public order and protect public assets in the locality.

- Within the provision of the law, the people's council decides on local economic, cultural and social affairs, mobilizes the local capacities to perform the tasks of the whole country locally and improves the living standards of the local people.

- The people's council protects the rights and interests of the local people and ensure that local people fulfill well their obligations to the state.

- People's councils of all levels ensure the equality of ethnic groups, maintain and strengthen the unity of ethnic groups.

- Based on the law and resolutions of higher bodies, the people's councils of all levels make resolutions on local issues. If the people's council make resolutions on issues belonging to the power of approval of higher bodies, these resolutions must be approved by the higher bodies before being effective.

- The people's council elects the administrative committee and the people's court of the same level and has the power to dismiss members of those bodies.

***** Tasks and power of administrative committees***

Under articles 89 and 90 of the 1959 Constitution and articles from 40 to 43 of the 1962 Law, administrative committees have the following common tasks and power:

- *First*, administrative committees of all levels have the tasks of organizing the implementations of resolutions made by the people's council of the same level and resolutions, orders made by administrative bodies of higher levels.

- *Second*, administrative committees of all levels have the tasks of managing the local administrative work; direct the work under their responsibilities and the work of administrative committees of lower levels.

- *Third*, administrative committees of all levels have the tasks of amending or repealing improper decisions made by agencies under their management and by administrative committees of lower level; have the power to suspend the implementation of improper resolutions made by people's councils of one level lower and request the people's council of the same level to amend or repeal such resolutions.

- *Fourth*, administrative committees of all levels have the tasks of convening meetings of people's councils and prepare the agenda for the people's councils to discuss and decide.

1.3. Organization of local governments from 1980 to 1992

1. Organization of administrative units

The organization of administrative units in this period followed the general guidelines of the previous period. There were minor changes in the names of administrative units of centrally-governed cities from urban quarters to urban

districts and from sub-quarters to wards. This division of administrative units is provided for by the 1980 Constitution:

“Administrative units of the Socialist Republic of Vietnam are organized as follows:

The country is divided into provinces, centrally governed cities and administrative units of the same level;

Provinces are divided into districts, provincial cities and provincial towns; centrally governed cities are divided into urban districts, rural districts and towns;

Rural districts are divided into communes and communal towns; provincial cities and provincial towns are divided into wards and communes; urban districts are divided into wards;

People’s councils and people’s committees are established in all those administrative units”. (chapter IX, Article 113).

The trend in this period of combining of administrative units of provincial and district levels to bigger administrative units continued. But not long after that, due to difficulties in the managerial capacity and in transport, administrative units were divided. Administrative units of communal level in particular, which had been combined in to too big administrative units (combination of 5-6 or even 9-10 communes) were divided into smaller ones.

The combination of administrative units was done most in 1976 and some year that followed. By 1986 the number of provincial level administrative units increased from 36 to 41.

2. Organization of state bodies in administrative units

On December 18 1980, the National Assembly passed a new Constitution. The 1980 Constitution had chapter IX on the organization of people’s councils and people’s committees of all levels. In 1983, the National Assembly passed the Organic Law of people’s councils and people’s committees (hereinafter referred to as the 1983 Law) to specify constitutional provisions. In the period from 1980 to 1992, the Government issued some decrees, circulars and the Prime Minister issued some instructions and decisions on the organization of local government such as the issues of administrative boundary change, classification of district levels,

enforcement of the law on elections of people's council members, providing for additional functions, tasks and power of local specialized agencies, etc.

**** Organization of people's councils***

***** Functions and legal basis of people's councils***

On functions, the 1980 Constitution (Article 114) and the 1983 Law continue reaffirming: *the people's council is a local state power body, elected by the local people and responsible before the local people and state bodies of higher levels.*

To further clarify this function, article 1 and article 2 of the 1983 Law provide for as follows:

- The people's council represents the will, aspiration and collective sovereignty of the local working people, encourages and coordinates the building and strengthening of the governments and carrying out three revolutions by the people: the revolution on production relations, scientific and technical revolution and the revolution on thinking and culture, of which the scientific and technical revolution is pivotal; thus contributing to the successful building of socialism and the firm protection of the socialist Fatherland.

- Based on the law and policies of the State and its power and tasks, the people's council decides and ensures the implementation of policies and measures to mobilize local potentials, develop the locality in political, economic, cultural and social terms, and in national defense and security, and to continuously improve the material and cultural living standards of the local people, and fulfills local obligations to the State.

***** Tasks and power of people's councils***

Based on the law and decisions made by higher state bodies, the people's council has the power to:

- + Make resolutions and monitor the implementation of these resolutions. Resolutions which are to be approved by a higher body as provided for by law must be approved by the higher body.

+ Supervise and guide the work of people's councils of lower levels; amend or repeal improper decisions made by the people's councils of one level lower.

+ Supervise the work of the people's committee, amend or repeal improper decisions made by the people's committee of the same level. Supervise the work of the people's court of the same level.

In addition to general tasks and power, under article 17 of the 1983 Law, the people's councils of provinces, centrally governed cities and administrative units of the same level have the following power:

+ Decide on the policy of building and the work of industrial, agricultural, forestry, fishery, infrastructure development, transport and commercial institutions in the locality; create an economic link between local economic units and central economic units based in the locality, thus gradually building an industry – agriculture economic structure.

+ Based on the obligation of product submission to the central government according to the assigned planned targets, decide on the local planning and coordinate the economic and scientific and technical cooperation with other localities; decide on the policy of export product making based on the local and central plans.

+ Decide on the policy of building and the work of local cultural, information, education, health and social units.

+ Decide on the policies and plans of building districts and other administrative units of the same level.

*** Organizational structure of people's councils*

Under articles from 27 to 30, to assist the people's council fulfill their tasks and power, the structure of people's councils is as follows:

- People's councils of all levels established their specialized boards and a Secretariat. Members of the boards are elected by the people's council from among the council members. Each board has a chair, vice chair and members. The number of each board is decided by the people's council. Member of a people's council's board can not be at the same time member of the people's committee of the same level.

*** *Organization of people's committees***

**** *Functions and legal basis of people's committees***

- Under article 113 of the 1980 Constitution, a people's committee is established at all three levels: province, district, commune and administrative units of the same levels. One of the important change in this Constitution is the renaming of local administrative bodies from administrative committees to people's committees. The renaming is to clearly show that the State is of the people, elected by the people and work for the interest of the people. Moreover this name is also to hold high the spirit of collective sovereignty of the working people, the responsibility and right of the people in establishing, participating in and supervising the work of local state bodies.

- On the functions and legal basis of the people's committee, article 121 of the 1980 Constitution and the 1983 Law stipulate: *The people's committee elected by the people is the executive body of the people's council, is the local state administrative body. The people's committee is responsible and reports to the people's council of the same level; is under the direction of higher state bodies and the unified direction of the Council of Ministers.*

**** *Tasks and power of people's committee***

People's committees of all levels have the power to make decisions and instructions as stipulated by the law and supervise the implementation of those decisions and instructions; suspend the implementation, amend or repeal improper decisions made by agencies under their responsibility and made by people's committees of lower levels; suspend the implementation improper resolutions made by the people's council of one level lower and request the people's council of the same level to amend or repeal such resolutions.

**** *Organizational structure of people's committees (as provided for from articles 53 to 59 of the 1983 Law)***

- A people's committee consists of a Chair, one or more vice chairs, a secretary member and other members. Members of a people's committee must be a member of a people's council.

- On membership, people's committees of provinces or centrally governed cities or administrative units of the same level have from 11 to 17 members. People's committees of districts, provincial cities and provincial towns have from 9 to 13 members. People's committees of communes, wards or communal towns have from 7 to 9 members.

- Assisting the people's committee are specialized agencies. These agencies are established by the people's committee following a decision of the Council of Ministers. Specialized agencies help the people's committee of the same level with the local governance work and ensure a unified management from central to grass-roots levels. Specialized agencies belonging to a people's committee are under the direction in terms of organization, staffing and operation of the people's committee of the same level and at the same time are under the direction of specialized agencies of higher levels. The directors of specialized agencies are responsible and report to the people's committee, report to the people's council of the same level when requested; and at the same time are responsible and report to specialized agencies of higher levels.

In this period, our Party paid attention to the role and the strengthening of governments of rural district and grass-roots levels with the viewpoint: *"Rural districts are important sites for the reorganization of production, division of labour and moving toward huge socialist production"; rural districts must become the "fortress", the "leverage" for socio-economic development.* Under that viewpoint the district and communal level governments focused on such major tasks as economic development, material and cultural life organization, building working people of new type, maintaining well national security and defense and public order. To create the legal basis for the operation of local government of local and communal level in this period, the Government (later Council of Ministers) issued a number of documents such as: *Decree No. 86- HDBT dated August 4 1983 on the tasks, power and organization of specialized agencies belonging to a rural district people's committees; Decision No. 202- HDBT dated May 26 1981 on functions, tasks and organization of the work of government apparatus of provincial cities and provincial towns.*

In brief, compared to previous periods, provisions of the 1980 Constitution and the 1983 Organic Law of People's councils and People's committees on organization of local governments have the following remarkable changes:

- *First*, the tasks and power of people's councils and people's committees have been made specific in economic, socio-cultural areas and national security and defense, etc. The specification has facilitated the bodies in their work and in dealing with issues in terms of their working relationship with other organs and bodies.

- *Second*, there have been provisions on ensuring conditions for the work of people's councils and people's committees, such as: guidance on the work of people's councils, creating material and spiritual conditions and the links with social organizations and associations.

- *Third*, the Constitution and the Law have had provisions on the organization of people's councils and people's committees in case of administrative boundary changes. This proves the strengthened legislative skills in the form of anticipatory provisions.

With such specific provisions, the 1980 Constitution and the 1983 Law have contributed to creating the important legal basis for the organization and operation of local government bodies in the 1980- 1992 period.

1.4. Organization of local governments from 1992 to present

1. Organization of administrative units

In this period, there has been no change in the organization of administrative units compared to previous periods. The whole country is divided into 3 levels (province, district and commune). However there is a large increase in the separation of administrative units of all levels. They are as follows:

**** Provincial level administrative units***

On January 1 1996, in the whole country there were 53 units (50 provinces and 3 centrally governed cities). On December 31 2006, there were 64 units (59 provinces and 5 centrally governed cities). It is an 11 unit increase in 10 years. At the moment the number of provincial level administrative unit is 63 (58 provinces and 5 centrally governed cities).

On November 6 1996, the 9th National Assembly at its 10th session passed a Resolution on the division and change of the administrative boundaries of some provinces and centrally governed cities: Bac Thai province was divided into Bac Kan and Thai Nguyen provinces; Ha Bac province was divided into Bac Giang and Bac Ninh provinces; Hai Hung province was divided into Hai Duong and Hung Yen provinces; Minh Hai province was divided into Bac Lieu and Ca Mau provinces; Nam Ha province was divided into Ha Nam and Nam Dinh provinces; Quang Nam – Da Nang province was divided into Da Nang – a centrally governed city – and Quang Nam province; Song Be province was divided into Binh Duong and Binh Phuoc provinces; and Vinh Phu province was divided into Vinh Phuc and Phu Tho provinces. As such by early 1997, our country had had 61 provinces and centrally governed cities (57 provinces and 4 centrally governed cities).

On November 26 2003, the 11th National Assembly passed Resolution No. 22/2003/QH 11 on the division and change of the administrative boundaries of some provinces and centrally governed cities: Can Tho province was divided into Hau Giang province and centrally governed city Can Tho; Dac Lac province was divided into Dac Lac and Dac Nong provinces; and Lai Chau provinces was divided into new Lai Chau province and Dien Bien province.

On May 29 2008, the 12th National Assembly passed a Resolution on the change of the administrative boundaries of Ha Noi and some related provinces, under which the entire Ha Tay province, the entire Me Linh district of Vinh Phuc province and 4 communes of Luong Son district, Hoa Binh province were added to Hanoi. This resolution started to take effect on August 1 2008. At the moment Vietnam has 58 provinces and 5 centrally governed cities. Ha Tay province no longer exists in the Vietnamese administrative map.

**** District level administrative units***

In 10 years from 1996 to 2006, there were big changes in the number of district level administrative units. On January 1 1996, in the whole country there were 574 district level administrative units (including 16 provincial cities, 62 provincial towns, 21 urban districts and 475 rural districts). By December 31 2006, there had been 673 units (34 provincial cities, 53 provincial towns, 43 urban districts, and 543 rural districts). It was a 99 unit increase in 10 years. By June

2011, the number of district level administrative units increased to 698 units. Compared to the number of late 2006, it is a 23 unit increase (56 provincial cities, 43 provincial towns, 47 urban districts and 552 rural districts).

**** Communal level administrative units***

On January 1 1996, in the whole country there were 10,221 units (8,862 communes, 856 wards and 503 communal towns). By December 31 2006, there had been 10,929 units (9,102 communes, 1,230 wards and 597 communal towns. It was a 708 unit increase in 10 years.

By now (June 2011) among 10,112 communal level administrative units, there are 9,059 communes, 1,418 wards and 635 communal towns.

2. Organization of state bodies in administrative units

**** The 1992 – 2003 period***

***** Organizational structure and power of people's councils***

Basically, provisions of the 1992 Constitution and the 1994 Law on this issue are the same as those of previous periods, there are the following changes:

- *First*, a clear principle for the organization of people's councils and their functions and tasks was provided. Under this principle, provincial level and district level people's councils have a standing board and other specialized boards. Communal level people's councils have a chair and a vice chair.

- *Second*, the 1994 Law has provided for the tasks and power of a communal level people's council chair. The Vice chair of communal level people's council assists the chair and act on behalf of the chair when the chair is absent.

- *Third*, the organizational structure of the specialized boards of people's councils of all level was provided. Under article 38, a provincial level people's council has 3 boards: the economic and budgetary board, the socio-cultural board and the legal board. For localities having many different ethnic groups, an ethnic board can be established. A district level people's council establishes two boards: the socio-economic board and the legal board.

The number of members of each board is decided by the people's council. A member of a people's council's board can not at the same time be a member of a

people's committee of the same level. The chair of a provincial level board can be a full time member. The chair of a district level board can not be a full time member. The chair of a provincial level or district level board can not at the same time be the head of a specialized agency of the people's committee, the Chief Prosecutor of the People's Procuracy or the Chief Judge of the People's Court of the same level.

*** Organizational structure and power of people's committees*

Basically, the 1994 Law continues affirming previous provisions and further specifying the following issues:

- According to article 46, a people's committee is elected by the people's council of the same level. It has a chair, vice chair and other members. The chair of a people's committee is a member of a people's council. *Other members of a people's committee are not necessarily a people's council member.*

- The number of people's committee members decreases compared to that of previous periods: A provincial level people's committee has from 9 to 11 members (the people's committee of Ha Noi and people's committee of Ho Chi Minh city have no more than 13 members); a district level people's committee has from 7 to 9 members. A communal level people's committee has from 5 to 7 members.

*** Specialized agencies of people's committees*

According to article 53 specialized agencies help the people's committee of the same level with the local governance work and ensure a unified management from central to grass-roots levels.

Specialized agencies belonging to a people's committee are under the direction in terms of organization, staffing and operation of the people's committee of the same level and at the same time are under the direction of specialized agencies of higher levels. The directors of specialized agencies are responsible and report to the people's committee and specialized agencies of higher levels; and report to the people's council of the same level when requested.

In reality, in implementation of the policy of streamlined apparatus, the number of specialized agencies and the staff pool of these agencies in provinces have been reduced. This has led to the avoidance of overlap and possible

bureaucracy in their work. The reduction in the number of specialized agencies of provincial people's committees is an innovation in the organization and operation of people's committees and is in line with the organizational principle of our state apparatus.

The most outstanding streamlining work is the combination of the Agriculture Department, the Forestry Department and the Irrigation Department into the Department of Agriculture and Rural Development. This combination helps reducing the number of provincial departments and boards and district divisions and boards. In the past there were from 38 to 40 provincial department and boards of the same level on average. Now this number is reduced to 20 to 24 agencies. Centrally governed cities have the largest number of agencies – around 27 departments, boards, inspectorates, offices and agencies of the same level. The province of the least number is 17 departments, boards, inspectorates, offices and agencies of the same level.

In 2001, the Government issued Decree No. 12/2001/NĐ-CP stipulating that provincial governments have the power to decide on the organization of district level people's committees. Provincial people's committee prepares a plan on the organizational structure of specialized agencies belonging to district level people's committees and submit it to the people's council for approval. Under this provision, a rural or urban district has no more than 10 divisions; a provincial town or provincial city has no more than 12 divisions, an island district has no more than 8 divisions. There is not a unified model for the organization of specialized agencies belonging to a district level people's committee for all localities. Each locality based on its own real conditions organizes their specialized agencies in a suitable manner.

In reality, in a rural district people's committee has 13 specialized divisions and boards. For rural districts like urban districts, they have two more divisions: the land division, the division for agriculture and irrigation, the division of construction and transport in stead of division for urban management (of an urban district).

For communal level, the organization of the apparatus have some changes to fit the condition of a grass-roots level government. Assisting a communal people's committee are some boards such as: Board of internal politics, judicial

board, land board, financial board, culture and information board, office of the committee, military board and public security board.

**** The period from 2003 to present***

***** Organizational structure and power of people's councils***

- The legal basis of people's councils is provided for in the 1992 Constitution (amended in 2001), and the 2003 Organic Law of people's councils and people's committees.

Article 119 of the 1992 Constitution (amended in 2001) stipulates "People's councils are local state power bodies representing the will, aspirations and sovereignty of the people, elected by the local people and responsible before the local people and higher state bodies"⁴¹. The position and nature of people's councils are also provided for in the 2003 Organic Law of people's councils and people's committees: People's councils fulfill tasks and power provided for by the Constitution and the law, ensure the central unity and bring into play the local creativeness. These provisions reflect the multi-functional nature of people's councils. On the one hand, a people's council is part of the unified State power structure, representing the State to address local issues of national significance and fulfill local obligations to the State. On the other hand, a people's council is an institution representing the people in a territorial – administrative unit, on behalf of the people decides on local issues based on the needs of the local people.

As an institution having the function of local governance, "based on the constitution, laws and documents of higher state bodies, 'people's councils decide on measures to ensure the serious local enforcement of the constitution and laws; on the implementation of local socio-economic developments and budgets, and local security and defense; measures to stabilize and improve the living standards of the people; fulfill the tasks assigned by higher state bodies; and fulfill the tasks to the whole country".

The 2003 Organic Law of people's councils and people's committees prescribes tasks and power of people's councils of all levels; tasks and power of

⁴¹. The 1992 Constitution of the Socialist Republic of Vietnam. National Political Publishing House, Hanoi 2012, p.65,66,67

people's councils of urban areas. People's councils and people's committees perform their tasks and power in accordance with the constitution, laws and documents issued by higher state bodies, mobilize the sovereignty of the people, strengthen socialist legislation; prevent and combat bureaucracy, corruption, wastefulness and other negative manifestations in the organizations, the staff pool and in the local government bodies.

Based on their functions, tasks and power and the common national interest and the local people, people's councils decide on policies and measures for local economic, socio-cultural, health and educational development, fulfill their obligations to the State.

To perform their functions, tasks and power, based on the Constitution, laws, resolutions of the National Assembly, ordinances and resolutions of the National Assembly Standing Committee and documents issued by higher state bodies, people's councils make resolutions and supervise the implementation of those resolutions. When doing oversight work, people's councils have the power to repeal wrong resolutions made by the people's councils of one level lower, and decisions and instructions made by the people's committee and the chair of the people's committee of the same level.

Functions, tasks and power of people's councils are performed by: meetings of the people's council, the standing board of the people's council, boards of people's councils and the work of each individual people's council members. Meetings of people's councils are the most important form of operation of people's councils. During their meetings, people's councils discuss and make resolutions on issues under their tasks and power. A resolution of the people's councils must be passed by more than half the total number of people's council members, except for the dismissal of people's council members.

The standing board of the people's council is the institution ensuring the operation of the people's council, responsible before the people's council of the same level, under the oversight and guidance by people's councils of higher levels, the National Assembly and the National Assembly Standing Committee.

In implementation of the constitution and the 2003 Law, the organizational structure of the standing board of the people's council since the term 2004 – 2011

has changed. For provincial level and district level standing boards, a standing member is added. The standing board of communal level people's council is established consisting of the chair and the vice chair of the people's council

On the organization of specialized boards of people's councils of provincial and district levels, based on the constitution, the 2003 law stipulates that people's councils of provinces and centrally governed cities establish 3 boards: the legal board, the economic-budgetary board and the social-cultural board. People's councils of rural districts, urban districts, provincial cities and towns establish 2 boards: the economic-budgetary board and the social-cultural board. In localities having many different ethnic groups, an ethnic board can be established. For members of people's council boards, all people's councils of provincial and district levels have the chair and vice chair of the board working full time. Each provincial level board has from 9 to 13 members; the district level boards have from 5 to 7 members. Most of the provinces have 01 chair and 01 vice chair of each board. Some provinces have 2 or 3 vice chairs. District level people's councils establish 02 boards: the economic-budgetary board and the social-cultural board. District level boards are encouraged to have the chair and vice chair of the boards working full time. In reality the number of those people working full time is only about 7.5%.

*** Organizational structure and power of people's committees*

- Functions and legal basis of people's committees

Basically, article 2 of the 2003 Law continues affirming the same functions and position of people's committees as in the past:

+ A people's committee elected by the people's council is the executive body of the people's council, the local state administrative body, responsible before the people's council of the same level and state bodies of higher levels.

+ A people's committee is responsible for the enforcement of the constitution, laws and documents made by higher state bodies and resolutions made by the people's council of the same level to ensure the implementation of socio-economic development measures, national security and defense and other local policies.

+ A people's council performs the function of local governance, contributing to the unified governance in the administrative system from central to grass-roots levels.

For *people's councils of provincial cities or towns*, in addition to performing the same tasks and powers as those of district level people's committees, they have other tasks and power as provided for in article 108 of the 2003 Law.

Like provincial cities and towns, in addition to performing the same tasks and powers as those of people's committee of rural districts, *people's committees of urban districts*, have other tasks and power as provided for in article 109 of the 2003 Law.

Based on the provisions on the tasks and power of people's committees of communes and communal towns, the 2003 Law prescribes *additional tasks and power of people's councils of wards* in article 119.

The 2003 Law stipulates that specialized agencies of people's committees are advisory bodies assisting the people's committee to perform their task of local governance. A specialized agency of a people's committee is not a level of governance, but a body supporting the people's committee and carrying out tasks assigned by the people's committee of the same level and as provided for by the law; contributing to the unified governance from central to grass-roots levels.

From the above mentioned provisions, it can be seen that the 2003 Organica Law of people's councils and people's committees has fundamental changes compared to previous periods in the followings:

- People's councils and people's committees are added with very concrete provisions on tasks and power, especially the tasks and power relating to the enforcement of laws.

- The 2003 Law prescribes the tasks and power for each administrative level with a distinction between rural and urban areas and has special provisions for island areas.

- The 2003 Law has a new chapter on the oversight of people's councils. This means that the awareness of the role and position of people's councils has been increased and the democracy of the state apparatus has been strengthened.

Provisions of the 2003 Law have been the important legal basis, contributing to increasing the effectiveness of the organization and operation of local government bodies in Vietnam for the moment and the coming time.

- Organization of specialized agencies of people's committees since 2003:

After the 2003 Organic Law of people's councils and people's committees was promulgated, the Government issued Decree No. 171/2004/NĐ-CP providing for the organization of specialized agencies of people's committees of provinces and centrally governed cities. Under this Decree, all people's committees of provinces and centrally governed cities have 19 departments and equal agencies; 8 departments and equal agencies depending on the local characteristics as guided by the Government on principles and criteria.

Organization of specialized agencies of people's committees of provincial level is done following Decree No. 13/2008/NĐ-CP dated February 4 2008 on the organization of specialized agencies of people's committees of provinces and centrally governed cities, the number of specialized agencies of all provinces and centrally governed cities is 17 and have 2 to 4 unique specialized agencies depending on the local characteristics. In the whole country, there are 1,246 specialized agencies of people's committees of provinces and centrally governed cities, including 1,071 permanent agencies and 175 unique specialized agencies.

- Organization of specialized agencies of people's committees of districts, provincial towns and cities is done following Decree No. 14/2008/NĐ-CP dated February 4 2008, the number of specialized agencies of all district level people's committees is 10 and have 2 to 3 unique specialized agencies depending on the local characteristics. In the whole country, there are 8,189 specialized agencies of people's committees of districts, provincial towns and provincial cities.

Besides, urban districts, provincial towns and cities can establish 2 more units: the Economic division (established in all urban districts, provincial towns and cities: 137 units) and the Urban management division (137 units).

- For communal level people's committees, there are 7 title holders who are communal level civil servants. The total number of communal level civil servants according to a statistics of the Central Organization Commission in 2007 is 81,314.

2. Current situation of administrative decentralization between central and local governments based on social survey in some fields

The policy of strengthening the administrative decentralization, mobilizing the democracy and people's participation in the governance work, increasing the local proactiveness in the context of a unified state governance was made in the 6th National Party Congress and continuously affirmed to the 11th National Party Congress and it is mentioned in some following important Party documents: the 8th meeting of the 7th Central Party Committee (in 1995) passed a program on public administration reform; Instruction No. 30-CT/TW dated February 18 1998 of the Politbureau on grass-roots level democracy, etc.

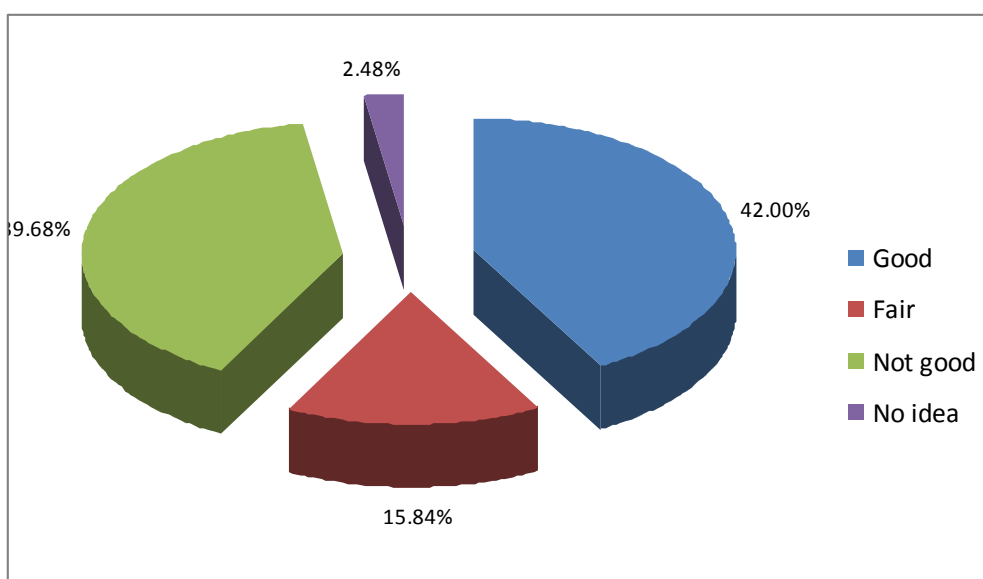
In implementation of the Party policy, administrative decentralization has been accelerated to bring into play the activeness, creativeness and self-responsibility of local governments in carrying out local socio-economic development tasks. The administrative decentralization is now focused on 6 major fields: (1) development planning and investment; (2) state budget; (3) land, natural resources and state assets; (4) state owned enterprises; (5) public services; (6) organization of apparatus and civil servants. To objectively assess the current situation of administrative decentralization in those fields, we conducted surveys on administrative decentralization between central and local levels in some provinces across the country, followings are the results:

2.1. Administrative decentralization in the field of development planning and investment

42% of the opinions hold that the administrative decentralization in the field of development planning and investment now is good. The decentralization has created conditions for more substantive operation of local government. Tasks decentralized to local governments, especially investment, land use planning, revenue receipt, etc are all done by people's councils, therefore the substantive power of representative bodies are increased. The people have more opportunities

to participate in the discussion and decisions on important local tasks. The openness and transparency have gradually improved. The people started showing interest in the work of local people's councils. The role and responsibility of representative bodies and democracy have been improved; arbitrary actions relating to important local issues are reduced. In planning, the requirement that a body defends for its plans before a higher body has been abolished. Socio-economic development plans, including annual and 5 year plan of each level now are decided by that very level. In addition, the decentralization in the field of investment has led to the creativeness in investment attraction and licensing and more importantly the number of agencies involving in the licensing has been minimized, thus reducing the cost and time and creating the confidence of investors.

However, *up to 39.68% of the opinions hold that decentralization in this field has not been good* because planning has been decentralized to local bodies but the central plans, especially infrastructure development plan in support of modernization and industrialization as well as sector plans have not been made public. When the central government changes or expands plans, local governments will be put in a difficult situation due to their commitments to foreign investors. Moreover the decentralization in FDI management has created a number of difficulties, such as regional planning, industrial zone planning, vocational or sector planning are not well organized and thus investment silences have been issued arbitrarily without considering the needs of the market, causing wastefulness and low effectiveness. For example there are many economic zones or industrial zones, airports or golf courts in a region causing a local imbalance. Besides, the legal system and policies are not sufficient and consistent. They are understood in different ways by different local bodies, causing difficulties in investment project assessment and listening. "Investors are still worried about the inconsistency in the policies of central and local governments".



Graph 1: Decentralization in the field of planning and development investment

2.2. Administrative decentralization in the field of state budget:

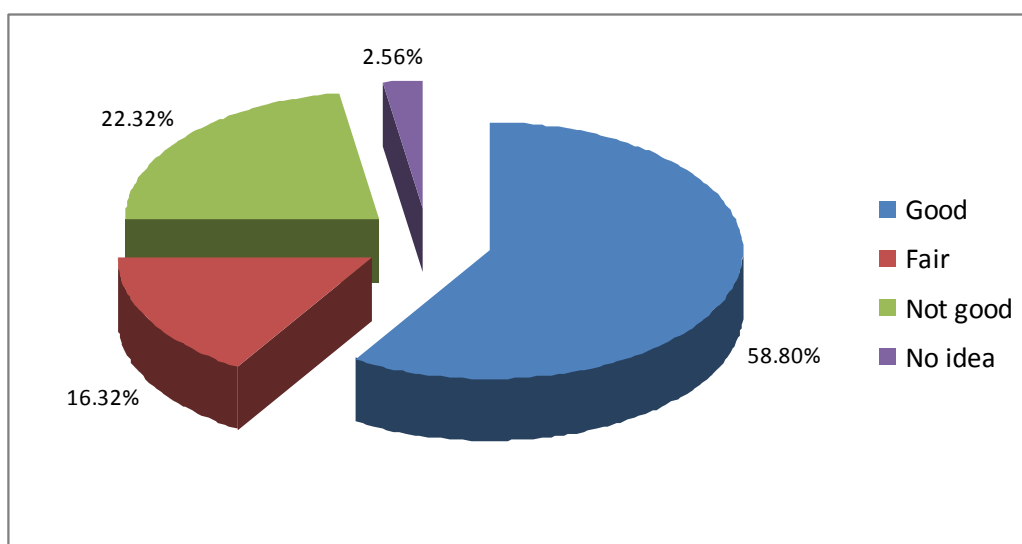
Basically, the central government still decides on tax and fees of different types, loans and regimes and cost norms applicable across the country. Provincial level people's councils are entitled to deciding budget expenditures in accordance with local characteristics. For expenditures on salary, remuneration, allowance, before deciding, people's councils have to ask for opinions of ministries in charge. Provincial level people's councils also decide on fee collection relating to land, natural resources, to the administrative management of local governments and other contributions of the people as provided for by laws.

Although state budget process is still decided by governments of different levels, the power of people's councils in deciding on the budget estimation and allocation have been significantly increased. In addition to traditional power of budget management, people's councils have the task of: deciding on the division of revenue receipt and expenditure to local bodies of different levels. Decide on the ratio of division of budget revenue that local governments cannot retain among local governments of different levels. The decentralization is made clear to local government of each level. Central state budget and local state budget revenue receipt and expenditure are decentralized in accordance with the decentralization in the field of socio-economic management. Central budget plays the key role in

fulfilling national strategic tasks and in assisting localities which are unable to balance revenue receipt and expenditure.

In the context of implementing AFTA and WTO commitments, central budget revenue from import tariff is decreasing sharply. Besides, the reduction in corporate income tax strongly affects the revenue structure of central budget and local budget. Especially, in the context of organization of no people's councils at district and ward levels, the decentralization of state budget management to create substantive autonomy of local governments is an urgent requirement to develop revenue sources and meet the increasing expenditure needs. Our survey shows that *58.8% of the opinions hold that decentralization in the field of state budget is good* because in reality local budget expenditure and revenue management have witnessed clear progress. Most of the localities increase their revenue sources through business and production development and services, spending budget in a proactive, timely and efficient manner. Thanks to local revenue and the adjustment of ratio of local retained budget from central budget revenue source, in 2002 there were 4 administrative units of provincial level being able to balance revenue receipt and expenditure. By 2004 this number increased to 14 administrative units being able to balance revenue receipt and expenditure without support from central budget.

However, *22.32% of the opinions hold that decentralization in this field is not good*. Though the State Budget Law gives people's councils of provincial level the power to decide on local revenue, the National Assembly keeps the key regulation power through deciding additional target revenues. Moreover through the provision of bonus for local budget for exceeding planned revenue receipt (article 59, item 5), the National Assembly can influence local revenue sources. Due to the different socio-economic conditions and development tasks of different localities, a unified ratio of adjustment of central and local budget is hard to be given.



Graph 2: Administrative decentralization in the field of state budget

2.3. Decentralization in the field of land, natural resource and state asset management

After the 2003 Land Law was made, the governance in the field of land has been specified, especially the decentralization in land management between central and local governments and among land management bodies in the local government system. The decentralization in this field is made specific in the followings:

- For the central government: The 2003 Land Law (items 1 and 2 article 7) and documents guiding its enforcement (Decree 181/CP; Decree 188/CP dated 16-11-2004; Decree 197/CP dated 03-12-2004; Decree 198/CP ngày 03-12-2004; Decree 200/CP dated 03-12-2004; especially decree 123/2007/NĐ – CP dated 27-7-2007 on amending and supplementing some articles of Decree 188/2004/NĐ- CP dated 16 – 11- 2004 on land pricing methods and land price bracket; Decree 84/2007/NĐ – CP dated 25 - 05 – 2007 with additional provisions on the issuance of land use right certificates, land use right exercise, land confiscation, procedures and process for compensation, support for rehabilitation when the land is taken by the State, and handling land complaints, and circulars guiding the enforcement of these decrees, etc. all stipulate the power of the National Assembly, the Government and related ministries and authorities in exercising the power of governance of land through the making and implementation of policies and laws on

lands. The Ministry of Natural Resources and Environment is responsible before the Government for land management across the country.

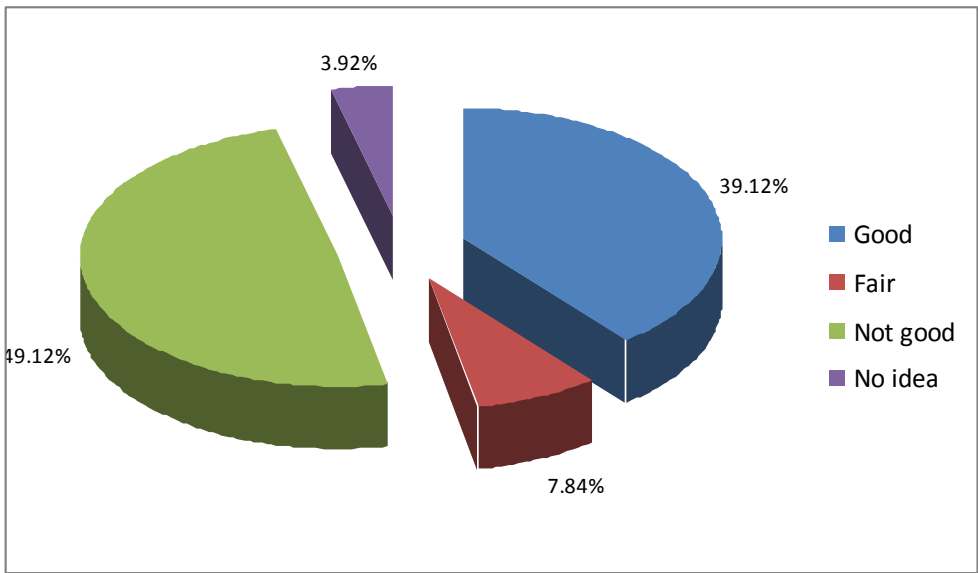
- For local governments: Legal documents on land provide for the power and responsibility of local governments of different levels. “People’s councils supervise the local enforcement of land laws” (article 7, item 3 of the Land Law), “people’s committees exercise the representative right of the entire people’s ownership of land according to their power...” (Article 7, item 4 of the Land Law). In addition, Resolution No. 08/ 2004/NQ - CP dated 30- 6 – 2006 of the Government prescribes a clear division of power and responsibility of land management based on articles 26 and 37 of the Land Law and other legal documents.

Only 39.12% of the opinions in the survey hold that decentralization in the field of land, natural resource and state asset management is good, 7.84% of the opinions hold that it is fair, 3.92% could not give an answer, and the remaining 49.12% hold that it is not good, because:

First, the decentralization in the field of land use planning by the State for the past time was to check the legality, the unity, the reasonability and feasibility of the land use master plans and plans which had been made before. However, in reality the decentralization of power to make and implement land use plans and master plans of state bodies of 4 levels as provided for by the Land Law (article 25, items 3 and 4), including communal level (for communes which are not within an urban development plans) and urban district level is not feasible. Because as stipulated by law, units of communal level only have 1 or 2 land staff, many of them have not been equipped with knowledge of land management, especially in advising the chair of the communal people’s committee to make local land use plans and master plans. For district level bodies, when making land use plans and master plans, especially detailed 1/2000 master plans, the capacity of district level staff cannot either meet the requirements, especially the land use in urban areas. For these reasons, land use planning and master planning for the past years have made land use fragmented, and unable to meet the need of land use and management in the whole country and international economic integration. Many unreasonable land use plans and master plans have broken the natural landscapes and national historic and cultural installations. Criteria for land use planning and

plan adjustment among bodies of different levels (central level and provincial level, district level and communal level) and among different sectors (construction, transport, architecture and natural resource and environment management) and among localities (Ha Tay, Hanoi, Ho Chi Minh city, etc.) have not been complied with.

Second, land laws (article 37, articles 31, 32 Decree181/CP...) provide for a very concrete division of power in land allocation, hiring out and change of land use purpose. However, in the enforcement of these legal documents, many local agencies and staff abused these provisions to allocate or hire out land in an arbitrary and illegal manner. The management of land in many localities therefore becomes very complicated. Even communal level bodies allocate land arbitrarily and not to the right persons. The allocation of land is not based on the needs of investors and the people and thus land becomes fallow and investment “thinned out”.

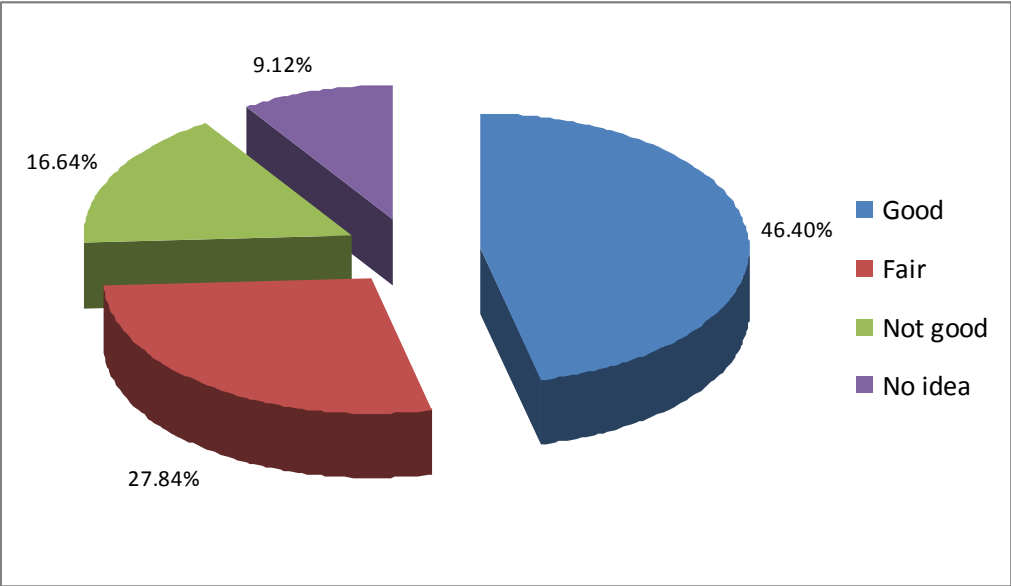


Graph 3: Decentralization in the field of land, natural resource and state asset management

2.4. Decentralization in the field of state owned enterprise management

According to the survey, 46.4% of the opinions hold that decentralization in the field of state owned enterprise management is good, 27.84% hold that it is fair, 9.12% cannot give an answer and 16.64% hold that it is not good.

With the current decentralization, in the capacity as ownership representative, governments of provincial level can arrange and re-organize state owned enterprises under their management, establish new state owned enterprises under their mandate when they deem it necessary for the provincial socio-economic development needs. The provincial government is the representative for the state capital in enterprises. In principle, the Government governs in terms of institution, policy, creates a favorable environment and supports in necessary circumstances for state owned enterprises and other economic organizations. Provincial governments decide on the re-arrangement of state owned enterprises under the direct management of the provinces following a comprehensive master plan approved by the Prime Minister; exercise the representative right of ownership over their subordinate state owned enterprises. The Prime Minister approve master plans of state owned enterprise and state owned business establishment; decides on the establishment of state owned corporations and businesses of special importance. The chairs of provincial people’s committees decide on the establishment of businesses of other types.

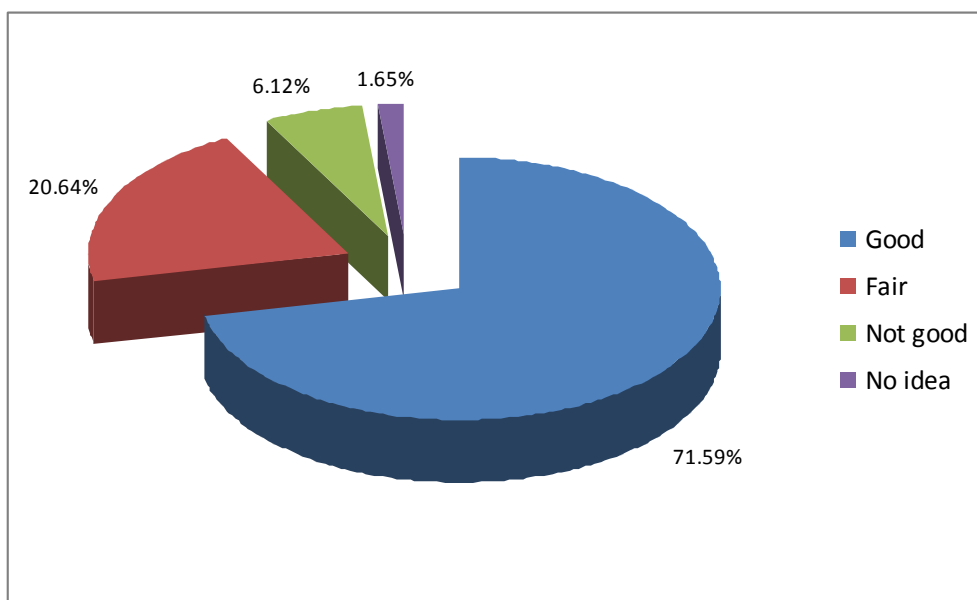


Graph 4: Decentralization in the field of state owned enterprize management

2.5. Decentralization in the field of public services

According to Resolution 08, the Government governs the strategy, institution, policies and inspects and examines public service activities; directs ministries in the organization of essential public service provision and other public services that local governments cannot provide. The Government delegates to provincial governments to re-arrange and re-organize the system of public service provider in accordance with the real local conditions; plan the network; decides on the establishment and management of public service providers in such fields as education, health care, science and technology, culture, sports, environment, clean water, etc. and other services for production (agricultural, forestry, fishery and industrial encouragement).

On this issue, most of the opinions hold that decentralization in the field of public services is good (71.59%), 20.64% of the opinions hold that it is fair, and only 6.12% hold that it is not good, 1.65% of the asked persons could not give an answer.)



Graph 5: Decentralization in the field of public services

General observations: Decentralization in the field of public services for the past years has mobilized the proactiveness and creativeness of local governments; mobilized potentials, contributing to enhancing the effectiveness of local

governance and accelerating local socio-economic development; better met the needs of organizations and the interest of the people; avoided overlaps in functions and tasks; maintained the principle that one task is assigned to one body. In economic field, most of the localities made use of their own advantages, exploited land and labour potentials; restructured local economy. The local budget receipt and expenditure have witnessed progresses. Through the development of business and production, localities have increased their revenue sources and have timely and efficient expenditure. The local staff pool gradually improved their knowledge and skills though fulfilling the tasks delegated to them.

3. The pilot organization of no people's councils at some urban, rural districts and wards, experience and lessons

The Report of the Politbureau at the 8th meeting of the 7th Central Party Committee on the one step forward reform of the state administrative service prescribes the viewpoint on innovating the organization and operation of local government: *“The administrative apparatus of cities and provincial towns need to be organized in accordance with the characteristics of urban management which is highly centralized and unified, different from provinces with middle levels. Cities are unified administrative units, having their specialized apparatus doing the governance work and addressing common issues of the urban communities. Based on the urban planning in around 10 years, it is necessary to identify areas outside urban boundaries to ensure the right nature and requirement of urban management. Defining the right functions and position of district level governments to organize a rational and streamline apparatus with clear power and responsibility. Consolidating communal level governments, addressing the issue of communal budget and gradually professionalizing some posts of communal level. Applying the model of village leader elected by the village people as staff of the communal government and assigned with some administrative work in the village but not a state administrative level. Functions of the chief of a mountainous village should be in accordance with mountainous characteristics”*.

In implementation of the Resolution of the 7th National Party Congress, resolution of the 8th meeting of the 7th Central Party Committee, resolution of the 8th National Party Congress, resolutions of the 3rd, the 6th and the 7th meetings of the 8th Central Party Committee, the Prime Minister issued Decision No.

136/2001/QĐ-TTg dated 17/9/2001 on the comprehensive program for public administration reform for the period 2001-2010. Besides issues of institutional and administrative reform, the Program put forth the task of local government reform based on a clear identification of functions, tasks and power of local governments, a clear division between central and local levels, a distinction between the functions and tasks of urban governments and rural governments; a rational organization of people's councils and people's committees at each level.

In implementation of the Party resolution, the Government prepared a master plan on organization of no people's councils in some rural, urban districts and wards and submitted it to the Politbureau and the National Assembly. Resolution No. 26/2008/QH12 of the National Assembly was made, laying the legal foundation for the pilot organization of no people's councils from April 25 2009 in 10 provinces and centrally governed cities (7 provinces: Lào Cai, Vĩnh Phúc, Nam Định, Quảng Trị, Phú Yên, Bà Rịa- Vũng Tàu, Kiên Giang and 3 centrally governed cities: Ho Chi Minh, Da Nang and Hai Phong cities), including 67 rural districts, 32 urban districts and 483 wards.

3.1. Positive results

a) Distinction between urban governments and rural governments

According to the pilot policy, people's councils and people's committees are designed under two models: local urban governments and local rural governments.

For rural areas, the organization of local governments is as follows: provincial level (people's council and people's committee) – district level (people's committee) – communal level (people's council and people's committee).

In this model, the district people's committee works as the representative body of the provincial administrative body; directing, guiding and monitoring the implementation of policies, resolutions and plans made by higher state bodies. The oversight of the district people's committee is done by National Assembly members and provincial MP delegation, the people's council and the Vietnam Fatherland Front; and directly by the people. The provincial people's committee still maintains its examination in the administrative system.

A communal government consists of a people's council and a people's committee responsible for developing and coordinating the implementation of socio-economic development plans, managing communal budget, doing local governance work in the fields of education, health care, land, construction, household management, etc. as provided for by law. Based on the functions and tasks of communal governments, civil servant posts have been identified in a specific and stable manner and with in depth specialized jobs.

For urban areas, people's council is organized at city level (in districts and wards, only people's committees are established). As such the organization of local governments is as follows: city (people's council and people's committee) – districts (people's committee) – wards (people's committee).

In administrative units where a people's council is not established, the people's committee is appointed instead of being elected by the people's council of the same level. The chair of the people's committee of the province or centrally governed city appoints, removes or dismisses the chair, vice-chairs and members of rural or urban district people's committees.

The chair of the people's council of an urban district, provincial town or provincial city appoints, removes or dismisses the chair, vice-chairs and members of people's committees or wards.

The organization of no people's councils in urban, rural districts and wards led to the adjustment of functions, tasks and power of people's councils and people's committees of all levels. The adjustment principle is that tasks and power of representative nature would be done by the people's councils of higher levels; tasks and power relating to the management and direction of socio-economic development, national security and defense would be assigned to people's committees.

The pilot work has created two models of local governments, avoiding the equation of urban people's councils and people's committees and rural people's councils and people's committees.

b) Freedom and rights of the people are guaranteed

One of the important criteria for the assessment of the results of the pilot program is how the people's freedom and rights are guaranteed in the context that a body representing them is not organized in some places. Basically the right to information, the right to representation and the oversight of individual are guaranteed.

Information on the meeting of the people's council of the province or centrally govern city is disseminated through radio, television and the press. The people can watch the work of the people's council – their local representative body.

Opinions of the people is transferred to relevant state bodies for resolutions by provincial MP delegations, individual National Assembly members, the standing board of the people's council, other boards of the people's council and people's council members, the Vietnam Fatherland Front and other socio-political organization and other associations.

Meetings between National Assembly members and people's council members with the people are increased. According to reports of the 10 pilot provinces and cities, the number of meetings between National Assembly members and people's council members with the people were maintained the same compared to the period from 01/7/2008 to 30/6/2009 and from 01/07/2009 to 30/6/2010. In 2009, the number of meetings between National Assembly members and people's council members with the people was 3,314 (11 meeting higher than the number of the following year: 3,303 meetings).

In the pilot localities, the number of meetings was higher than that of the year before piloting. In a specific term, the number of meetings of National Assembly members in rural districts increased by 7.3%, in urban districts by 1.9% and in wards by 6.8% in the pilot year. The number of meetings of province or city people's council members in rural districts increased by 6.1%.

The result shows that the active work of people's representatives (National Assembly members and people's council members) in meeting with their voters created conditions for the people to present their opinions and aspirations to their representatives and their will and aspirations were reflected in policies and legal documents of the State.

In pilot localities, although there is not a people's council, the oversight of the work of the local people's committee, the people's court and people's procuracy as well as other agencies in the rural, urban districts or wards was still maintained by the oversight by National Assembly members, the standing board other boards and members of the provincial or city people's council.

According to a survey of the Central Steering Committee of the pilot program and reports of pilot localities, during the pilot time, the standing boards of the people's councils of some provinces and cities closely supervised the work of local state bodies. The standing boards requested the people's councils of districts and wards to report on their performance of local socio-economic development tasks. In 6 moth reports or annual reports of people's councils of provinces or cities, the assessment of the work of people's committees of rural, urban districts and wards are added to support the oversight work of provincial people's councils over the work of agencies in the districts.

The issues of oversight by the standing boards and other boards of provincial people's councils were not limited to the performance of local socio-economic development tasks but the issues of improving people's living standards, and especially pressing issues in the fields of land management, site clearance and project implementation.

According to statistics, in the two pilot years, the oversight work of provincial people's councils over the work of people's committees of pilot rural or urban districts increased compared to years before piloting, in which the rural districts increased by 6%, urban districts by 15.4%. The number of post-oversight recommendations of rural districts increased by 3.6% and urban districts by up to 58%.

The oversight of the standing boards of the provincial people's councils and the people's councils themselves was a factor contributing to increasing the responsibility and efficiency in the work of district people's committees. Post oversight recommendations were sufficiently handled by the people's committees. The number of recommendations handled increased compared to that of previous year. The number of recommendations handled in a timely manner by rural district people's committees increased by 32 or 8.6% compared to the number of 2009; by urban district people's committees by 214 or 59.61% compared to the number of 2009.

People's committees of higher levels strengthened their direction and examination of the work of people's committees of districts and wards through monthly meetings, reviewing 6 moth and annual reports, and through approving programs and plans of socio-economic development of districts and wards.

In parallel with the oversight of representative bodies, people's councils of higher level increase their periodical and random examination of the work of people's committees of districts and wards. In 10 pilot provinces, the number of planned, periodical and random check in districts and wards was higher than that of 2009. In rural districts, the number of periodical examinations increased by 26%, random examinations by 20% and other forms of examinations by 7.3%. In urban districts, the number of periodical examinations increased by 35.9%, random examinations by 24% and other forms of examinations by 26.7%. In wards, periodical examinations increased by 3.3%, random examinations by 12.3%.

The Party committees of pilot districts and wards strengthened their leadership role over the work of people's committees. Socio-economic development plans, other major policies of people's committees had been reported to the party committees of the same level for opinions. In some localities, together with the pilot organization of no people's councils was the pilot combination of the post of party committee secretary and chair of people's committee. By October 2010, there had been 17 district level units (13 rural districts and 4 urban districts); 580 communal units (116 wards, 464 communes and communal towns) across the country piloting the combination of the post of party committee secretary and chair of people's committee. In these localities, the direction of the party committee over the people's committee was quick, smooth and helped reducing levels of reporting.

According to reports and survey, the openness and transparency requirement in pilot localities was seriously met. The openness and transparency of policies of state governance were done in various forms, creating opportunities for the people to monitor and supervise the work of the local governments. Besides making information available in the website of the people's committee, on notice boards at the people's committee building, on the media, and disseminated by the council of legal information dissemination of districts, the people's committees of

districts also directly sent documents to people's committees of communes and wards to inform the people.

c) The socio-economic situation, national security and defense of the pilot localities witnessed progresses

- According to statistics on the socio-economic situation of pilot localities, the socio-economic situation of these localities witnessed important results. Economic growth was higher year by year. While the growth rate in 2010 of the whole country was expected to be 6.78%, the rate of pilot localities was impressive (above 10%). Specifically, the GDP growth rate of Lao Cai province in 2010 increased by 13%. Nam Dinh province's GDP was expected to reach 10,480 billion dong, an increase by 10.7%. Hai Phong city's GDP was expected to reach 24,003 billion dong, an increase by 10.96%. Vinh Phuc province's GDP increased by 19.1%; Quang Tri 10.6%. Da Nang city's GDP was expected to reach 10,274 billion dong, an increase by 11.54%. Phu Yen's GDP increased by 12.5%; Ba Ria – Vung Tau about 15.1%. Ho Chi Minh city's GDP was expected to reach 414,068 billion dong, an increase by 11.8%. Kien Giang province's GDP reached 18,801.51 billion dong, increasing by 12.05%.

The living standards of the people in the pilot localities was improved significantly, social security was maintained, education and health care were cared for. GDP per capita was higher than in 2009 and above the national average rate. Followings are some specific figures:

Lao Cai: GDP per capita reached more than 16.2 million dong a year (increase by 25% compared to 2009). The education and training and health care were continuously strengthened. There are 135 schools of national standards across the province; 126 communes, wards and communal towns meet the national standards of communal health care. Social security was cared for, poverty reduction and hunger elimination programs were efficient. The 30a program, the 167 program were actively implemented, finishing building 6,647 houses for poor households, completing the plan 100%.

Vinh Phuc: GDP per capita reached about 36.5 to 37 million dong⁴². Employment and social security continued to be cared for.

Hai Phong: on education and training, for school year 2009-2010, the ratio of pupils passing the final exams reached 98.96%. There were 217 over 733 or 29.6% schools of national standards. Health examination and disease treatment for poor people, children of less than 6 years old and people under health insurance policy were implemented at communal and ward levels. 100% of the communes meet the national health standards. Target programs, plans to improve the quality of the population, controlling the population of island and coastal areas were implemented efficiently. The number of families having the third child decreased by 31 compared to that of 2009. About 47,353 persons were given a job, increasing 4.7% compared to that of 2009, meeting 100.75% the plan. The ratio of poor households (according to old national standards) decreased to 3.86%.⁴³

The organization of no people's councils led to changes in the budget process. According to the Organic Law of people's councils and people's committees and the State Budget Law, the people's council has the power to decide on the local estimated budget revenue; estimated local budget revenue receipt and expenditure and estimated allocation of budget; approve local budget settlement; decide on policies and measures to implement local budget; adjust the estimated local budget in necessary circumstances; supervise the implementation of budget. For provincial level, people's councils decides on the decentralization of revenue sources and expenditures for localities according to the State Budget Law.

In localities without a people's council, those tasks of people's councils of districts or wards are assigned to the people's committee of the same level. People's committees of districts and wards are entitled to decide on annual budget estimation and settlement; adjust the estimated local budget in necessary circumstances and approve the local budget settlement. Basically there was not a major difference in the budget process from budget estimation to settlement in pilot localities and other localities. The only difference was the non-involvement of

⁴² <http://dvt.vn/20101230103324999p0c69/nam-2010-gdp-vinh-phuc-tang-truong-191.htm>.

⁴³

<http://haiphong.gov.vn/Portal/Detail.aspx?Organization=UBNDTP&MenuID=4506&ContentID=14446>

people's councils of districts and wards. The power to decide on the decentralization of revenue sources and expenditures of districts and wards was still fulfilled by provincial people's councils according to the State Budget Law.

Under current regulations, in the budget process, the role of financial bodies is very important. Besides the approval of budget by people's councils or people's committees, there is the examination of higher financial bodies in budget estimation, budget implementation and settlement.

The estimated local state budget, estimated local revenue receipt and expenditure must be sent to higher financial bodies and other related agencies for a consolidated estimated budget submitted to the people's committee of the same level. The local higher financial body has the responsibility to examine and appraise the estimated budget prepared by agencies of the same level and of lower level agencies; cooperate with other managerial agencies of the same level to prepare local estimated budget and allocation of budget to report to the people's committee of the same level. For provincial towns or cities, the financial agency of the towns or cities appraises, synthesizes and reports on the estimated budget to the people's committee for submission to the people's council of the same level.

The task of examining and appraising estimated budget by the financial agency together with the power to decentralize revenue receipt and expenditure of district or ward budget of provincial people's council in the context of budget integration have helped ensuring the stability and safety in the budget process as well as the role of representative bodies in the process of making decisions on local budget.

The organization of people's councils has helped reducing the time amount and procedures in preparing estimated budget, allocation of budget allocation and implementation of budget, ensuring the neutrality and unity of budget management by local government apparatus.

d) Efficiency in the work of people's committees is maintained

During the pilot time, the managerial work of the administrative apparatus was normally maintained. The administrative nature of the people's committee where a people's council did not exist was more visible and upheld.

The people's committees of districts or wards received and performed some tasks of the people's councils of the same level and of the people's committee of one level higher. Although there were certain changes in the organization and operation, the managerial work of localities was normally done and there was not a gap in the power of governance.

The fact that the chair of the people's committee of higher level appoints, removes or dismiss the chairs and other members of people's committees of districts or wards; and the chair can choose his or her deputy and other members have created favorable conditions for a centralized, unified and smooth direction of an administrative body over its lower bodies, and favorable conditions for the use and move of staff.

The organization and operation, the work and other working relationship of people's committees of the pilot districts and wards were still under the principle of democratic centralism and were significantly innovated. The collective responsibility of the people's committee and individual responsibility of the chair and each member of the Committee were clearly identified, helping the governance work of the people's committees in the local socio-economic life.

In order to supplement the pool of managerial staff in the organizational structure of people's committees, the Government issued Decree No. 27/2009/NĐ-CP dated 19/3/2009 amending Decree No. 107/2004/NĐ-CP dated 01/4/2004, which was to be applied to pilot localities. Under this decree, the people's committee of places where a people's council does not exist will have one more vice chair of the people's committee and the membership of the people's committee includes: the chair, 03 vice chairs and 03 other members. According to reports of localities, the number of chair, vice chairs and other members of pilot districts or wards as provided for by the decree is reasonable.

The work of meeting with the people, handling the people's complaints and petitions was maintained. The number of complaints and petitions sent to the people's committees of districts or wards in the pilot year decreased compared to the previous year, in which at rural districts this number decreased by 3.5%, urban districts by 7.9% and wards (of an urban districts) by 4.5%, and wards (of

provincial towns or cities) by 34.6%. The number of complaints and petitions handled was higher than that of the previous year.

The people's committee of some districts and wards were proactive in developing and promulgating their working statutes and regulations on the functions, tasks and power of their specialized supporting divisions with added tasks in the context of no people's councils in their localities.

The people's committee of some rural districts were proactive in assigning a vice chair of the committee to monitor the work of communal people's committees. Representatives of communal people's committees were invited to meeting of the people's committee of their districts. Representatives of the people's committee and its specialized supporting divisions were sent to meetings of communal people's councils. Decisions on policies of the people's committee of the district are sent to the people's councils of communes and communal towns in a timely manner.

3.2. Limitations

a) The institutional framework for the organization and operation of the governments of pilot localities has not been suitable and synchronous

Resolution of the 5th meeting of the 10th Central Party Committee affirmed that "In rural districts, the people's committees as the representative bodies of the provincial administrative body address administrative issues and other work related to the rights and interest of the people as provided for by law"; "In urban districts and wards, the people's committees as the representative bodies of higher administrative body perform tasks as provided for by law and assigned by higher bodies according to decentralization". Under this policy of the party, when the people's councils are removed, the organization of governments according to territorial units, there is not an administrative level in the pilot districts or wards.

However, the legal provisions on the position, tasks and power of people's committees of pilot localities have not been complete and have not followed the above policy of the Party. According to the resolution there are changes in the nature and position of the people's committees of pilot districts and wards. They have become an administrative body representing the people's committee of higher level to perform the governance work of higher people's committee in their

districts or wards. However, Resolution No. 26/2008/QH12 and No. 725/2009/UBTVQH12 have not represented the resolution's spirit. Under article 6 of Resolution 725/2009/UBTVQH12, the tasks and power of the people's committees of pilot places remain the same as those provided for in the current Organic Law of people's councils and people's committees. The adjustment of the tasks and power of people's councils and people's committees of provinces and centrally governed cities, and of districts and wards is just a kind of re-arrangement without substantive contents to fit the new positions of each institution.

The position, role and responsibility of the people's committee chair in his relationship with the people's committee of the same level and with the chair of people's committee of one level higher remain the same as those provided for by current legal documents, which have not caught up with the change in the nature and position of people's committees of districts and wards.

This has had certain influences on the work of people's committees. Statistics show that the number of guiding and managerial documents issued by the people's committees and people's committee chairs decreased by 8,902 or 1.06% (in 2009: 838,994 documents; in 2010: 830,092 documents). Specifically, the number of decisions of people's committees of districts and wards decreased by 12,704 or 5% (in 2009: 253,778 documents, in 2010: 241,074 documents) compared to 2010. Other documents decreased by 3,123 or 1.6% (in 2009: 189,069 documents, in 2010: 185,946 documents).

In some localities, the number of guiding and managerial documents issued by the people's committees and people's committee chairs decreased considerably compared to that of 2009. Specifically, the number of decisions of people's committees of urban districts decreased by 6,492 or 9.2%; decisions made by wards of urban districts by 3,219 or 8.5%; and decisions made by chairs of people's committees of wards of provincial cities or towns by 2,521 or 23.5%.

b) Tangles in the enforcement of legal provisions on budget management remain

Under article 6, item 2 of Resolution No. 725/2009/UBTVQH12, the people's committees of rural districts "prepare local estimated budget revenue receipt and estimated expenditures and report to the people's committee of higher

level to submit to the people's council for decision. Based on the assigned estimated budget, decide on detailed estimated local budget receipt and budget expenditures, adjust local estimated budget when necessary; decide on measures to implement budget and report the people's committee of one level higher on the allocation of budget and assignment of local estimated budget. They report to the people's committee of higher level to submit to the people's councils on budget revenue and expenditure settlement". The same tasks and power apply to people's committees of urban districts and wards.

As such, as provided for by law, the people's committees of pilot districts and wards were still a state budget level though incomplete. This is not in accordance with the design of local governments under the pilot program. The role and responsibility of the people's committee in deciding and implementing the budget process have not been clearly defined. Specifically:

- On the task of deciding on local budget settlement:

When performing the task "preparing the settlement of revenue receipt and expenditures and reporting to the people's committee of higher level to submit to the people's council for approval or for the people's committee of higher level to approve", the people's councils of some districts and wards did not discuss the issue collectively and decide on the settlement but only prepare the budget settlement and report to the people's committee to submit to the people's council for approval. Due to the fact that people's councils of provinces and provincial towns were not added the tasks and power of approving budget settlement of pilot districts and wards, there remained tangles in the implementation of this task.

- On deciding budget estimation: Resolution No. 725/2009/UBTVQH assigns people's committees of pilot districts and wards to prepare estimated local revenue receipt and expenditure and allocation of budget to bodies of the same level. However, people's committees of some provinces assigned detailed estimations to each pilot rural districts as a basis for the approval of budget settlement according to articles 6 and 7 of the Resolution No. 725/2009/UBTVQH.

CHAPTER III

VIEWPOINTS AND SOLUTIONS TO INNOVATING THE ORGANIZATION AND OPERATION OF LOCAL GOVERNMENTS IN ACCORDANCE WITH NEW DEVELOPMENTS

1. Viewpoints on innovating the organizational model of local governments

1.1. Innovating the organization and operation of local governments to meet the requirements of the national industrialization and modernization

All innovations originate from reality. The comprehensive renewal process in our country (first and foremost) in economic field since the 1990s has brought about breakthroughs in the quality of life. Before the requirements of the news situation, our Party and State made a strategy of building our country toward industrialization and modernization.

The Platform for national construction in the transitional period to socialism (supplemented and developed in 2011) affirms: “Economic development is the central task; national industrialization and modernization coupled with knowledge based economic development and environmental and natural resource protection; building a stable, efficient, modern and suitable economic structure with a close link among agriculture, industry and services. Importance is attached to the development of heavy industry, foundation manufacturing industry and other advantageous industries. Developing agriculture, forestry and fishing with high technologies and high quality closely linked with the processing industry and the building of rural areas of new type. Ensuring a harmonized development of different regions and areas; pressing ahead with the development of key economic zones while creating conditions for economic development of difficult areas. Building an independent, self sufficient economy and being proactive and active in international economic integration”.

Based on that spirit, guidelines for the innovation of the local government system were put forward in the Resolutions of the 10th National Party Congress: “Enhancing the quality of the work of people’s councils and people’s committees, guaranteeing the autonomy and self responsibility of local government within their

decentralized scope. Mobilizing the oversight role of people's councils. Rationally organize local governments, redefining the mandates of local governments in rural, urban and island areas "44.

Reality shows that the innovation of the organization and operation of local governments need to follow the direction of increasing the autonomy of local government apparatus; creating compatible change to fit with changes in reality; ensuring a harmonized development among different regions to achieve the common development goal of the whole country. Increasing the autonomy for local governments to create a strong and active apparatus, thus enhancing the governance and management of local socio-economic development, achieving the goals of national industrialization and modernization.

1.2. Innovating the organization and operation of local governments to meet the need of building a socialist law-governed state of the people, for the people and by the people

A state of the rule of law is a state which is built and operates based on a democratic and progressive legal system. Recognized characteristics of a state of the rule of law include: equality of the citizen before the law, recognition of the citizen's rights, human rights and democratic institution in the legal system; respect for, enforcement of and protection of the law through state bodies, especially judicial bodies; a mechanism for state power check of which the separation of power among state bodies is central.

Based on the common political and legal spirit and practice of countries in the world on a state of the rule of law, the 7th National Party Congress defined the contents of building a socialist law-governed state of the people, for the people and by the people in Vietnam. It is a state governing society by law, continuously strengthening socialist legislation; respecting and ensuring in reality fundamental human freedom and rights; maintaining close contacts with the people, avoiding any manifestation of bureaucracy and corruption; being organized toward centralization of power in the highest representative body with clear allocation and coordination among legislative, executive and judicial bodies.

⁴⁴ Vietnam Communist Party. Documents of the Xth Party Congress. National Politics Publishing House, Hanoi, 2006. Page 127.

To meet the requirements of a socialist state of the rule of law, the innovation of local governments must follow the most fundamental thinking such as: guaranteeing democracy and sovereignty of the people in the organization and operation of local governments; guaranteeing a transparent legal system and serious enforcement of laws. Most of the requirements for the building of a state of the rule of law are reflected in the innovation of local governments. Fundamental requirements for the innovation of local governments in line with the spirit of building a socialist law governed state can be summarized as: first, the innovation of local governments must guarantee the principle of democracy and people's sovereignty; second, the innovation of local governments must be linked with the development and enforcement of a transparent and progressive legal system relating to local governments.

1.3. Innovating the organization and operation of local governments to meet the need of apparatus streamlining and quality and efficiency insurance

Accountability is closely linked to the requirement of increasing the autonomy and simplicity of administrative apparatus. A bulky apparatus with an ambiguous division cannot be highly accountable.

There remains redundancy in the organization of current local governments: local administrative bodies are still organized following the model of collective leadership in combination with individual leadership (important issues under the responsibility of people's committees must be collectively discussed and voted by majority). This provision leads to difficulties in the division of power of the collective committee and the chair of the committee and thus accountability is hard to be established. Although some specialized laws provide for the division of power in each field, not all issues under the management of the committee have been covered. It is not a coincidence that there remains controversy in some court over whether the defendant in some administrative case is the collective committee or the individual chair of the committee. The Supreme Court many times had to provide guidance relating to this issue.

The pilot program under which the people directly elect the chair of the people's committee of the commune is a step toward increasing the

accountability of the grass-roots government system and is accordance with increasing local autonomy, guaranteeing local direct democracy. For an efficient implementation of this program, synchronous solutions need to be given: when a communal people's committee chair is directly elected, the chair must be given by law the autonomy to decide on the organizational structure of the committee and in his or her managerial work. As such the autonomy and accountability of the communal people's committee chair can be complete.

In the organization of people's committees, redundancy exists in the system of subordinate specialized agencies. Manifestations of the centralized and state subsidized regime of the war time remain in the organization of subordinate specialized agencies: when an agency is established at the central level, the same agencies are established in all local levels. The 2003 Organic Law of people's councils and people's committees has in its some kind of innovation when it gives people's councils of provincial level the power to decide on the organization of its specialized agencies in accordance with local characteristics based on the guidance of the Government. Perhaps to increase the autonomy and to streamline the local apparatus, the complete autonomy in this work should be given to people's councils.

Streamlining the local government apparatus is the policy which has been implemented for the recent years. One of the major job done relating to this policy is the pilot of organization of no people's councils at urban district, district and wards level. The benefits in terms of streamlined apparatus is obvious. However these benefits should be considered in parralel with requirements such as the people's sovereignty, representative democracy in the organization of local governments, etc. – the fundamental principles for the organization of the state apparatus in general and local government in particular.

Streamlining the apparatus of local governments also needs to be linked with the study of how to stipulate the grounds for the organization of local governments according to administrative territories. The fairly strict provisions of the Constitution and laws on all administrive territories may cause difficulty for localities to define their own models which are suitable with the unique characteristics of each locality.

1.4. Innovating the organization and operation of local governments needs to guarantee the smooth state administrative governance

When local governments are autonomous, the principle of unity in the operation of the whole state apparatus must be guaranteed. The fact that unity in the operation of the state apparatus in our country is heightened results from our single apparatus structure. Each locality can be autonomous in their operation, each region can mobilize their own advantages, however in order to create a harmonized and comprehensive development in a national scale, there needs the coordination and linkage among localities – this is the role of the Government.

As such the unity is not contrary to the need to increased autonomy because they both aim at a common goal: local and national socio-economic development. Experience of other countries shows that the difference or gap between different regions without the central coordination will lead to political or social threats. Moreover, in administrative governance, there are issues that cannot be divided following territories but they need a common management such as rail transport, water transport, infrastructure development and management, and environmental protection, etc.

Originating from a centralized administrative system, our current laws provide strictly for the managerial and directive power of the administrative system from central to local levels. For example: the Government ensures the effectiveness of the state apparatus from central to grass-roots levels (article 109 of the 1992 Constitution); people's councils are responsible before state bodies of higher levels (article 119 of the 1992 Constitution); make resolutions based on the constitution, laws and other documents issued by higher state bodies. People's committees are responsible for the enforcement of the constitution, laws and other documents issued by higher state bodies (article 123 of the 1992 Constitution). The chair and other members of the people's committee are elected not only by the people's council of the same level but also approved by administrative body of higher level. Decisions made by local administrative bodies and even representative bodies can still be suspended or repealed by administrative bodies of higher level.

In our opinions, the provisions on the interference in the administrative system from central to grass-roots levels needs to be included in the complete system of legal provisions on local governments : the power of interference and direction should exist only in areas which are not within the local autonomy. Areas which are not delegated to local governments, administrative bodies of higher levels and the Government can direct and supervise. Therefore the power to repeal documents made by people's councils of provincial levels (relating to issues not under the local autonomy) should be given to the Government in stead of the National Assembly Standing Committee. And in all cases, the Government should be given the power to dissolve people's councils of provincial levels when a council causes serious damages to the people's interests. That will ensure a unified management of the administrative apparatus and the spirit of decentralization. However it is necessary to review the position of people's councils: they should not be state power bodies but representative bodies of the local people.

1.5. Innovating the organization and operation of local governments needs to guarantee the accountability of local governments and an increased examination and oversight of the work of local governments

Increasing the self-government and responsibility of localities is not at all different from building and implementing local autonomy – the issue that have not been well governed by our constitution and laws. Increasing local autonomy needs to be attached to defining the position of local governments in their relationship with the central government; delegating power to local governments and developing localities with unique statutes.

The responsibility of localities can only be ensured based on a clear division of functions and tasks between central and local governments and among local governments. The increased responsibility of local government should couple with the decreased interference of the central government in the work of local governments and of governments of higher levels over those of lower ones. Responsibility can only be ensured on the basis of delegation of power. There also need to be mechanisms of close check – through judicial measures (to be mentioned in later parts). Because an administrative control

mechanism can also create interference from bodies of central or higher bodies and thus additional power can be created in addressing administrative issues.

As analyzed above, the administrative oversight by higher administrative bodies and the highest administrative body: the Government should only be done to tasks that are still be “shared” between local governments and those higher administrative bodies. If the oversight or examination (through the suspension or annulations of documents or requirements of reporting, approving or other disciplinary measures, etc.) is done to tasks that have been assigned to local governments, that work will be contrary to decentralization or in other words will invalidate decentralization. Experiences of many other countries show that for areas under the autonomy of local governments, only one form of oversight can exist: judicial oversight. The court will be the most objective, independent and professional body to rule on the legality of the work of local governments on decentralized areas. Even for areas that have not been decentralized to local governments, besides administrative examination and oversight, judicial oversight should exist in parallel or be the last resort to supervise local governments.

2. Solutions for the innovation of local government organization and operation

2.1. On the organization of administrative units

Different from ruling apparatus of an exploiting state, in a socialist state, the work of local governments is not limited to coordinating the implementation of decisions and instructions made by higher state bodies. It includes the implementation of the people’s power and taking care of the local people’s lives. An administrative first and foremost must be a residential place in which local government is first the representative of the local people, is responsible for the organization of the execution of the rights of the local people as provided for by law

In this aspect, administrative units such as communes, communal towns, towns and city all are those which can belong to the same type, in which the governments are the most direct representatives for the interests of the people in the territory. The division into smaller units (levels) (such as cities are divided into

urban districts and wards) not only is not necessary but also creating obstacles to an unified governance.

A provincial administrative unit is a middle level administrative unit maintaining contacts between the central government and residential communities. However in our country a province has the nature of a administrative unit fairly independent in terms of economic or cultural traditions and having unique characteristics and thus being a complete administrative units.

As such, administrative units can be divided into two types: basic administrative units and middle administrative units such as urban, rural districts and wards – a middle administrative level, not an independent socio-economic management level. In this regard, urban districts and wards as complete administrative units in provincial towns or cities should be abolished (if not they should only exist as a middle class, not an independent socio-economic management level). Rural districts should be separated from big cities so that city governments can focus on urban management. In provinces, rural districts as an independent socio-economic management level should be abolished because they aactually have never been a complete administrative territorial units. They should be retained as a middle level. In the future they can be abolished.

The organization of administrative units and local government bodies according to different levels proves to be inefficent as analyzed above. It is necessary to divide administrative units into basic and middle administrative units as in the past and as a common practice of other countries now. A basic administrative unit is based on a natural residential unit in which local government bodies first and foremost is a representative body of the local people, responsible for the organization of the people's power (public power) execution as provided for by law and supervised by other state institutions. According to this standard, communal administrative units (consisting of only one village), communal towns, provincial towns or cities (having purely urban nature) are administrative units of the same type – basic administrative units. They are inseparable administrative units. The division of some of these administrative units (such as centrally governed cities are divided into urban districts, wards; provincial cities or towns are divided into wards and communes) should only be favorable for the execution of power, not a separate administrative unit or a level of local government. Middle

administrative units are administrative units artificially divided by the state according to certain standards, in which government bodies are established to execute central power at localities. Provinces and rural districts and equal administrative units are administrative of this type. Among them, provincial administrative units have some unique characteristics as a fairly independent territorial community (region) with unique economic and cultural interests. For the short term they can be considered basic administrative units. The distinction of two major type of administrative units will help organizing suitable government bodies in such administrative units.

2.2. Organization of local government bodies

Option 1: *Strong innovation of local governments, building urban governments of new model with one representative level and two administrative levels.*

- a) Urban governments of centrally governed cities
 - For centrally governed cities, urban governments consist of the people's council and administrative body of the city. In all administrative units of lower levels, people's councils do not exist. In such places, the administrative unit shall act as the representative body of its direct superior administrative body.
- b) For rural administrative bodies within a city, they are called administrative committees. They represent their direct higher administrative bodies. The chair of the rural administrative body is Chair of the Administrative Committee (district, commune).
- c) Governments of provincial cities
 - For provincial cities and towns, the government consists of people's council and administrative body. There shall be no people's councils at administrative units of lower level. In such places, the administrative unit shall act as the representative body of its direct superior administrative body.
 - Administrative bodies in urban areas are called Administrative Committee. The head of this body is Chair of the Administrative Committee.

Option 2: *Development of local government of three levels as the existing model (similar to the pilot model of no people's councils of urban districts, districts and wards) with new organization, operation and a distinction between rural local government and urban local government*

- a) For urban government of centrally governed cities:
- Governments of centrally governed cities consists of a people elected body (people's council) and an administrative body – administrative committee. The people's council is elected directly by the people. The head of the administrative body is the administrative committee chair elected by the people's council. Election results shall still be approved by superior bodies.
 - For urban districts: no people's council is organized but only administrative body. The head of the administrative body is the administrative committee chair appointed by the centrally governed city administrative committee chair. Deputy chairs of urban district administrative committee are nominated by the chair and appointed by the centrally governed city administrative committee chair. The administrative body of an urban district is the representative body of the city administrative body.
 - For provincial towns: the government consists of a people elected body (people's council) and an administrative body – administrative committee. The people's council is elected directly by the people. The head of the administrative body is the administrative committee chair elected by the people's council. Election results shall still be approved by superior bodies.
 - For urban wards and communal towns: no people's council is organized but only administrative body. The organization and operation of the administrative body of a ward are similar to those of urban district level.
 - For rural local governments under a centrally governed city government (rural districts of centrally governed city; communes of rural districts and communes of urban provincial districts):
 - + For governments of rural districts: no people's council is organized but only administrative body. The head of the administrative body is the administrative committee chair appointed by the centrally governed city administrative committee chair. Deputy chairs of rural district administrative committee are nominated by the chair and appointed by the centrally governed city administrative committee chair. The administrative body of a rural district is the representative body of the city administrative body.
 - + For governments of communes: the government consists of a people elected body (people's council) and an administrative body – administrative committee. The people's council is elected directly by the people. The head of

the administrative body is the administrative committee chair elected by the people's council. Election results shall still be approved by superior bodies.

b) For governments of urban provincial districts:

- For provincial cities and urban provincial towns: the government consists of a people elected body (people's council) and an administrative body – administrative committee. The people's council is elected directly by the people. The head of the administrative body is the administrative committee chair elected by the people's council. Election results shall still be approved by superior bodies. The resolutions of the 4th meeting of the 11th Central Party Committee should be implemented toward the fact that administrative committee chair appoints his or her deputy chairs.

- For wards: no people's council is organized but only administrative body. The head of the administrative body is the administrative committee chair appointed by the provincial city or urban provincial town administrative committee chair. The administrative body of a ward is the representative body of the city administrative body.

- For communes: the government consists of a people elected body (people's council) and an administrative body – administrative committee. The people's council is elected directly by the people. The head of the administrative body is the administrative committee chair elected by the people's council.

3. Recommendations for amending the 1992 Constitution chapter on “the people's councils and people's committees”

3.1. According to option 1

We recommend that there should be the 4 following articles in the chapter on local governments:

1. The first article on administrative units:

Administrative units of the Socialist Republic of Vietnam consist of provinces, centrally governed cities and other administrative units under the provinces and centrally governed cities.

The establishment of administrative units under a province and other administrative units is provided for by law.

This stipulation will create a legal basis for the design of rural local governments, urban local governments and special economic administrative units pursuant to item 9, article 75 of the draft amended Constitution (the National Assembly decides on the establishment or dissolution of special economic administrative units).

2. The second article on local governments:

People's councils are state bodies representing the will and aspirations of local people, elected by the local people, are responsible before the local people and superior state bodies.

The establishment of people's councils and administrative bodies in administrative units is provided for by law.

This article only defines the name and nature of representative bodies, not those of administrative bodies so as to create a legal basis for the definition of name and nature of administrative bodies in specific administrative units.

3. The third article on the decentralization between central government and local governments:

The people's council and administrative body, within their mandates as provided for by law, decides on issues of their localities. Decisions made by local governments shall not be contrary to documents made by superior state bodies.

This article does not define specific issues under the decisions of people's councils and administrative bodies so as to create a flexibility in the stipulation of specific tasks and power of people's councils and administrative bodies in administrative units.

4. The fourth article on the relationship between local governments and the Fatherland Front and other local people's associations:

The people's council and administrative body comprehensively inform the Fatherland Front and people's associations of their work; create conditions for the Fatherland Front and people's associations to supervise and give their social criticism.

Based on this general stipulation, laws will provide specifically for the relationship between the people's council and administrative body at each level of administrative unit with the Fatherland Front and people's associations.

3.2. According to option 2

3.2.1. On the name of the chapter

“Local governments”

3.2.2. On administrative units (Article 118)

Option 1. Remains the same as that of the 1992 Constitution. At the end of the article, the name people's committee is changed to administrative committee.

“Administrative units of the Socialist Republic of Vietnam are divided as follows: the country is divided into provinces and centrally governed cities; Provinces are divided into districts, provincial cities and urban provincial towns; centrally governed cities are divided into urban districts, rural districts and towns; rural districts are divided into communes and communal towns; provincial cities and urban provincial towns are divided into wards and communes; urban districts are divided into wards.

The establishment of people's councils and administrative committees in administrative units is provided for by law”.

Option 2. This article is amended as follows:

“Administrative units of the Socialist Republic of Vietnam consist of provinces, centrally governed cities, communes, wards and communal towns.

Administrative units under provinces and centrally governed cities and the organization of bodies in administrative units are provided for by law”.

In the context that our country is still in the process of developing a suitable model, this option can create a flexibility for the selection of different models in the future.

3.2.3. On the nature of people's councils (article 119)

Option 1. Basically we retain the article. We recommend to exclude the

term “people’s sovereignty” because it is not clear in terms of meaning and to ensure the unity with the term people’s power. Besides, the stipulation that people’s councils represent the will and aspirations of the people fully reflects the power and representative nature of people’s councils.

This article can read as follows: *“People’s councils are local state power bodies, representing the will and aspirations of the people, elected by the local people, and are responsible before the local people and superior state bodies.”*

Option 2. The power nature of people’s councils is not defined because: to be pursuant to the principle that state power is unity and not to create contradictions when the pilot model of no people’s councils at urban district, rural district and ward levels is officially applied across the country.

This article can read as follows: *“People’s councils are state power bodies representing the will and aspirations of the people, elected by the local people, and are responsible before the local people and superior state bodies”.*

3.2.4. On the mandate to issue documents of people’s councils (article 120)

Option 1. Some words are changed in article 120 as follows:

“Pursuant to the Constitution and documents of superior state bodies, people’s councils make resolutions on measures to enforce the Constitution and laws in the localities; socio-economic development and budget; national security and defense in the localities; measures to stabilize and improve people’s living standards; fulfill all the tasks assigned by superior bodies and other tasks for the whole country”.

Option 2. This article is rewritten so as to increase decentralization for people’s councils: *“Pursuant to the Constitution and documents of superior state bodies, people’s councils make resolutions on local issues as assigned and are responsible for their decisions before superior state bodies”*

3.2.5. On the legal status of people’s councils (Article 121)

Some of the terms in this article need to be changed/amended to ensure a consistency with other provisions of the Constitution (articles 8 and 53) and the exact meanings of the words.

*“People’s councils members represent the will and aspirations of the local people; maintain close connections with ~~voters~~ **the people**, are subject to the oversight of ~~voters~~ **the people**, maintain contacts with and reports their work to their voters and their people’s council, respond to questions and requests of voters, monitor and speed up the handling of ~~the people’s~~ **the citizen’s** complaints and denunciations.*

*People’s councils members have the task of persuading the **citizen** to apply the laws and policies of the State, resolutions of their people’s councils, encouraging ~~the people~~ the citizen to take part in state governance work”.*

3.2.6. On the mandates of people’s council members (Article 122)

Some of the terms and phrases of this article need to be amended to affirm the position and role of people’s council members as the representatives of the will and aspirations of the local people.

*“People’s councils members have the right to questions the chair of the people’s council, the chair and other members of the people’s committee, heads of agencies under the people’s committee, the chief judge of the people’s court, the chief prosecutor of the people’s procuracy. The questioned persons must give their answers before the people’s council **at the latter’s sittings. In necessary situations, the people’s council can let the questioned persons to answer in the next sitting or in written form.***

*People’s councils members **have the right to request local state bodies, social organizations, economic organizations to answer questions of their interest.** The head of these bodies and organizations have the responsibility to meet, take into consideration and **address the issues as requested by the members within a law-defined period of time”.***

3.2.7. On the legal status of people’s committee (article 123)

The stipulation on the nature of people’s committee should be amended as follows:

“The administrative committee is the local state administrative body, is responsible for the compliance with the Constitution, laws and documents made by superior state bodies and resolutions of the people’s council of the same level.

The establishment of administrative committees is provided for by law”

3.2.8. On the mandate to issue legal documents of the people’s committee (article 123)

“The administrative committee within its tasks and power as provided for by law, make decisions and monitor the implementation of their decisions.

*The chair of the **administrative** committee lead and manage the work of the committee.*

*When making decisions on important local issues, the **administrative** committee shall collectively discuss and make decisions by majority.*

*The chair of the **administrative** committee has the right to suspend the implementation of or repeal **illegal** documents made by agencies under the people’s committee and people’s committees of lower levels; suspend the implementation of **illegal** resolutions of people’s councils of lower levels and at the same time request the people’s council of the same level to repeal those resolutions.”*

In case when people’s councils of urban districts, rural districts and wards are not organized, the provision should change: “... suspend *the implementation of **illegal** resolutions of people’s councils of lower levels and at the same time request the people’s council of the same level to repeal those resolutions.*” to “*the chair of the administrative committee of intermediate level can suspend the implementation of **illegal** resolutions made by people’s councils of grass-roots level and at the same time request the people’s councils of the province or centrally governed city to repeal those resolutions*”.

3.2.9. On the relationship between the Fatherland Front and the people’s council, people’s committee (article 125)

Article 125 needs to be amended to add and clarify the responsibility of local state bodies before the oversight role and social criticism of the Vietnam Fatherland Front and local people’s associations.

“The President of the local Vietnam Fatherland Front and heads of local people’s associations are invited to sittings of the people’s council and administrative committee of the same level on related issues”.

*The people's council and administrative committee fully inform the Fatherland Front and people's associations of the local situation; **create conditions for the Fatherland Front and people's association to supervise and give their social criticisms;** listen to the opinions and petitions of these organizations on the building of the local government and local socio-economic development; cooperate with the Fatherland Front and people's associations together with the State to fulfill local socio-economic development, national security and defense tasks".*

SECTION 3
RESEARCH REPORT

**“FURTHER IMPROVEMENT OF PROVISIONS OF THE DRAFT
REVISED 1992 CONSTITUTION ON TASKS AND POWERS OF THE
NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE”**

A. INTRODUCTION

The current Constitution of Vietnam (which was issued in 1992 and amended in 2001) is now under revision. Like other countries in the world, revision and amendment of the Constitution is an important task of the Party and the State of Vietnam and is a national legal and political event with great concern from the whole political system and the people.

Therefore, a number of agencies, organizations and individuals have recently conducted researches on issues relating to the revision of the Constitution. All want to make contributions to a better Constitution meeting requirements of the current context.

As a research agency under the Standing Committee of the National Assembly, from 2010 to 2012, the Institute for Legislative Studies (ILS) has been assigned with important tasks in the Constitution revision process, from the course of decision making on constitutional revision, to the review of implementation of the current Constitution, and the subsequent development and finalization of the draft revised Constitution (the Draft). Noticeably, ILS has organized a number of seminars and workshops as well as conducted in-depth research on issues relating to the amendment and supplement of the Constitution within the framework of the Project “Strengthening the legislative research and ICT capacities of the ILS” funded and technically supported by the United Nations Development Programme (UNDP).

Results from the above-mentioned activities have contributed to the ILS’s fulfilment of assigned tasks in order to timely and effectively support activities of the National Assembly (NA), the Standing Committee of the National Assembly (NASC), and the Committee on drafting the revised Constitution as well as to provide comparative experiences, theoretical and practical recommendations on improvement of the Draft to be submitted to the NA.

The Draft was discussed by the NA at its 4th session in November, 2012 and is widely introduced for opinions of the people, agencies and organizations at

all levels before submission to the NA for consideration and official approval for enforcement.

In the coming time, under the Plan on compilation of opinions of the people on the draft revised Constitution, the ILS, in cooperation with relevant agencies, is compiling opinions, advising the NA and the Committee on drafting of the Revised Constitution on acceptance and explanation of opinions of the people, revising and finalizing the draft revised Constitution.

Aiming to further increase the role of ILS in revision and amendment of the Constitution based on previous research results funded by UNDP Project as well as to further improve contents of the draft Constitution, ILS has conducted an in-depth research on the topic of “***Further improvement of provisions of the draft revised 1992 Constitution on tasks and powers of the NA and the NASC***”.

The topic is selected for in-depth research not only because it directly relates to the NA and the NASC (ILS function) – the subject of ILS research and support but also because it is an issue of great concern and controversial debate as showed by initial results of the public referendum on the draft revised Constitution.

The research was conducted by ILS starting from end of 2012 aiming to specify theoretical and practical bases for constitutional provisions on tasks and powers of the NA and the NASC and to make recommendations on improvement of contents of the draft revised Constitution. The research involved a number of international and national leading experts, managers and scientists on organization and operation of the NA institution including Dr. Vu Duc Khien, Dr. Bui Ngoc Thanh, Prof. Dr. Tran Ngoc Duong, Prof. Dr. Nguyen Dinh Huong, Prof. Dr. Nguyen Dang Dung, Associate Prof. Dr. Dang Van Thanh, Dr. Luong Hong Quang (Office of the President), Dr. Tran Kim Chung (Institute for Central Economic Management), Dr. Hoang Thi Ngan (Office of the Government), Dr. Hoang Quynh Chi (SPP), Dr. Vo Tri Hao, etc.

The draft report on research results has been finalized recently. ILS would like to introduce this draft report for opinions in order to improve it before submitting to authorized actors.

The draft report includes two parts. Part 1 points out issues subject to revision and amendment based on comprehensive research on the current situation of tasks and powers of the NA and the NASC under the 1992 Constitution including shortcomings, problems and causes during implementation. Part 2 makes comparison, analysis and assessment on contents subject to revision and amendment of the Draft on relevant issues as well as makes recommendations for further improvement before submission to the NA for approval.

Results of the research on ***“Further improvement of provisions of the Draft Revised 1992 Constitution on tasks and powers of the NA and the NASC”*** are reported in the subsequent parts.

B. RESEARCH RESULTS

CHAPTER 1:

ISSUES IN AMENDMENT AND SUPPLEMENT OF THE 1992 CONSTITUTION ON TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE

I. ROLE AND FUNCTIONS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE: PROVISIONS SUBJECT TO REVISION

1. Role and functions of the National Assembly and its Standing Committee under the 1992 Constitution

a) Role and functions of the National Assembly under the 1992 Constitution

Article 83 of the 1992 Constitution prescribes:

“The National Assembly is the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam.

The National Assembly is the only body vested with constitutional and legislative powers.

The National Assembly decides on fundamental domestic and foreign policies, on national socio-economic, defence and security tasks and on the main principles governing the organisation and functioning of the State apparatus and the social relations and activities of citizens.

The National Assembly exercises the right of supreme oversight of all State activities.”

Though without mentioning directly and officially in the article, it is understood that:

- **The NA’s role in the state apparatus:** the NA a representative body, a legislative agency and the highest state authority;
- **The NA’s functions:** it has three main functions including (i) constitutional and legislative making; (ii) decision making on important issues of the country; (iii) supreme oversight.

b) Role and functions of the Standing Committee of the National Assembly under the 1992 Constitution

Article 90 of the 1992 Constitution reads:

“The Standing Committee of the National Assembly is the permanent body of the National Assembly.

The Standing Committee of the National Assembly consists of:

- The Chair of the National Assembly;*
- The Vice Chairs of the National Assembly;*
- The members.*

The number of members of the Standing Committee is determined by the National Assembly. A member of the Standing Committee can not at the same time be a member of the Government.

The Standing Committee of each legislature of the National Assembly shall discharge its duties and exercise its power until the next legislature of the National Assembly has elected a new Standing Committee.”

It is noticed that **the 1992 Constitution only prescribe the role of the NASC as a permanent body of the NA but does not specify its role and functions.**

2. Concerning issues on role and functions of the National Assembly and its Standing Committee in revision and amendment of the 1992 Constitution

Based on comparative research on viewpoints, theories and experiences on the institution of people-elected body in a rule-of-law state as well as following guidelines and policies of the Party and the State and practical experiences from organization and operation of the Vietnamese NA over the last 65 years, it is pointed out by experts that some issues on role and functions of the NA and its Standing Committee are subject to revision and amendments as follows:

a) Role and functions of the National Assembly

The 1992 Constitution has confirmed the important role and functions of the NA as the highest representative body of the people and the highest state

authority in the Socialist Republic of Vietnam. It further highlights three main functions of the NA including the constitutional and legislative-making powers, making decisions on important issues of the country, exercising supreme oversight of all State activities. It is noticed that the 1992 Constitution has enhanced the role of the NA and made its activities more effective.

Since 1992, the NA has issued, revised and amended the Law on election of the NA members for several times (in 1992, 1997, 2001, 2010) aiming to promote democracy and quality of election of the NA members, improving election procedures with more appropriate proportion and structure, etc.

The Law on Organization of the NA was issued in 1992 and then revised and amended in 2001 and 2007 as legal basis for reform of the NA organizational structure. At the same time, the NA has issued many legal documents relating to working procedures of the NA, its agencies, delegations of NA members, and NA members in order to improve effectiveness and to overcome shortcomings of its working procedures compared to those of the previous NAs.

The NA has constantly improved to fully and effectively fulfill its tasks and powers as regulated in the Constitution, contributing to improvement of democracy and development of a rule-of-law socialist state of the people, by the people and for the people.

However, in addition to advantages, the 1992 Constitution has certain shortcomings and disadvantages which do not meet requirements, guidelines and directions of the Party and the State in the new context. Specifically, provisions of the Constitution do not meet requirements of guidelines and policies of the Party and the State on development of a rule-of-law socialist state of the people, by the people, and for the people in the new context of which two emerging main issues include “the people’s right to mastership” and the principle of “state power control” in addition to other functional issues. Some shortcomings, disadvantages and problems relating to the NA role and functions subject to further improvement in the Constitution are found as follows:

Firstly, no distinction is made in the Constitution between the constitutional power and other functions of the NA in order to confirm the people’s mastership of

the Constitution and to reflect development mechanism of the NA constitutional power.

The current Constitution does not specify the people as masters of powers nor their constitutional power. Even if the people “authorise” the NA as their highest representative body, such authorization should be provided for in the Constitution and it does not mean that they entirely authorize the NA. As masters of powers, the people should have their own powers over the Constitution and the NA when implementing the constitutional power. Therefore, it is necessary to revise and amend this issue.

Secondly, as the current Constitution does not specify that the NA functions are identified within the structure and principles of state power organization, there is no distinction between the NA “functions” and “tasks and powers”.

Although the current Constitution does not directly mention, it might be understood that the NA has three main functions including the constitutional and legislative powers, making decisions on important issues of the country, and supreme oversight. However, it should be noted that **the NA constitutional-making function is not based on its tasks and powers but is considered in relation with state power organization.** In both theory and practice, whether absolute separation of powers is implemented or not, the state powers often include the legislative, executive, and judiciary powers. Consequently, while the NA in many countries not only issues laws but also supervises the implementation of such laws and makes decisions on important national issues, the Constitutions in such countries only prescribe the NA as a legislative body which performs the legislative power as the sole and typical function of the NA in order to distinguish with the executive and judiciary powers. If the NA functions are stated in the Constitution, functions of the Government, the People’s Court, and the People’s Procuracy should be also considered in relation to their tasks and powers. Such logic does not reflect the role and nature of the Constitution.

b) Role and functions of the Standing Committee of the National Assembly

The NASC plays a very special role in the Vietnamese state apparatus. It is the organizational structure and powers of the NASC that makes it special. The

NASC in Vietnam is similar to the Presidium of the Supreme Soviet USSR. There is no similar agency in the state apparatus of many countries in the world.

This institution was first established following the 1959 Constitution, however, under the 1980 Constitution, the NASC was replaced by the State Council – the highest permanent body of the NA and the collective President of the Socialist Republic of Vietnam. Under the 1992 Constitution, the institution went back to the model of the 1959 Constitution of “the Standing Committee of the National Assembly”.

It is believed that the institution is important and in line with the Vietnamese context. During its existence and operation, the NASC has made a lot of contributions to activities of the NA especially in the war time and in between the two NA sessions as it is now.

However, the provisions of the current Constitution on role and functions of the NASC have shortcomings as follows:

Firstly, the 1992 Constitution does not specify role and functions of the NASC. Obviously, in order to identify the role of the NASC, it is important to put the institution in relation with the establishing body and with the whole organization of the NA. Accordingly, the Constitution only stipulates the nature of operation of the NASC as the permanent body of the NA but does not specify the role of the NASC as a body established by the NA to ensure and maintain regular activities of the NA.

Secondly, the current Constitution does not specify functions of the NASC. This manifests uncertainty of legislators in identifying the role of the NASC when dividing the State Council under the 1980 Constitution into two institutions including the NASC and the State President under the 1992 Constitution.

This uncertainty has resulted in controversial discussions on the role of the NASC when some people believe that the NASC is a “small NA”, a “higher level” agency of the Ethnic Council and the NA committees or even higher than the State President, the Government, the Supreme People’s Court (SPC), the Supreme People’s Procuracy (SPP) as these actors have to report to the NASC. Therefore, it is recommended that provisions on role and functions of the NASC be revised and amended.

II. TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE – PROVISIONS SUBJECT TO REVISION AND AMENDMENT

1. Tasks and powers of the National Assembly and its Standing Committee under the 1992 Constitution

a) Tasks and powers of the National Assembly and its Standing Committee under the 1992 Constitution

Under Article 84 of the 1992 Constitution, the NA has 14 tasks and powers as follows:

1- To draw up and amend the Constitution; to make and amend laws; to decide on the Law- and Ordinance-making Program;

2- To exercise the right to supreme oversight over the observance of the Constitution, laws and resolutions of the NA; to examine reports by the President, the NASC, the Government, the SPC and the SPP on their respective activities;

3- To decide on the national socio-economic development plan;

4- To decide on national financial and monetary policies, to decide on estimates of the State budget and allocation of the Central budget, to ratify State budget finalisation reports; to determine, revise and repeal the various kinds of taxes;

5- To decide on State policies on ethnic minorities and on religions;

6- To determine the organisation and activities of the NA; the President, the Government, the People's Court, the People's Inspectorate and local authorities;

7- To elect, suspend and revoke the President, the Vice-President, the Chairman and Vice-Chairmen and the members of the Standing Committee of the NA, the Prime Minister of the Government; the Chief Justice of the SPC, the Chief Prosecutor of the SPP; to ratify the appointment, suspension and revocation of Deputy-Prime Ministers, Ministers and other members of the Government upon the proposal of the Prime Minister; to ratify the list of members of the National Defense and Security Council proposed by the President; and to take a vote of confidence in favor of officials elected or approved by the NA;

8- To decide on the institution and dissolution of the Ministries and other Government bodies at the same level; creation, fusion, division of provinces and cities directly under the central authority and modification of their boundaries, institution and dissolution of special administrative-economic units;

9- To abrogate texts adopted by the President the Standing Committee of the NA, the Government, the Prime Minister of the Government, the SPC and the SPP which are incompatible with the Constitution, the laws and resolutions of the NA;

10- To grant general amnesties;

11- To determine ranks in the armed forces, diplomatic service and other State ranks; to determine medals, decorations and honorific State titles;

12- To decide on matters of war and peace, to determine the state of emergency and other special measures aimed at ensuring national defense and security;

13- To decide on fundamental foreign policies, to ratify or nullify international treaties signed directly by the President; to ratify or nullify the signature of or accession to international treaties upon the proposal of the President;

14- To decide on the holding of referendums.

Under Article 91 of the current Constitution, the NASC has 11 tasks and powers as follows:

1- To make public and preside over the election of representatives to the NA;

2- To organize the preparation, convening and chairmanship of the sessions of the NA;

3- To interpret the Constitution, laws and ordinances;

4- To issue decrees on issues assigned by the NA;

5- To supervise the implementation of the Constitution, laws and resolutions of the NA, ordinances and resolutions of the NASC; to supervise activities of the Government, the SPC, SPP; to suspend the implementation of

documents adopted by the Government, the Prime Minister, the SPC, the SPP which are incompatible with the Constitution, laws and resolutions of the NA and submit for the decision of the NA the abrogation of those documents; to abrogate documents adopted by the Government, the Prime Minister, the SPC, SPP, which are incompatible with ordinances and resolutions of the NASC;

6- To supervise and guide activities of the People's Councils; to repeal improper resolutions of the People's Councils of provinces and cities under the central authority; to dissolve the People's Councils of provinces and cities under the central authority if they cause serious damage to the interests of the people;

7- To direct, harmonize and coordinate activities of the Ethnic Council and Committees of the NA; to guide and ensure necessary operational conditions for the deputies to the NA;

8- To decide on proclamation of the state of war in case of aggression when the NA cannot assemble and to report the proclamation to the NA for consideration and determination at its earliest session;

9- To decide in a general or partial mobilization; to proclaim a national or local state of emergency;

10- To conduct the external relations of the NA;

11- To hold a referendum as decided by the NA.

b) Overview on achievements

In general, the tasks and powers of the NA and the NASC have been regulated quite comprehensively and specifically. Review on implementation of the 1992 Constitution shows a number of achievements as follows⁴⁵:

- ***In terms of the constitutional and legislative powers:*** by issuing the 1992 Constitution and the Resolution No. 51/2001/QH10 dated 25 December, 2001 on revision and supplement of a number of articles of the 1992 Constitution, the NA has timely institutionalized key guidelines of the Communist Party at its VIth and IXth Congress, forming legal basis for further reform of the state apparatus, reform of the political system; improvement of effectiveness and efficiency of state

⁴⁵ See Report on implementation of the 1992 Constitution of the NASC, the National Assembly

management; promotion of democracy; development of a rule-of-law socialist state of the people, by the people and for the people; development of an independent and self-managing socialist-oriented market economy based on promotion of internal resources and active international economic integration; industrialization and modernization of the country.

The NA legislation has created legal framework for the country's comprehensive renovation and international integration focusing on development of a socialist-oriented market economy; development of a rule-of-law socialist state of the people, by the people and for the people; maintenance of political stability; development of the economy; international integration; promotion of human rights and citizens' freedom; making contributions to development of a modernized and industrialized country in 2020. Currently, the NA legislation has basically met requirements of the renovation, development and protection of the country.

In terms of quantity, over the last 4 tenurs, the National Assembly has issued 219 laws and codes, 56 resolutions containing legal normative provisions (36 laws and codes were issued by the IXth National Assembly, 32 laws and codes and 29 resolutions by the Xth NA, 84 laws and codes and 12 resolutions by the XIth NA, 67 laws and 12 resolutions by the XIIth NA).

In terms of quality, laws are issued in increasingly good quality, ensuring the constitutionality, legality, unity and consistency of the legal system as well as reflecting fully and precisely the current situation of social economic development of the country. More and more legal documents avail themselves for immediate enforcement without waiting for guiding documents, timely meeting requirements on social economic management and monitoring.

In terms of substance, issues governed by laws are more and more expanded to cover almost all areas of the society ranging from process and procedures in issuance of legal normative documents to social economic areas, culture, science, technology, environment, national defense, security, external affairs, state apparatus organization, administrative area, civil area, criminal area, judicial area, etc. The NA has regulated the organization and operation of the NA, the President, the Government, the SPC, the SPP and local authorities; ranks in the armed forces, diplomatic service and other State ranks; medals, honours and

honorary titles. Noticeably, the NA has spent a lot of time and efforts on revision, amendment or new issuance of economic laws such as enterprises, investment, banking, credit, commerce, real estate, taxation reform, etc. in order to meet requirements of the country's development, realisation of international commitments, promotion of economic integration especially in the context of Vietnam joining the World Trade Organization. The NA has spent a lot of time, expertise and efforts in development and issuance of legal documents governing complicated and sensitive economic relations such as management and use of state property; management of public debts; property acquisition and requisition; agricultural land use tax; natural resources tax; personal income tax. At the same time, the NA has timely revised and amended provisions of laws which are no longer in line with the current context such as in banking, credit, taxation, infrastructure construction investment, prevention of corruption, nationality, road traffic, publication, intellectual property, international treaties, etc. in order to meet requirements of economic development and integration,, security, social order and safety.

In terms of legislative procedures and techniques: issuance of the Law on revision and amendment of a number of articles of the 2002 Law on Promulgation of legal normative documents and the Law on Promulgation of legal normative documents in 2008 has contributed to significant changes in legislation. Legislative procedures are reformed in order to improve quality, democracy, and specification of legal documents. Under the 2008 Law on Promulgation of legal normative documents, some legislative procedures are reformed to be more logical, democratic, and precise. Timeframe for the NA's approval of the annual law and ordinance-making programme has been changed from the session at the end of the year to the session early in the year, creating conditions for drafting agencies to take initiative in preparation and development of the documents. Revision and amendment of the law and ordinance-making programme is more flexible as the NASC is entitled to consider and revise the Programme to report to the NA at the earliest session. In addition, provision on gender mainstreaming in legislative procedures is considered an advanced step and in line with the world tendency. The changes are suitable with practical situation, meeting requirements on management of the society by laws. Assignment of the NASC as the leading agency in receiving

and finalizing draft documents before submitting to the NA for approval has created conditions for the NA agencies to take initiative in development of legal documents, improvement of quality, and speeding up the development of bills.

In terms of legislative techniques, the NA has applied the form of issuance of a law to revise and amend contents of some laws in order to timely meet practical requirements, save time, simplify procedures while ensuring quality of bills.

For the last few years, some NA committees have taken initiative in proposing and drafting bills to submit to the NA for approval (the Committee on Science, Technology and Environment has drafted the Law on electronic transaction; the Committee on Social Affairs has drafted the Law on Gender Equality and the Law on Prevention of Domestic Violence). This is a positive sign in improvement of legislative capacity of the NA.

Drafting and appraising bills are actively implemented with clear division of labour between leading agencies and cooperating agencies. There is a close cooperation among relevant agencies and organizations in preparation of bills. The NA agencies take initiative in conducting research, carrying out surveys, collecting opinions of subjects directly affected by legal documents and opinions of experts, scientists, voters, etc. Consequently, appraisal reports are being more improved, showing strong opinions, reflecting higher criticism, having scientific and practical bases. The NASC has carefully guided the editing and finalization of draft documents before submission to the NA for approval.

The NA Delegations have organized various forms of discussion and compilation of opinions of relevant local agencies, organizations, individuals on bills. NA members are highly responsible for their works, taking initiative in conducting research, contributing opinions to improve quality of issued documents.

Compilation of opinions of the people, departments and sectors at all levels is paid attention and gradually reformed in various types including promotion and use of information technology and mass media. Compilation of opinions on bills focuses on different subjects especially those directly affected by the legal documents to be issued. Publication of draft legal documents on mass media especially on electronic information gateways has created conditions for the

people, agencies, organizations, and enterprises to timely understand tentative changes in policies and laws to have opinions and prepare conditions for subsequent implementation. Compilation of opinions on bills is more and more effective, showing democracy and carefulness in legislation, mobilizing the people's expertise and consensus, ensuring transparency and openness even in policy planning.

Consideration and approval of bills are sped up, contributing to improvement of quality of bills.

Achievements reflect efforts, marking development of the NA, the Government, NA agencies and relevant agencies in legislation, speeding up the improvement of the legal system in the country.

- In terms of oversight:

In addition to legislation, the NA has paid attention to its function of oversight mentioned in the 1992 Constitution. Accordingly, the NA oversight function is reformed with increasingly improved quality, effectiveness and efficiency. Noticeably, the Law on the oversight of the NA was issued in 2003, creating important legal basis for the NA and its agencies to actively and orderly implement its active function of oversight according to plans and programmes which results in considerable achievements and changes.

Oversight focuses on urgent issues and covers almost areas of the society, such as economy, state budget, culture, education, science and technology, national defense, security, external affairs, activities of judicial agencies, etc.

Oversight method of the NA is renovated with a focus on improvement of supreme oversight, consideration of the Government's reports in combination with field trips, regular oversight in combination with topical oversight.

Oversight is more in line with requirements of the current situation thanks to the NA's approval of the resolution on the annual oversight programme focusing on urgent issues of the society. The NASC has issued a master plan and strictly guided the implementation of the NA's annual oversight programmes. The NA's Ethnic Council and committees have taken initiative in implementation of assigned oversight within their tasks and powers to prepare reports to the NASC and the NA.

The NA's delegations and members have actively developed their oversight plans following the master plan of the NA as well as implemented such plans within their tasks and powers as provided by laws.

Oversight at the NA's sessions is reformed with a focus on diversifying areas of oversight and democratic discussion. Time for consideration of reports is more and more appropriate. In addition to consideration of reports of agencies, organizations, individuals as required, the NA has focused on supreme supervision at its sessions on topics relating to urgent issues of the society, pointing out achievements, discussing shortcomings and disadvantages as well as causes and solutions to problems. The NA has issued the Resolution specifying requirements and tasks for the Government and relevant agencies to focus on.

Interpellation (Q&A) is regularly and strictly organized, showing high responsibility before the people, focusing on most urgent social-economic issues that reflect the people's aspirations, clarifying the current situation and causes, pointing out responsibilities and solutions to problems. Methodology in organization and chairing of interpellation is also reformed, focusing on groups of issues, requesting the Prime Minister or Deputy Prime Ministers to directly answer questions of the NA members, reducing time for presentation, increasing time for dialogue between interpellants and persons being questioned to create an open and straight-forward atmosphere, improving quality of questions and answers, overcoming shortcomings, improving quality and effectiveness of the state apparatus. Interpellations at NA's sessions are live broadcast on radio and television and are welcome by the people. After interpellation, relevant individuals and agencies have seriously worked on issues raised by the NA's members. Compilation of questions, follow up with promises made at interpellation time, announcements of relevant issues after interpellation are regularly made. At some sessions, based on the real situation, the NA has issued resolutions on interpellation, requesting the persons subject to such questioning time to have specific measures for relevant issues and later report to the NA at its subsequent session. Also, hearings at the Ethnic Council and the NA's committees have gained initial achievements.

Oversight of legal normative documents is an important issue. In the XIth term, the NA has supervised *the issuance of legal normative documents of the*

Government, the Prime Minister, ministries, ministerial-level agencies, SPP, SPC and has issued a resolution on this issue. Based on its supervision, the NA has requested the Government, the SPC, the SPP to timely remove inappropriate documents; timely issuing documents guiding the implementation of laws, ordinances, and resolutions to meet practical requirements; regulating the issuance of legal normative documents in accordance with provisions of the laws.

More attention is paid to people's aspiration support, meeting people and dealing with petitions. Many delegations of the NA have directly visited localities to speed up and supervise settlement of cases by relevant state agencies. The NA has issued a resolution on settlement of complaints and denunciations in state administration. The NA, its agencies, delegations of the NA members have taken initiative in meeting people, overseeing the settlement of complaints and denunciations. Thousands of petitions, complaints and denunciations are settled by the NA agencies under their powers while a number of issues are completely resolved by relevant agencies.

The NA has reviewed the NASC report on oversight of settlement of voters' petitions nationwide. This activity has enormous effect on aspiration and sentiment of the people, strengthening their confidence in the Party and the State, encouraging the people to further involve in state management activities. This is also a basis for NA members to continue to raise questions to clarify responsibilities of Ministers, Head of Departments especially in realization of issues promised before the NA and voters.

Oversight activities of the NA agencies are actively implemented with a lot of positive changes. The NASC, the Ethnic Council, the NA committees have comprehensively performed oversight on areas under their powers. Contents and forms of supervision are reformed while regular oversight is combined with topical oversight. Quality and effectiveness of appraisal of annual reports, oversight of legal normative documents, oversight of settlement of complaints and denunciations, topical oversight, etc. are also improved. Assessments and comments in oversight reports have closely and objectively reflected the current situation, pointing out achievements as well as shortcomings in mechanism, policies and laws, weaknesses in management. As recommendations in oversight reports are specific, feasible and agreeable by the majority of members, they

actively contribute to the effectiveness of supreme oversight of the NA at its sessions as well as improvement of policies and laws under responsibilities of the Council and the NA committees.

Delegations of the NA members have spent a lot of efforts on local oversight. Following such oversight, a number of recommendations are taken by relevant ministries, departments and agencies at central and local levels. Delegations of the NA members have also cooperated well in topical oversight according to the oversight programme of the NA, the NASC, the Ethnic Council, the NA committees. Many NA members have actively involved in oversight activities of the NA agencies and delegations of the NA members and voter meetings to better implement the right to interpellation and supreme oversight at the NA sessions.

- In terms of making decisions on important issues of the country:

The NA has focused and taken initiative in making decisions on important issues of the country. Consideration and making decisions on important issues of the country are implemented on the basis of democratic and open discussion especially on social-economic development plans, state budget, national projects and works, high-ranking personnel of the State.

Effectiveness and efficiency of decisions are paid attention for the national benefits in line with policies and guidelines of the Party and the people's aspirations. This is not only reflected on decision-making but also on oversight of implementation of the NA resolutions in order to ensure strict implementation of the NA decisions.

Legal framework is improved such as revision of the Law on state budget in 2002, issuance of the 2005 Law on state audit, Resolution No. 66/2006/QH11 on national projects and works to be submitted to the NA for approval on investment guidelines, etc., as important "tools" for effective performance of the NA tasks and powers on making decisions on important issues of the country.

Procedures on consideration and making decisions on important issues of the country are improved with a focus on specific measures combined with performance of oversight function especially procedures on approval of social-economic issues and state budget in order to develop resolutions in line with

practical demands. Information (such as information on candidates, audit reports of state budget) is better provided to the NA members.

The NA has decided on 5-year and annual social-economic development plans as bases for performance of social-economic tasks of the country. Given the complex and unpredictable changes of the international context which has adverse effects on the national social-economic development, the NA has taken high responsibility and spent a lot of efforts and expertise to listen to voters' aspirations, frankly and openly discussed to find appropriate solutions to problems, contributing to changes, ensuring stability and development.

Quality of the NA decisions on financial and state budget issues such as state budget estimate, central allocation of state budget to ministries and departments, approval of state budget balance statements is improved with a focus on stabilization of macro economy; increase of economic growth; promotion of economic restructuring; settlement of social security issues; poverty reduction; national defense, security, external affairs; maintenance of macroeconomic balances; healthy state budget balancing, manageable government and national debts; debts payment as committed; clear division of labour to create substantive and active changes in management of state budget as well as to ensure material conditions to timely deal with arising issues; promotion of administrative reforms especially in management of state budget.

Over the last few years, the NA has successfully implemented its tasks and powers relating to election of key personnel of state agencies and approval of appointment of members of the Government; suspension and removal of some positions elected or approved by the NA; procedures of removal of NA membership of some NA members.

The NA has made decisions on the organizational structure of the Government; merging of some ministries; establishment of new provinces, merging and dividing several provinces and cities directly under the central management; adjustment of administrative boundaries of Hanoi city and some provinces and cities directly under the central management; issuance of the resolution on pilot project on non-establishment of the People's Council at district and commune levels.

Consequently, the NA has approved investment guidelines on national important projects and works such as 5 million hectare reforestation Project, Ca Mau gas-power-fertilizer Project, Dung Quat No.1 Oil Refinery Project, Son La Hydroelectricity Plant Project, Ho Chi Minh Road Master Plan, Lai Chau Hydroelectricity Project, Ninh Thuan Nuclear Power Electricity Project, etc. With high responsibility and based on reports and submissions from the Government, the NA has carefully and thoroughly discussed and decided not to approve the investment on Hanoi-Hochiminh city high-speed railway project but to assign the Government to review and finalize the master plan of transportation from the North to the South to submit to the NA for consideration and approval at appropriate time.

In order to meet practical requirements on improving powers and responsibilities of the NA in particular and state management agencies in general in making decisions on investment guidelines and in effective management and use of big-size investment projects and works in Vietnam and to abroad, the NA approved the Resolution No. 66/2006/QH11 dated 29/6/2006 on national important projects and works to be submitted to the NA for investment guidelines and the Resolution was amended and revised in 2009.

The NA has made decisions on issues relating to national defense and security, issuing the Resolution on approval of the Treaty on land border between the Socialist Republic of Vietnam and the People's Republic of China (in June, 2000); the Resolution on approval of the Agreement on bilateral trade relation between the Socialist Republic of Vietnam and the United States of America (in November, 2001); the Agreement between the Socialist Republic of Vietnam and the People's Republic of China on delimitation of sea territory, the exclusive economic zone, and the continental shelf of the two countries in the Gulf of Tonkin in 2004; the Treaty between the Socialist Republic of Vietnam and the Kingdom of Cambodia supplementing the 1985 Border Treaty; approving the Protocol on Vietnam joining the World Trade Organization (WTO).

Basically, it is noticed that performance of tasks and powers of the NA in making decisions on important issues of the country has resulted in certain achievements, creating conditions for social-economic management, maintaining political stability, improving international integration.

However, besides the above-mentioned achievements, provisions of the 1992 Constitution on tasks and powers of the NA, the NASC also manifest certain shortcomings subject to revision and amendment as follows:

2. Concerning issues on tasks and powers of the National Assembly and its Standing Committee in revision and amendment of the 1992 Constitution

a) Issues in the relation between the National Assembly and its Standing Committee and in relation with other agencies of the National Assembly

In general, tasks and powers of the NASC are divided into two groups. Group 1 includes tasks and powers “authorized” by the NA, i.e. tasks and powers of the NA by nature. Group 2 consists of “specific” tasks and powers of the NASC as a permanent agency of the NA. It is noticed from the implementation of the 1992 Constitution that there are a lot of challenges in performance of these two groups.

- Authorized tasks and powers of the NASC:

Firstly, it is inappropriate and infeasible that the 1992 Constitution gives the NASC the right to constitutional interpretation. This provision does not clarify the NA responsibilities towards the people nor ensures the supremacy of the Constitution. Obviously, Vietnamese people have authorized the NA (a collective of nearly 500 members) the legislative power to implement the “constitution making” and to some extent, constitutional interpretation might be understood as constitution making; however, the NA is in turn authorized this right to its sub-agency (consisting of about 17 members). This does not show the NA’s responsibility towards the people. Moreover, as the NASC is only allowed to issue ordinances and resolutions, it is unclear that under which form and which procedures the NASC interprets the Constitution and what validity of such document is. Meanwhile, the validity of both ordinances and resolutions is lower than the Constitution, laws, resolutions of the NA. It is due to these shortcomings that the NASC has so far never interpreted the Constitution.

Secondly, it is unreasonable to give the NASC the power of constitutional interpretation. As the power of issuance of legal documents is considered the unique power of the NA, development and approval of bills reflect the consensus of the NA members as a whole. Therefore, if the NASC is given the power of

constitutional interpretation, it seems that the NASC “acts for” the NA and thus becomes a small NA. This is obviously irrational.

Thirdly, unclear scope of authorization by the NA to the NASC in issuance of ordinances and resolutions resulted in the fact that the NASC “acts for” the NA. It is noticed that quite a number of issues, which should have been considered and decided by the NA, are decided by the NASC especially in issuance of new guidelines and policies or financial issues and budgeting such as:

- Resolution on civil housing transaction before 1st July, 1991 (Resolution No. 58/NQ-UBTVQH10 dated 20 August, 1998);

- Resolution on compensation to people wrongfully punished by authorised personnel in criminal proceedings (Resolution No. 388/2003/NQ-UBTVQH dated 17 March, 2003);

- Resolution on settlement of a number of specific cases on land and housing during implementation of land and housing management policies and socialist reform policies before 1st July, 1991 (Resolution No. 755/2005/NQ-UBTVQH11 dated 2 April, 2005).

Fourthly, it is ineffective and inappropriate that the NA authorizes a lot of powers to the NASC relating to oversight function as specified at Section 5, Section 6 of Article 91 of the Constitution.

In fact, only professional agencies of the NA have the right capacity and enough resources (committees with members who are experts in specific areas and their support staff) to assist the NA to implement these tasks. As the NASC is not a professional agency of the NA and its members as heads of the Ethnic Council and the Committees do not have same qualification and are not supported by staff, effectiveness of its oversight is not very high.

- Specific tasks and powers of the NASC:

Specific tasks and powers of the NASC under the 1992 Constitution are divided into three groups including (i) preparation for internal organizational structure, personnel of the NA such as election of the NA members; structure of the Ethnic Council and Committees or development of a proposal on improvement and reform, etc.; (ii) preparation for works of the NA “leadership” such convening,

chairing, mediating sessions or external affairs, etc.; (iii) creating links and cooperation among the NA members, between the NA and its agencies.

In brief, as basic role and functions of the NASC are not specified, the Constitution only regulates few “specific” tasks and powers. It is noticed that the tasks and powers authorized by the NA to the NASC are much more and “stronger” than the specified ones. This is not in line with guidelines, directions and practice of organization and operation of the NA in the recent terms. Some issues are noted from practical implementation of the 1992 Constitution as follows:

Firstly, the fact that the NASC (an NA agency consisting of NA members who are high ranking leaders of NA agencies) is given the power of pronouncement and chairing the election of the NA members does not reflect independence and objectiveness of such election. Although in terms of procedures, election of the NA members is considered an “internal” issue of the legislative agencies, this, by nature, is a way for the people to directly enjoy the right to mastership. Consequently, in many countries in the world, the power relating to election of the NA members is given to an independent agency or an institution whose members come from different classes in order to ensure the people’s right to mastership. Moreover, the number of re-elected NA members is increasing (167 members were re-elected at the XIIIth term, making up 33.40% of the total members with an increase of 5.81% compared to the XIIth term). In theory, it would be more independent and objective if candidates have no role in election.

Secondly, the current Constitution does not distinguish nor specifies the scope of tasks and powers of the NASC and the NA leadership.

Article 92 of the 1992 Constitution provides “The Chairman of the National Assembly shall *preside over its sessions... organise the carrying out of its external relations; maintain relationship with its members*”. Meanwhile, Article 93 states that the NASC *shall preside over the NA sessions, carry out external affairs of the NA; direct, coordinate, cooperate activities of the Ethnic Council and the NA committees; guide and ensure conditions for activities of the NA members*. However, as the NA Chairman is also the head of the NASC, it is difficult to distinguish his capacity when implementing these tasks. Moreover, it might be inferred from the current provisions that the NA Chairman is only given the tasks

and powers during the NA sessions and has no power beyond the NA sessions except the power of “signing for approval of laws and resolutions of the NA”. If this is the case, the role of the NA Chairman is not really highlighted. Comparative experiences show that the NA Chairman plays a very important role.

Thirdly, provisions of the 1992 Constitution on tasks and powers of the NASC are not reasonable as relative “independence” and role of professional agencies are not specified.

Section 7, Article 93 of the 1992 Constitution states that the NASC “shall **direct**, coordinate, cooperate activities of the Ethnic Council and the NA committees; guide and ensure conditions for activities of the NA members”. It seems that due to influence of the model of “collective leadership” of the State Council under the 1980 Constitution and the principle of collective leadership, the role of the NASC as provided in the 1992 Constitution and in practice sometimes “stand outs” from professional agencies of the NA. One typical example is the consideration and giving opinions on bills before submission to the NA for approval. There were cases where the NASC “directs, provides guidelines” on technical issues of review reports of committees. This is not in line with guidelines of the NA nor the tendency in the world which promotes activities of professional/technical committees.

It is noticed that in the internal relations of legislation, the NASC exists as “a bridge of cooperation and consensus” between the NA, professional agencies, and the NA members but not a “high ranking leadership of the NA” to give “prior decision” or professional “screening” given the fact that the NA does not meet regularly.

Fourthly, the current Constitution lacks of provisions on tasks and powers of the NASC over other institutions outside legislative system. Obviously, under the parliamentary system, the NA plays a “key” role not only in internal relations but more importantly in relations with other institutions in the state apparatus as well (such as with the President, the Government, the Prime Minister, the NA agencies, etc.). However, the current Constitution “leaves this NASC’s task open”.

b) In relation with the State President

It is agreed by the expert team that provisions on tasks and powers of the NA and the NASC in relation with the State President do not specify the role of the State President in the state apparatus in general and in relation with the NA and the NASC in particular.

Firstly, relating to legislative power, it is necessary to prescribe the NA responsibility in “review of approved laws and resolutions at the earliest session” upon request of the State President if any violation to the Constitution is found or such laws and resolutions might affect the national defense and security. In case the NA decides to continue to approve such laws and resolutions without considering the request of the State President, the Constitutional Council will consider the request before pronouncement of such laws and resolutions;

Secondly, relating to the NA power to make decisions on important issues of the country, the role of the State President as the Head of the State and link between powers of the NA and the State President are not specified. For example, in terms of personnel, there is no difference in election, suspension and removal of the State President compared to other high ranking titles of the Government while the role of the State President over judicial agencies especially judges and the National Defense and Security Council.

Noticeably, there is no regulation that some decisions within the powers of the NA relating to the state of war and peace, emergency and other special measures for national defense and security, general or partial mobilization, referendum, amnesty, etc could only be official upon the pronouncement of the President. As a matter of fact, these powers are implemented on behalf of the State or representing the voice of the whole nation. Although the NA is a representative body and a state authority, the State President is the most appropriate actor to act on behalf of the State and the whole community representing the State and the whole nation in calling or pronouncing the official viewpoint of the State and the country to the people and the world.

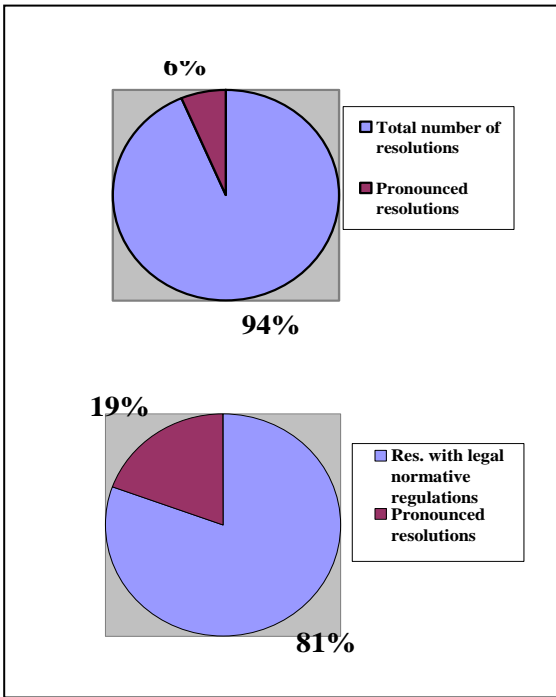
Thirdly, relating to supreme oversight of the NA, the Constitution does not specify methodology, scope and time of reporting. For example, whether it is in the form of irregular or periodical reporting, annual or half-term or whole-term

reporting or whether the scope of reporting includes all activities or only issues of concern by the NA, and so on.

Fourthly, in relation with the NASC, the Constitution only generally stipulates that “*the State President is entitled to participate in meetings of the NASC*” but does not specify which meeting the State President participates and what role of the State President in such meeting.

Fifthly, the current Constitution and provisions of the laws do not distinguish between the power of “pronouncement” of the State President and the power of “ratification” of the NA chairman. In practice, there are only few documents of the NA and the NASC signed for pronouncement.

From the X th to the XIII th term (August, 2012)	Total
<i>Total number of NA resolutions</i>	223
<i>Resolutions inclusive of legal normative regulations</i>	62
<i>Pronounced resolutions</i>	15
<i>Resolutions not being pronounced</i>	208



There are only few resolutions of the NA pronounced by the State President as only 19% of resolutions inclusive of legal normative regulations are pronounced. This manifests a lot of shortcomings in pronouncement. Main reasons for these shortcomings include (i) there is no consistent legal framework. The Constitution (Article 103) only states the power of the State President in pronouncement of the Constitution and laws but not in pronouncement of resolutions of the NA. Meanwhile, Article 57 of the 2008 Law on promulgation of legal normative documents confirms that resolutions of the NA (as legal normative documents) are pronounced by the State President; (ii) there is no distinction between resolutions inclusive and exclusive of legal normative provisions nor there is no provision on which resolution inclusive of legal normative provisions is subject to pronouncement.

c) In relation with the Executive agencies

Firstly, it is inaccurate that the 1992 Constitution prescribes the NA as the sole agency having constitutional and legislative powers as it does not highlight the importance of the Government, the Prime Minister, ministries and agencies in submission of bills and resolutions (accounting for nearly 92%) as well as issuance of legal documents.

Secondly, the 1992 Constitution does not specify the scope of powers of the NA and the Government in making decision on social-economic development plans and state budget. This not only affects validity and effectiveness of resolutions of the NA on social-economic development plans (reflected in low percentage of resolutions approved by the NA and number of revisions) but also affects activeness of management of the Government;

d) In relation with judicial agencies

Basically, due to the nature of “independence” of judicial agencies and the fact that the current Constitution does not have specific provisions on organization and operation of judicial agencies, there are not so many shortcomings in relation between judicial agencies and the NA, the NASC. However, experts says that the current Constitution has not specify the “controlling” role of the NA over judicial agencies, since the NA is the highest state authority in Vietnam.

CHAPTER 2

FURTHER IMPROVEMENT OF PROVISIONS OF THE DRAFT REVISED 1992 CONSTITUTION ON TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE

I. ROLE AND FUNCTIONS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE

1. Proposed changes on role and functions of the National Assembly and its Standing Committee under the draft revised Constitution compared to those under the 1992 Constitution

a) Role and functions of the National Assembly under the draft revised Constitution

Current Constitution	Draft revised Constitution
<p>Article 83</p> <p>The National Assembly is the highest representative organ of the people and the highest organ of State power of the Socialist Republic of Vietnam.</p> <p>The National Assembly is the only organ with constitutional and legislative powers.</p> <p>The National Assembly shall decide the fundamental domestic and foreign affairs policies, the socio-economic tasks, the country's national-defense and security issues, the essential principles governing the organization and activity of the State apparatus, the social relations and activities of citizens.</p> <p>The National Assembly shall exercise supreme oversight over all activities of the State.</p>	<p>Article 74</p> <p>The National Assembly is the highest representative organ of the people and the highest organ of State power of the Socialist Republic of Vietnam.</p> <p>The National Assembly shall exercise constitutional and legislative powers, make decisions on important issues of the country, exercise supreme oversight control over activities of the State.</p>

Differences between the 1992 Constitution and the Draft are as follows:

(i) Roles: The Draft reserves provisions on the NA role similar to those in the 1992 Constitution;

(ii) Functions: There are two changes on the NA's function.

Firstly, legislative techniques are changed to prescribe more precisely, comprehensively and appropriately 3 functions of the NA. Accordingly, the function of *“making decisions on fundamental policies on domestic and foreign affairs, social-economic tasks, national defense and security, basic principles on organization and operation of the state apparatus, social relation and activities of citizens”* is changed into *“making decisions on important issues of the country”*. This change makes it more inclusive, precise and easy to remember and suitable with the practice of using this phrase. In addition, relating to the supreme oversight, the word *“all”* is removed (but still ensuring the comprehension) as it is dispensable and might cause misunderstanding that there might be specific or partial oversight as well.

Secondly, the Draft does not state that the National Assembly is the only agency having the constitutional and legislative powers but only prescribes that the National Assembly exercises the constitutional and legislative powers. Consequently, the Draft has removed the word *“only”* and add *“power”* after *“legislative”*.

This is not only a change of wording but a substantive change on the NA functions. It is agreed by the research team that changes in the Draft are necessary and accurate. Such changes not only reflect certain separation between the legislative power and the constitutional power but also constitutionalize the role and tasks of other actors such as the Constitution Drafting Committee, the NASC, the Government, in implementation of the NA constitutional and legislative powers.

However, there are other arguments that the Draft (i) does not specify the NA as an actor implementing the legislative power in relation with the people; (ii) does not reflect the *“seperation”* of powers in order to confirm that the legislative power of the NA is placed among state powers, i.e. legislative, executive and judiciary powers; there is no distinction between *“function”* and *“power”*.

- Firstly, the Draft does not specify the difference in origin, subject, and mechanism to perform the constitutional power of the NA compared to the legislative power nor clearly prescribes the viewpoint on “the right to mastership of the people”.

In both theory and practice in many jurisdictions, these two terms are different in origin and nature while the constitutional power in a democratic society belongs to nobody else but the people. Direct or indirect performance of the constitutional power by the people does not change its origin and nature nor deprives their status as the master of the society and the State. Moreover, recent documents of the Party especially the document of the XIth Congress all mention two new and important issues including promotion of the right to mastership of the people and division, cooperation and control of power.

Therefore, there are two options in finalization of this provision in the draft revised constitution. In the first option, the constitutional power of the people is increased by the provision on minimum percentage of voters having the right to request for constitutional changes and the right to approval of the Constitution by the people. However, in the current Vietnamese context (especially given the low legal awareness of the people and the fact that the constitutional power has been exercised by the NA for over the last 65 years), this option is not really feasible and appropriate. In the second option, while the constitutional power is still exercised by the NA, provisions on actors and mechanism for the NA to exercise this power should be clarified. Like many countries in the world, the fact that the NA of Vietnam is authorized by the people to exercise the constitutional power is totally in line with the ideology of the people’s mastership. The difference here is that the people enjoy their right through indirect democratic way. However, it is important to finalize the Draft with a focus on:

- (i) confirming the constitutional power of the people;
- (ii) confirming the mechanism of approval of the Constitutional by the people to authorize the NA to exercise the constitutional power on their behalf;
- (iii) the constitutional power and the legislative power are separated.

- Secondly, the Draft does not clearly specify the legislative power as the basic and typical power of the NA in order to distinguish and separate

functions among state agencies in the state power structure. Three branches of power in the state power structure include the legislative, the executive, and the judiciary. Although Vietnam, like some other countries, does not follow the absolute model of separation of powers, it does not mean that any of the branches does not exist or other branches are added. The underlying difference among countries is the way of organizing powers, i.e. identifying actors, comprehension, and relation among these three branches. Accordingly, it is important that the Constitution specifies which power, among the three powers, is given to a certain actor and function of such actor. The NA as an agency exercising the legislative power has the typical legislative function while other actors enjoy the executive and judiciary powers. Subsequently, the fact that the Draft prescribes the NA as an agency exercising the legislative power does not affect the status of the NA as the highest state authority as to some extent, such provision even highlights the principle of “division of labour and cooperation”.

In addition, it is thought that the Draft should not separate the NA powers into three main powers including the legislative power, making decisions on important issues of the country, and supreme oversight over activities of the State. Some people believe that provisions of the Draft aim to constitutionalize the three main powers of the NA which have been popular and stable in practice. However, it is argued by others that the Draft should only regulate two powers of the NA including the constitutional power (as a specific power in the Vietnamese context) and the legislative power as follows:

(i) The NA powers are constitutionalized in the relation with other actors exercising the executive and judiciary powers in order to separate the powers. If the power of making decisions on important issues of the country is given to the NA, does it mean that the Government, the Prime Minister, ministries and departments including judicial agencies have no power to make decisions on important issues of the country? It is absolutely not. Similarly, if the NA is given the power of supreme oversight over activities of the State, how the term of supreme oversight is interpreted and whether “non-supreme” oversight exists or not and if yes, which actor is responsible for exercising such power, etc. It might be useful to refer to the Constitution of China – a neighbouring country having a lot of similarities to Vietnam on this model.

“Article 58. Actors exercising the legislative power of the State:

The National People’s Congress and the Standing Committee of the National People’s Congress shall exercise the legislative power.”

(ii) Comprehension of the legislative power is often interpreted in a broad sense. By nature, making decisions on important issues and supreme supervision also belong to the legislative power. The NA of most countries in the world often exercises these two powers whether the Constitution prescribes such powers or not.

(iii) The fact that the Draft separates the NA powers into three functions does not increase its role as the highest state authority nor clarifies the typical function of the NA which might result in confusion between the term of “function” and “tasks and powers”. Comprehension of the legislative power is often specified in provisions on tasks and powers of the NA in any constitution. If Vietnamese constitution makers want to clarify these 3 functions, it is thought that the Draft should provide for this issue in provisions on tasks and powers of the NA.

b) Role and functions of the Standing Committee of the National Assembly under the draft revised Constitution

Current Constitution	Draft revised Constitution
<p>Article 90</p> <p>The Standing Committee of the National Assembly is its permanent Committee.</p> <p>It is composed of:</p> <ul style="list-style-type: none">- the Chairman of the National Assembly;- the Vice-Chairmen of the National Assembly;- the members. <p>The membership of the Standing Committee shall be determined by the National Assembly. A member of the</p>	<p>Article 78</p> <p>1. The Standing Committee of the National Assembly is its permanent Committee.</p> <p>2. The Standing Committee of the National Assembly consists of the Chairman of the National Assembly, Vice Chairmen of the National Assembly and members.</p> <p>3. The membership of the Standing Committee shall be determined by the National Assembly. A member of the Standing Committee of the National Assembly cannot be at the</p>

Current Constitution	Draft revised Constitution
<p>Standing Committee of the National Assembly cannot be at the same time a member of the Government.</p> <p>The Standing Committee of each legislature shall fulfill its tasks and exercise its powers until the election by the new legislature of a new Standing Committee.</p>	<p>same time a member of the Government.</p> <p>4. The Standing Committee of each legislature shall fulfill its tasks and exercise its powers until the election by the new legislature of a new Standing Committee.</p>

Some issues are noticed from the above table as follows:

Firstly, there is no substance change in the Draft compared to the 1992 Constitution;

Secondly, there are only changes in terms of legislative skills according to which the substance is divided into 4 sections. Consequently, the Draft continues to confirm the existence of the NASC and its role as a permanent body established by the NA.

2. Recommendations on further improvement of role and functions of the National Assembly and its Standing Committee under the draft revised Constitution

a) Role and functions of the National Assembly

Based on the above-mentioned comparison, assessment and analysis, it is recommended that provisions on the role and functions of the NA be changed in the Draft as follows:

“Article 74:

The National Assembly is the highest representative body of the people authorized by the people to exercise the constitutional power (or exercising the constitutional power on behalf of the people).

The National Assembly is the highest state authority of the Socialist Republic of Vietnam; the agency exercising the legislative power.”

Or “*The National Assembly is the highest representative body of the people, the highest state authority of the Socialist Republic of Vietnam.*”

The National Assembly is authorized to exercise the constitutional power by the people and is the agency exercising the legislative power.”

b) Role and functions of the Standing Committee of National Assembly

Over the last 65 years of the NA history, existence of the NASC has been essential given the lack of a professional NA operating on a regular basis. However, some issues are found during the NA practical operation especially during the reform of its working procedures including (i) in some cases, the NA power is combined with the NASC power making it difficult to determine which power is a specific power of the NASC and which power is authorized by the NA⁴⁶; (ii) the role and the nature of operation of the NASC in relation with other agencies such as the Ethnic Council, committees of the NA, the Government, the State President, etc., are not clearly and properly provided for⁴⁷. The main reason for this situation is that the Constitution does not specify the function and the legal status of the NASC. Therefore, it is necessary to revise and amend some relevant provisions of the 1992 Constitution. There are three schools of thought on this issue.

- **According to the first school of thought**, as the NA is a people-elected body working collectively and making decisions by majority vote of equal members, there is no decentralization. Therefore, following the tendency in many countries in the world and in line with recent guidelines on renovation, there is no agency with a lot of privileges like the NASC. The NA leadership is responsible for ensuring the continuing and regular activities of the NA as well as the harmonization and cooperation among NA members and agencies. If necessary, permanent or provisional committees are established to implement relevant tasks

⁴⁶ For example, hearing at the NASC sessions, interpretation of the Constitution, laws or issuance of some resolution – in practice, it is very difficult to decide when a resolution of the NA or a resolution of the NASC is issued, etc.

⁴⁷ For example, the right to suspension of implementation of legal normative documents issued by the Government, the Prime Minister, the SPC, the SPP which are contrary to the Constitution, laws, resolutions of the NA; the power to have opinions on bills before submission to the NA for approval, etc.

such as the Committee on NA member issues (responsible for personnel and communication with NA members), the Committee on Agenda, the Committee on Rules or the Committee on the NA affairs, etc.

Recommendations on revision and amendment of the draft revised Constitution: in terms of its role, the NASC has similar role of the Ethnic Council and the NA committees. In terms of its functions, the NASC is responsible for harmonization and cooperation to maintain continuing and regular legislative activities.

- **On the contrary, according to the second school of thought**, due to a lot of challenges in practice (weak legal system, challenges in oversight and making decisions on state budget, etc.) and given the fact that the NA does not work regularly and continuously while qualification of NA members is limited and travelling is difficult in a stretching country, etc., ; it is not only important to have a permanent agency but the role of such agency should be promoted. In addition to supporting the NA in “**administrative**” works to maintain continuous and regular legislative activities as well as to ensure the harmonization and cooperation between constituting agencies, the NASC acts as a focal point in performing two other important tasks including “**personnel**” and “**professional works**”. According to this school of thought, existence and acknowledgement of the “outstanding” role of the NASC are in line with the tendency in other countries in the world. For example, in China, the Standing Committee of the NA is not only responsible for performance of “administrative” tasks but is also considered an actor exercising the legislative power together with the NA (Article 58). In other countries, although there is no statutory provision, organizations are established in practice consisting of high ranking leadership of the Parliament and leaders of various parties to “direct” the legislative activities in terms of personnel and professional activities such as in Poland, the United States, etc. In the Vietnamese context where the Vietnamese Communist Party is the only leading party as provided for in the Constitution, it is totally appropriate that the NASC is given certain “privileges”. Therefore, it is thought that the Draft should inherit and

consider the provision of the 1980 Constitution on the role of the State Council in order to provide for the role of “the NASC as the highest and permanent agency of the NA”. Accordingly, the role of the NASC is clarified while the individual role of the NA leadership (the NA leadership is at the same time the NASC leadership).

Recommendations on revision and amendment of the draft revised Constitution: in terms of its role, the NASC is the highest and permanent agency of the NA. In terms of its functions, the NASC exercises the legislative function under its power; directs, leads and harmonizes legislative activities.

- **The third school of thought** harmonizes the two first schools of thought as it is believed that in the context of development of a professional NA working on a regular basis, it is important to have the NASC but “privileges” of this agency are reduced especially the direction and leading of professional works and issuance of legal normative documents. Obviously, as the number of full-time NA members is increasing in recent terms while their qualification is also improved and given the development of science and technology making it possible for online irregular meetings and sessions of the NA and online voting, the NA is entirely exercising more tasks and powers “by itself” and thus reducing the power of the NASC.

Recommendations on revision and amendment of the draft revised Constitution: in terms of its role, the NASC is a permanent agency of the NA. In terms of its functions, the NASC assists the NA in personnel, harmonization, cooperation in order to maintain regular and continuing legislative activities as well as to exercise the legislative function as authorized by the NA (subject to reports to the NA for consideration and decision at the earliest session).

II. TASKS AND POWERS OF THE NATIONAL ASSEMBLY AND ITS STANDING COMMITTEE

1. Proposed changes on tasks and powers of the National Assembly and its Standing Committee under the draft revised Constitution compared to those under the 1992 Constitution

a) Tasks and powers of the National Assembly under the draft revised Constitution

Current Constitution	Draft revised Constitution
<p>Article 84</p> <p>The National Assembly has the following obligations and powers:</p> <p>1- To make and amend the Constitution; to make and amend laws; to work out a programme for making laws and ordinances;</p> <p>2- To exercise supreme control over conformity to the Constitution, the law and the resolutions of the National Assembly, to examine the reports of the State President, the Standing Committee of the National Assembly, the Government, the Supreme People's Court, the Supreme People's Procuracy for Oversight and Control;</p> <p>3- To decide the country's plan for socio-economic development;</p> <p>4- To decide the national financial and monetary policies; to decide the draft State budget and budgetary appropriations; to approve the accounts</p>	<p>Article 75</p> <p>The National Assembly has the following obligations and powers:</p> <p>1. To make and amend the Constitution; to make and amend laws;</p> <p>2. To exercise supreme control over conformity to the Constitution, the law and the resolutions of the National Assembly; to examine the reports of the State President, the Standing Committee of the National Assembly, the Government, the Supreme People's Court, the Supreme People's Procuracy, the Constitutional Council, the National Election Council, the State Audit, and other agencies established by the National Assembly;</p> <p>3. To decide objectives, targets, policies, and main tasks in social-economic development of the country;</p> <p>4. To decide the national financial and</p>

Current Constitution	Draft revised Constitution
<p>of the State budget; to establish, change, or abolish taxes;</p> <p>5- To decide the nationalities policy of the State;</p> <p>6- To regulate the organization and activity of the National Assembly, the State President, the Government, the People's Courts, the People's Procuracies and the local administrations;</p> <p>7- To elect, release from duty, remove from office the State President and Vice-President, the Chairman of the National Assembly, the Vice-Chairmen and members of the Standing Committee of the National Assembly, the Prime Minister, the Chief Justice of the Supreme People's Court, the Head of the Supreme People's Procuracy; to sanction the proposals of the State President on the establishment of the Council of National Defense and security; to sanction the proposals of the Prime Minister on the appointment, release from duty and removal from office of Deputy Prime Ministers, Cabinet Ministers and other members of the Government;</p> <p>8- To set up or suppress government ministries and government organs of ministerial rank; to establish, merge,</p>	<p>monetary policies; to establish, change, or abolish taxes; to decide the principle of allocation of incomes and expenses between the State budget and local budget; to decide safe limit of national debt, public debt, governmental debt; to decide the draft State budget and budgetary appropriations; to approve state budget balance; to review of estimate report and state budget balance;</p> <p>5. To decide the nationalities policy, the religious policy of the State;</p> <p>6. To regulate the organization and activity of the National Assembly, the State President, the Government, the People's Courts, the People's Procuracies, the Constitutional Council, the National Election Council, the State Audit, local authorities and other agencies established by the National Assembly;</p> <p>7. To elect, release from duty, remove from office the State President and Vice-President, the Chairman of the National Assembly, the Vice-Chairmen and members of the Standing Committee of the National Assembly, Chairman of the Ethnic Council, Chairmen of the NA committees, Prime Minister, the Chief Justice of the Supreme People's Court,</p>

Current Constitution	Draft revised Constitution
<p>divide, or adjust the boundaries of provinces and cities under direct central management; to set up or disband special administrative-economic units;</p> <p>9- To abrogate all formal written documents issued by the State President, the Standing Committee of the national Assembly, the Government, the Prime Minister, the Supreme People's Court, and the Supreme People's Procuracy, that run counter to the Constitution, the law, and resolutions taken by the National Assembly;</p> <p>10- To proclaim an amnesty;</p> <p>11- To institute titles and ranks on the people's armed forces, in the diplomatic service and other State titles and ranks; to institute medals, badges and State honors and distinctions;</p> <p>12- To decide issues of war and peace; to proclaim a state of emergency and other special measures aimed at ensuring national defense and security;</p> <p>13- To decide fundamental policies in external relations; to ratify or annul international agreements that have been signed or participated in on the proposal of the State President;</p> <p>14- To hold a referendum.</p>	<p>the Head of the Supreme People's Procuracy, Chair of the Constitutional Council, Chair of the National Election Council, Auditor General, heads of other agencies established by the NA; to approve the appointment, release from duty, removal from office of the Deputy Prime Minister, ministers and other members of the Government, judges of the Supreme People's Court; to approve the membership list of the Council on national defense and security, the Constitutional Council, the National Election Council;</p> <p>8. To get confidence, to vote for confidence against people holding positions elected or approved by the National Assembly;</p> <p>9. To set up or suppress government ministries and government organs of ministerial rank; to establish, merge, divide, or adjust the boundaries of provinces and cities under direct central management; to set up or disband special administrative-economic units; to set up or disband other agencies according to provisions of the Constitution and the laws;</p> <p>10. To abrogate all formal written documents issued by the State President,</p>

Current Constitution	Draft revised Constitution
	<p>the Standing Committee of the national Assembly, the Government, the Prime Minister, the Supreme People's Court, and the Supreme People's Procuracy, that run counter to the Constitution, the law, and resolutions taken by the National Assembly;</p> <p>11. To proclaim an amnesty;</p> <p>12. To institute titles and ranks on the people's armed forces, in the diplomatic service and other State titles and ranks; to institute medals, badges and State honours and distinctions;</p> <p>13. To decide issues of war and peace; to proclaim a state of emergency and other special measures aimed at ensuring national defense and security;</p> <p>14. To decide fundamental policies in external relations; to ratify or annul international agreements on war and peace, issue relating to the national sovereignty, basic rights and obligations of citizens, membership of Vietnam at international, regional, commercial organizations;</p> <p>15. To hold a referendum.</p>

Compared to the 1992 Constitution, the Draft has changes as follows:

- In terms of structure, the Draft has re-structured the ordering of sections according to groups of issues corresponding to the main function of the NA as well as has revised some terms to make them more appropriate and accurate;

- In terms of substance, the Draft has following changes:

Firstly, some tasks and powers of the NA are clearer, more fessible and appropriate. For example, while the current Constitution confirms that the NA has the power “*to decide the country's plan for socio-economic development*” (Section 3 of Article 83), the Draft prescribes the NA “*to decide objectives, targets, policies, and main tasks in social-economic development of the country*” (Section 3 of Article 75). Such changes aim to clarify clearly the power of the NA and the power of the Government. Accordingly, the NA focuses on discussion and making decisions on macro issues but not decisions at micro level. Consquently, value of resolutions of the NA is increased while the Government is given the power to take initiative in maangement of the country’s economy. Another example is removal of the provision on “*the National Assembly... decides the law-and-ordinance making programme*” (section1 of Article 84 of the 1992 Constitution) in the draft revised constitution.

Secondly, provisions on the power to elect, release from duty, remove from office of high ranking personnel Chairman of the Ethnic Council, Chairmen of the NA committees, members of the National Election Council, T Auditor General and judges of the SPC (section 7 of the 1992 Constitution is also Section 7 of Article 75 of the draft revised constitution). Such revisions are in line with establishment of independent constitutional agencies, the principle of power control, recent judicial reform with a focus on improvement of the role of judges, ensuring that judges are independent and only act in accordance with provisions of the laws.

Thirdly, the NA power to exercise supreme oversight over activities of the State is supplemented to expand actors subject to the NA oversight such as the Constitutional Council, the State Audit, the National Election Council and other agencies established by the National Assembly (section 2 of Article 75). The power “*to vote for confidence against people holing positions elected or approved by the*

National Assembly” (section 8 of Article 75) is supplemented. Such supplementation aims to create conditions for implementation of “*vote for confidence*” which is not specified by the current Constitution.

Fourthly, the NA power to provide for organization, operation, and personnel of the Constitutional Council, the National Election Council, the State Audit, and other agencies established by the State is supplemented.

Fifthly, international treaties under the NA power of approval or removal are specified. The Draft prescribes the NA power “*to ratify or annul international agreements on war and peace, issue relating to the national sovereignty, basic rights and obligations of citizens, membership of Vietnam at international, regional, commercial organizations*” (Section 14 of Article 75). The current Constitution prescribes the NA power “*to ratify or annul international agreements that have been signed or participated in on the proposal of the State President*” (Section 13 of Article 84). Compared to the 1992 Constitution, the Draft specifies clearly which international agreements are under the NA approval or removal relating to war and peace, national sovereignty, rights and obligations of citizens, membership of Vietnam at international, regional, commercial organizations while it is required that any arising important financial obligation of the State be approved by the NA.

Sixthly, the NA power over the state budget is specified. The power “*to decide the principle of allocation of incomes and expenses between the State budget and local budget; to decide safe limit of national debt, public debt, governmental debt*” (Section 4 of Article 75) is supplemented in the draft revised constitution. Accordingly, the NA power over state budget is increased.

b) Tasks and powers of the Standing Committee of the National Assembly under the draft revised Constitution

Current Constitution	Draft revised Constitution
<p>Article 91</p> <p>The Standing Committee of the National Assembly shall have tasks and powers as follows:</p> <ol style="list-style-type: none"> 1- To call and preside over the election of the National Assembly; 2- To prepare for, to convene, and preside over the sessions of the National Assembly; 3- To interpret the Constitution, the laws, and ordinances; 4- To enact ordinances on matters entrusted to it by the National Assembly; 5- To exercise oversight and control over the implementation of the Constitution, the laws, the resolutions of the National Assembly, ordinances, resolutions of the Standing Committee of the National Assembly; over the activities of the Government, the Supreme People's Court, the Supreme People's Procuracy; to suspend the execution of the normative legal documents of the Government, the Prime Minister, the Supreme People's Court, the Supreme People's Procuracy, 	<p>Article 80</p> <p>The Standing Committee of the National Assembly shall have tasks and powers as follows:</p> <ol style="list-style-type: none"> 1. To prepare for, to convene, and preside over the sessions of the National Assembly; 2. To issue ordinances on issues assigned by the National Assembly; to interpret the Constitution, the laws, and ordinances; 3. To exercise oversight and control over the implementation of the Constitution, the laws, the resolutions of the National Assembly, ordinances, resolutions of the Standing Committee of the National Assembly; over the activities of the Government, the Supreme People's Court, the Supreme People's Procuracy, State Audit; 4. to suspend the execution of the normative legal documents of the Government, the Prime Minister, the Supreme People's Court, the Supreme People's Procuracy, that are contrary the Constitution, the laws, the resolutions of

Current Constitution	Draft revised Constitution
<p>that are contrary the Constitution, the laws, the resolutions of the National Assembly; to report the matter to the National Assembly for it to decide the abrogation of such documents; to abrogate the normative legal documents of the Government, Prime Minister, the Supreme People's Court, the Supreme People's Procuracy that are contrary to the ordinances and resolutions of the Standing Committee of the National Assembly;</p> <p>6- To exercise oversight and control over, and to give guidance to the activities of the People's Councils; to annul wrong resolutions by the People's Councils of provinces and cities under direct central rule; to disband People's Councils of provinces and cities under direct central rule whenever such Councils cause serious harm to the interests of the people;</p> <p>7- To direct, harmonize, and co-ordinate the activities of the Nationalities Council and the Committees of the National Assembly, to give guidance to, and to ensure good working conditions for, members of the National Assembly;</p> <p>8- In the intervals between sessions of the National Assembly, to proclaim</p>	<p>the National Assembly and to report the matter to the National Assembly for it to decide the abrogation of such documents at its earliest session; to abrogate the normative legal documents of the Government, Prime Minister, the Supreme People's Court, the Supreme People's Procuracy that are contrary to the ordinances and resolutions of the Standing Committee of the National Assembly;</p> <p>5. To exercise oversight and control over, and to give guidance to the activities of the People's Councils; to annul wrong resolutions by the People's Councils of provinces and cities under direct central rule; to disband People's Councils of provinces and cities under direct central rule whenever such Councils cause serious harm to the interests of the people;</p> <p>6. To direct activities of the Ethnic Council and committees of the National Assembly; to ensure good working conditions for members of the National Assembly;</p> <p>7. In the intervals between sessions of the National Assembly, to proclaim the state of war in case of foreign aggression and report the matter to the</p>

Current Constitution	Draft revised Constitution
<p>the state of war in case of foreign aggression and report the matter to the National Assembly for its approval at its nearest session;</p> <p>9- To proclaim general or partial mobilization; to proclaim a state of emergency throughout the country or in a particular region;</p> <p>10- To carry out the National Assembly's external relations;</p> <p>11- To organize a referendum following decision by the National Assembly.</p>	<p>National Assembly for its approval at its nearest session;</p> <p>8. To proclaim general or partial mobilization; to proclaim a state of emergency throughout the country or in a particular region;</p> <p>9. To establish, merge, divide, or adjust the boundaries of administrative units lower than provinces and cities under direct central management;</p> <p>10. To carry out the National Assembly's external relations;</p> <p>11. To organize a referendum following decision by the National Assembly.</p>

By comparison, it is noticed that the Draft has been revised and amended as follows:

- In terms of structure: some provisions of the Draft are re-ordered and rephased such as (1) section 3 is merged with section 4; (2) section 5 of the 1992 Constitution is divided into section 3 and section 4; (3) wording of section 6 of the 1992 Constitution is re-ordered, etc.

- In terms of substance, the Draft has some changes as follows:

Firstly, actors subject to oversight of the NASC are inclusive of the State Audit. Such change is in line with the establishment of the State Audit;

Secondly, the power *to pronounce, to take the leading role in election of the NA members* is transferred to the National Election Council. Such change is in line with the constitutional provision on establishment of the National Election Council

– an independent agency responsible for some tasks relating to organization of election including election of the NA members.

Thirdly, the power of the NASC to adjust the boundaries of administrative units lower than the provincial level is supplemented.

Under the 1992 Constitution, this power belongs to the Government. By nature, such change aims to confirm and improve the NA role. As a representative body of the people, the NA should make decisions on important issues especially issues on the territory – a integral part of the concept of “nation”. As explained by the Committee on drafting of the revised constitution, since the NA does not work on a regular basis, this power is assigned to the NASC as its permanent agency;

Fourthly, some powers on personnel, oversight over newly established independent constitutional institutions are supplemented.

2. Recommendations on further improvement of tasks and powers of the National Assembly and its Standing Committee under the draft revised Constitution

Based on analysis on issues subject to revision and amendment of the 1992 Constitution in part 1 and comparison between some contents of the 1992 Constitution which are revised and amended in the Draft, the expert team would like to have following recommendations to further finalize the Draft as follows:

a) In relation between the National Assembly and its Standing Committee themselves and with other agencies of the National Assembly

Compared to the current Constitution, changes in the Draft focus on improvement of the role and power of the NASC, for example, the power “*to direct activities of the Ethnic Council and committees of the National Assembly*” and “*to establish, merge, divide, or adjust the boundaries of administrative units lower than provinces and cities under direct central management*”(Section 6 and Section 8 of Article 80 of the Draft). However, some people think that such changes are not in line with guidelines of the Party and the NA on reform of organization and operation of the NA recently as well as do not overcome shortcomings and challenges arising from practical operation of recent terms.

In terms of recommendations, it is highly agreed by the expert team that while maintenance of this institution is important, it is necessary to reform the tasks and powers of the NA and the NASC according to the third school of thought mentioned above, i.e. the tasks and powers of the NASC are divided into two groups.

(i) The first group includes tasks and powers of the NASC as “authorized” by the NA. This group relates to performance of all three functions of the NA. Tasks and powers of the NASC under this group arise in relation with other state institutions such as the State President, the Government, etc. Therefore, to avoid overlapping, the expert team is going to make recommendations on revision and amendment of tasks and powers of the NASC in relation with other institutions in this group.

(ii) The second group includes “independent” tasks and powers of the NASC due to its specific role as a permanent agency of the NA. This group aims to ensure and maintain regular activities of the NA.

Subsequently, it is necessary to revise and amend provisions of the Draft relating to tasks and powers of these two agencies as follows:

- With respect to legislative tasks and powers of the NASC as authorized by the NA:

Firstly, relating the power of constitutional interpretation, the power should not be given to the NASC. It is thought by some people that constitutional interpretation belongs to the legislative power. Meanwhile, as the NA does not work on the regular basis, it authorizes the NASC to perform the constitutional power. Nevertheless, whether the power belongs to the legislative power or the judiciary power, from different perspectives, it is not very logical that the power of constitutional interpretation is given to the NASC and thus in practice, it has been never implemented. Consequently, it is recommended that **the power of constitutional interpretation is given to a constitutional protection agency if necessary or it is not necessary to provide for this power.** Arguably, this power is provided for in the constitution of many countries as a power of the court or a constitutional protection agency due to (i) the principle of the people’s mastership and separation of powers with a balance and control of each other of state agencies.

Accordingly, the Constitution is made by a Constitutional NA or a constitutional conference; the legislative branch is responsible for issuance of laws to specify the Constitution and supervise the implementation of such laws; the executive branch is responsible for implementation of the Constitution and laws; the judiciary branch is responsible for trial; and constitutional interpretation is implemented by independent or judicial agencies to avoid the abuse of power of the legislative branch; (ii) use of precedents. In these countries, constitutional interpretation of judges is considered a legal source and thus is used in application of laws; (iii) strict procedures of revision of the Constitution. As such, constitutional interpretation is easier to clarify a certain provision; (iv) the mechanism of direct application of the Constitution results in the needs of constitutional interpretation. It is noticed that these four elements are not clearly found in Vietnam. Therefore, if it is deemed to clarify any provision of the Constitution, the NA might do it through its power of revision and amendment of the Constitution.

Secondly, relating to the power of legal interpretation, it is important to specify the mechanism of authorization of the NA legislative power to the NASC through the right to legal interpretation. In the long term, this power should be removed after the NA works on a regular basis or a mechanism of online vote is developed. The NA then interprets or revises laws. In the short term, it is possible that the power of legal interpretation is given to the NASC subject to certain conditions such as (i) specific provisions on actors having power to request for legal interpretation and concrete procedures; (ii) legal interpretation is only done in between intervals of the NA sessions; (iii) legal interpretation should ensure the legislative idea of the NA at the time of issuance of the law based on archives; (iv) report is made to the NA at its earliest session.

Thirdly, relating to the power of issuance of legal documents, it is recommended that the NA should not authorize the NASC in issuance of ordinances (i.e., the power of issuance of ordinances is removed) or if the power is kept, the power should also include “issuance of resolutions of the NASC”. At the same time, normative mechanism and scope of the NA authorization should be specified especially the power to issue resolutions of the NASC. This aims to minimize the fact that the NASC might “act for” the NA especially in issuance of new guidelines or policies or financial or budgetary issues (such separation of

power will be mentioned in details in recommendations on revision and amendment of tasks and powers of the NA in relation with the Government, the Prime Minister in the following part);

Fourthly, relating to the power of deciding the boundaries of administrative units lower than the provincial level, the Draft gives this power to the NASC with a view that “administrative boundary” relates to “national territory” – one of important elements of the definition of a nation and thus is put under the NA function of making decisions on important issues of the country. However, as the NA does not work on a regular basis, the power is “authorized” to its “permanent” agency.

However, it is recommended by some experts that this provision be revised and amended to give the power to the Government (like in the 1992 Constitution) of the NA. Arguably, (i) if this is considered a national important issue, such issue should be decided by the NA but not through authorization. In fact, this issue is not really urgent and unforeseeable to be solved by a permanent agency; (ii) if decision on the boundaries at the provincial level is made by the NA while decision on the boundaries lower than the provincial level is made by the NASC, this, by nature, is a decentralization between a higher and a lower level – a distinctive principle of the executive power but not of the legislative power; (iii) it is also infeasible to give the power to the NASC as only the Government – an agency responsible for state management according to the administrative and territorial boundaries, is capable to perform it; (iv) as it is hard to know that whether shortcomings would be overcome if the power is given to the NASC, the best way is that the NA specifies criteria and conditions for the Government to perform this power in the Law on Organization of the Government and the Law on Organization of People’s Councils, People’s Committees.

Fifthly, relating to the power of deciding high ranking personnel, it is thought that “*Vice chairmen and members of the Ethnic Council*” should be voted or approved by the NA or elected by members of the Council, the NA committees at the first meeting of the new term of the Council, the NA committees but not by the NASC. Arguably, these agencies are under the NA, their personnel should be decided by the NA or by their members. This is totally in line with the principle that members of the Council, the committees are responsible before the NA and

before their Council, committees. It might be inferred from the Draft that the NASC is the “higher level” agency of the Council and the committees. This not only directly affects the leading role of Chairs of these agencies but also affects the objectiveness, honesty, and the principle of democracy of the NA as individuals holding the positions are obviously dependent on the will of the NASC – the agency which decides their political positions especially in the context that the NASC is given the power “*to lead activities of the Ethnic Council and committees of the National Assembly*” in the Draft.

Sixthly, relating to supreme oversight, it is necessary to limit the scope of authorization of the oversight power by the NA to the NASC as mentioned in Section 3, Section 4, and Section 5 of Article 80 of the Draft.

(1) The power “*to exercise oversight and control over the implementation of the Constitution, the laws, the resolutions of the National Assembly, ordinances, resolutions of the Standing Committee of the National Assembly; over the activities of the Government, the Supreme People's Court, the Supreme People's Procuracy, State Audit*” (Section 3) should be removed. That is because only professional agencies under the NA have the status and capacity to assist the NA to perform these tasks (members of committees include experts in specific areas supported by staff). The NASC is not a professional agency of the NA while members of the NASC are heads of the Council and the committees and thus do not have same professional background nor are supported by staff. Therefore, in practice, the NASC has performed certain supervision but for form sake only. In fact, the Council and the committees are the ones taking initiative in oversight and then reporting to the NASC for approval and stamping.

(2) The power “*...to abrogate the normative legal documents of the Government, Prime Minister, the Supreme People's Court, the Supreme People's Procuracy that are contrary to the ordinances and resolutions of the Standing Committee of the National Assembly*” should be change to the power to suspense such documents and to request the NA to make decision in line with the NASC role. The Draft and the current Constitution provide for this issue with a view that a “higher level” agency has the right to annul documents issued by the lower level agency if such documents are contrary to those of the higher level agency. Consequently, the NASC is given the power similar to the power of the NA and the

Government to abrogate documents issued by lower level agencies. However, it should be noted that the NASC is not and can not be “the higher level” agency of the Government, the Prime Minister, the SPC, the SPP. At the same time, by nature, issues provided for in the ordinances and resolutions of the NASC are under the NA power; however, in order to deal with “urgent situation”, the NA authorizes the NASC to issue such ordinances and resolutions. Moreover, the NASC has no time nor resources to perform this power.

(3) The power “*to exercise oversight and control over, and to give guidance to the activities of the People's Councils; to annul wrong resolutions by the People's Councils of provinces and cities under direct central rule; to disband People's Councils of provinces and cities under direct central rule whenever such Councils cause serious harm to the interests of the people*” should be removed. It is noted that the Draft and the 1992 Constitution are based on the principle that “the NA is the highest representative body of the people”. Accordingly, the People’s Councils are considered “lower level” representative agencies and thus are subject to directions of the higher level agencies. It is thought that this viewpoint is inaccurate as (i) the relation between lower and higher level agencies are administrative (executive) relation but not a principle of organization and operation of a people-elected institution; (ii) it is only possible to mention that the NA members represent for voters nationwide while members of the People’s Councils represent for local voters but it is impossible to confirm that the NA is the higher level agency of the provincial People’s Councils and the provincial People’s Councils are the higher level agencies of the district People’s Councils. As a result, it might be inferred that the legislative agencies are also organized according to the administrative levels similarly to the executive agencies and this is not in line with the principle of representation, collective working and making decisions on majority vote.

(4) It is important to consider the provision of “hearing” at the NASC sessions as, in the opinion of the expert team, the NASC is not a professional agency of the NA or “a small size NA”, it does not have this power while members of the NASC are not assisted by supporting staff or do not have expertise in specific areas. At the same time, hearing is a power implemented by individual NA member (collectively constituting the NA institution) against positions decided by

the NA, it should be done at the NA sessions. Moreover, the underlying purpose of hearing is not directly solving issues subject to such hearing but it is considered a supervision tool for the NA or more precisely, all NA members, to understand and assess the capacity and responsibility of positions elected by themselves in order to decide solutions to problems at the post oversight period. However, it is thought that hearings at the NASC do not meet this purpose.

Moreover, it is not very specific and logical when the Draft prescribes “the person subject to the hearing have to answer questions before the NA and the NASC or send the answer in writing” as the provision does not answer the questions as follows (i) does the person subject to the hearing have the right to choose to answer directly or send the answers in writing? If no, in which case the person has to answer directly and in which case the person is allowed to send answers in writing? (ii) Does the person subject to the hearing have to answer before either the NA or the NASC or both? In which case the person has the hearing before the NASC and if so, whether the approval of the NA is required or not?

- With respect to constitutional tasks and powers of the NASC in order to maintain regular activities of the NA given the NA does not work on a regular basis (i.e., these tasks and powers do not derive from the NA tasks and powers).

The role of the NASC in maintaining regular activities of the NA is reflected in three types of tasks and powers in the Draft as follows:

- To prepare for, to convene, and preside over the sessions of the National Assembly (Section 2 of Article 91 of the 1992 Constitution and Section 1 of Article 80 of the Draft);

- To direct activities of the Ethnic Council and committees of the National Assembly;

- To ensure good working conditions for members of the National Assembly (Section 7 Article 91 of the 1992 Constitution and Section 6 Article 80 of the Draft);

Consequently, changes of the Draft compared to the current Constitution include (i) the power “to direct, harmonize, and co-ordinate the activities of the Nationalities Council and the Committees of the National Assembly” is changed into the power “to direct activities of the Ethnic Council and committees of the National Assembly”; (ii) the power “to give guidance to... members of the National Assembly” is removed.

It is agreed by the expert team that the Draft continues to provide for the power “to prepare for, to convene, and preside over the sessions of the National Assembly” as it is a typical power to “maintain regular activities of the NA”. However, it is recommended that other changes be revised and amended as follows:

Firstly, the provision on the NASC **directing** activities of the Ethnic Council and the NA committees should not be supplemented but the equivalent provision of the 1992 Constitution be kept. As mentioned above, the NASC is not a “small size NA” nor a “higher level” agency of the NA agencies. As the NASC does not have expertise in specific areas, it is incapable to direct the NA agencies. Moreover, the principle of “directing” is not appropriate in a democratic institution. If the NASC is given this power together with the power to review and give opinions on bills before submission to the NA, the professional role of the Ethnic Council and the NA committees is meaningless and might result in complete change of the NA.

It should be noted that the NASC exists as “a bridge of cooperation and consensus” between the NA and other institutions in the state apparatus, the NA professional agencies and members given the NA does not work on a regular basis but not as “a higher collective leadership of the NA” to give “prior decision” or “screening” in terms of professional issues. Therefore, the 1992 Constitution is designed in a way that the NASC only has the power to direct, harmonize, and co-ordinate the activities of the Nationalities Council and the Committees of the National Assembly.

Secondly, it is necessary to supplement and specify the role, tasks and powers of the NASC to maintain regular activities of the NA through implementation of its tasks and powers in order to maintain regular and

continuous relations between the NA with other actors having tasks and powers relating to the NA (for example the State President, the Government, the Prime Minister, the NA agencies, etc.) and between the NA and the NA members, among the NA members themselves, and the NA agencies. Under this approach, the scope of tasks and powers of the NASC is not limited to the relation with the Ethnic Council, the NA committees but also extended to other actors having tasks and powers relating to the NA; creating the linkage among NA members themselves and with other institutions relating to the implementation tasks and powers of the NA members. Nevertheless, in all these relations, the NASC has no power to “decide” on professional issues.

b) In relation with the State President

It is thought by the expert team that it is necessary to clarify the role of the State President in the state apparatus in general and in relation with the NA, the NASC in particular in order to identify tasks and powers of the NA in relation with the State President.

Like other countries, different versions of the Vietnamese Constitution have the same provision on the role of the State President *as the head of the State, represents the Socialist Republic of Vietnam internally and externally*. However, the powers of the State President in Vietnam are different from those of the State President in other countries. There are two major differences including (i) it is unclear which power branch the State President belongs to based on the principle of separation, cooperation and balance; (ii) under the principle of unified state powers with the NA as the highest state authority, the role and tasks and powers of the State President are “deriving powers” from those of the NA. Accordingly, the State President is elected by the NA among the NA members and is responsible before and reports to the NA.

Consequently, the State President has close relation with the NA and the NASC. Therefore, in order to identify tasks and powers of the NA in this relation, it is necessary to understand directions of reform of the legal status of the State President. Presently, while there are quite a few of viewpoints on improvement of the institution of the State President, it is agreed by most of people that the current model is kept but some powers should be revised in order to clarify the role and to

increase the actual powers of the State President. This aims to timely institutionalize the guidelines of the Party on the principle of separation, division of labour and balance of the state powers in general and the directions on reform and improvement of the institution of the State President in particular under which it is necessary to “*clarify the powers and responsibilities of the State President in order to fully perform functions of the Head of the State, representing the State internally and externally, commanding armed forces; the relation between the State President and the legislative, executive, and judicial agencies*”. Arguments for this approach include (i) as Vietnam basically follows the parliamentary republic model, form of establishment (i.e. the NA elects the State President) and powers of the State President (a symbolic head of State) are appropriate; (ii) Vietnam has specific characteristics on state power organization (as it does not follow the model of absolute separation of powers but the democratic centralism with the NA as the highest state authority; (iii) the approach is in line with the Vietnamese constitutional tradition since 1959.

Under this approach, it is necessary to revise and amend some relevant tasks and powers of the NA in relation with the State President in order to improve the status and to promote the role of power check of the State President as follows:

Firstly, relating to the legislative power, it is necessary to clarify the role of the NA “to review laws and resolutions approved at its earliest session” upon request of the State President if any violation of the Constitution is found or such laws and resolutions might affect the national defense and security. In case the NA decides to continue to approve such laws and resolutions without considering the request of the State President, the Constitutional Council will consider the request before pronouncement of such laws and resolutions;

Secondly, relating to the power to decide important issues of the NA, it is necessary to specify some issues as follows:

(1) The NA elects the State President of the new term based on the nomination of the State President of the previous term or the State President has the right to nominate himself or to be nominated if meeting criteria but not for the two consecutive terms;

(2) The NA is only allowed to release from duty, remove from office the State President if the latter is not in good health or does not meet criteria or seriously violates the laws causing serious consequence to the national security or based on results of vote of confidence (with specific percentage);

(3) the State President should be given a power to request the NA to elect, release from duty, remove from office some positions as heads of independent constitutional agencies. At the same time, the Draft should clarify that the State President has the power to elect, release from duty, remove from office some high ranking officers not only at the beginning of the term but also in the middle of the term if there is a ground to believe that a violation is found or such officers no longer meet criteria;

(4) It is also necessary to clarify the role, tasks and powers of the State President, the NA, the NASC among themselves and with the Council of National Defense and Security in deciding issues relating to the national defense and security. For example, under his role of “commanding armed forces”, what tasks and powers of the State President are in ordering and mobilizing the military, etc., as the Draft prescribes the power of NA and the NASC in deciding issues relating to war and peace; proclaiming a state of emergency and other special measures aimed at ensuring national defense and security (Section 13, Article 75 of the Draft); the NASC has the power to decide a total or partial mobilization; to proclaim a state of emergency nationwide or at each locality (Section 9, Article 79 of the Draft).

In addition, it is necessary to provide for the power of the State President **to proclaim** to formalize the NA or the NASC’s decisions on war and peace; proclamation of a state of emergency and other special measures to ensure the national defense and security; decision on a total or partial mobilization; organization of a referendum; decision on an amnesty. Arguably, these powers are exercised on behalf of the State or the voice of the whole nation. Although the NA is a representative body and a state power authority, the State President as the head of the State representing the State and the whole nation is the most appropriate actor having the right status and capacity to represent the State and the whole society in calling or proclaiming to the people nationwide or to the world the official viewpoint of the State and the Government.

Thirdly, relating to the power of supervision of the NA, it is necessary to provide for the responsibility of the State President before the NA and the responsibility of presenting the annual and the term report before the NA.

Fourthly, in the relation with the NASC, it is important to provide for “*the State President has the right to attend the NASC sessions*” with a focus on (1) specifying which session the State President has to attend (it is thought that the State President should only attend the sessions relating to the tasks and powers of the State President); (2) specifying the role of the State President when attending such session (whether the State President has to chair or co-chair but can not vote); (3) specifying the validity of opinions of the State President; if the State President does not agree with opinions of the NASC after voting, he is entitled to request the NA to consider and the NA is responsible for consideration and making decision at the earliest session.

c) In relation with executive agencies

It is thought that there are many tasks and powers of the NA and the NASC relating to executive agencies covering all three functions of the NA. However, compared to the current Constitution, the Draft only has three big changes in tasks and powers of the NA and the NASC relating to legislative activities and all of them belong to the function of making decision on important issues of the country. Tasks and powers of the NA and the NASC relating to the constitutional, legislative, and oversight functions remain unchanged. Three big changes are as follows:

(i) the power of the NASC to decide the administrative boundaries lower than the provincial level is supplemented on the basis of transferring of such power from the Government. (This issue is already mentioned in the previous part);

(ii) The power of the NA “*to decide social-economic development plan*” under the 1992 Constitution is changed to the power “*to decide objectives, targets, and basic tasks of social-economic development of the country*” (Section 3 of Article 84 of the 1992 Constitution which is Section 3 of Article 76 of the Draft).

It is agreed by the expert team that such changes are necessary as they specify the scope of tasks and powers between the NA and the Government in order to create flexibility for the Government in management.

(iii) The power of the NA “*to decide the national financial and monetary policies; to decide the draft State budget and budgetary appropriations; to approve the accounts of the State budget; to establish, change, or abolish taxes*” is changed into the power “*to decide the national financial and monetary policies; to establish, change, or abolish taxes; to decide the principle of allocation of incomes and expenses between the State budget and local budget; to decide safe limit of national debt, public debt, governmental debt; to decide the draft State budget and budgetary appropriations; to approve state budget balance; to review of estimate report and state budget balance*” (Section 4 of Article 84 of the 1992 Constitution which is Section 4 of Article 76 of the Draft)

In this regard, compared to the 1992 Constitution, previous constitutions, the Law on State Budget, the Law on Organization of the NA, the Law on organization of the People’s Council, **the Draft has fundamental changes under the new viewpoint and thinking on state budget management** with two outstanding issues as follows:

(1) A new article (Article 60) on comprehension, principle, content of state management of financial and monetary issues and state budget is supplemented;

(2) The power of the NA is reduced according to which the NA only decides the central state budget estimate and the principle of allocation of incomes and expenses between the State budget and local budget but does not decide the local budget estimate; the NA only reviews estimate report and state budget balance but does not approve state budget balance.

It is thought by the expert team that revision and amendment of the tasks and powers of the NA relating to finance and state budget are important; however, it is necessary to further improve the Draft on issues as follows:

Firstly, provisions of Section 1 of Article 60 of the Draft are revised and amended to specify targets of national financial policies and clarify the comprehension of the term of “national finance” in order to identify the role and content of state management of the national finance through “the state finance” and management of “the national budget”.

Section 1 of Article 60 of the Draft prescribes “*the state budget, national reserve, state financial fund and other public financial resources are managed and*

used unanimously, effectively, equally, openly, transparently, legally, and properly by the State in line with the national financial and monetary policies from time to time". This provision is not sufficient nor accurate in terms of definition and comprehension of financial definitions as it does not reflect the structure of "Vietnamese financial system" for reasons as follows:

(i) The Draft uses the term of "public finance" which is inappropriate in the Vietnamese context. Given the context that Vietnam has specific characteristics of political and economic institutions with no separation of powers, no multi-party system, no division into public law and private law, it is inappropriate to divide the national finance into the public finance and the private finance. It is very difficult to interpret and separate the publicity and privacy of finance of political – social organizations or political-social-professional organizations in Vietnam. Therefore, it is thought that the national finance should include the state finance, the enterprise finance and the residential finance.

(ii) The Draft does not specify the definition and comprehension of the "state finance" in relation with the "national finance" in order to identify the role of the State in general and the role of people-elected institutions in particular in the national finance and the state finance. As mentioned above, the national finance include three elements of which the national finance plays a key role. The state finance includes (1) the state budget, state budget fund; (2) state centralized funds (including the national reserve fund, the contingency fund, the financial reserve fund, special purpose fund...⁴⁸) and deposit, internal and external state capital contribution, (3) internal and external state loans, debts, debt payments. The role of the State and people elected agencies over the state finance are in line with 3 basic characteristics of the state finance that it (1) belongs to the national ownership represented by the state; (2) serves the whole society, operating for non-profit purposes, promoting the rights and interests of the people and the whole society; (3) is managed and used in line with provisions of the laws. Therefore, in principle, the State has to show its role

⁴⁸ In Vietnam, there are approximately 50 centralized funds and special purpose funds under state management which are often called non-state-budget funds. Some funds have a capital of hundreds or thousand billion dongs such as the state reserve fund, the financial reserve fund, the contingency fund, the foreign debt payment accumulation fund, the national employment fund, the science and technology development fund, the environment fund, etc.

and management responsibility over the whole constituting elements of the state finance;

(iii) The Draft does not specify the role of the state over the state finance in relation with the national budget. That is because the definition of **the state finance** and the definition of **the national budget** are not entirely the same. Meanwhile, the role of the state is not only limited to “management and use” as mentioned in the Draft but also includes **mobilization, allocation, management and use** of the state finance and the national budget.

Therefore, it is recommended that Section 1 of Article 60 of the Draft be revised and amended as follows:

*“Develop and improve the national financial potential. The State shall unanimously **mobilize, allocate, manage and use of the state finance and the national budget.**”*

Secondly, provisions of Section 4 of Article 76 of the Draft should be revised and amended with a focus on (i) separating and specifying the role of the NA over the national finance, the state finance and the state budget; (ii) ensuring the principle that the state finance and the state budget are unanimously decided and managed but not only providing for the NA power to decide the central budget while leaving the power to decide the local budget “open”⁴⁹.

Therefore, it is recommended that Section 4 of Article 76 of the Draft be separated into two sections and be revised as follows:

Section 4a: *“**The NA shall decide national financial policies, accounting policies, national monetary policies, safe limit of national debt and governmental debt, national works and projects invested by the state budget.**”*

Section 4b: *“**The NA shall decide the state finance, state budget estimate, allocation of incomes and expenses between the State budget and local budget; central budgetary appropriations; state budget balance.**”*

⁴⁹ The Chapter on local authorities of the Draft only generally prescribes “the People’s Councils decide important issues of the locality” but does not specify the People’s Councils have power to decide which issues.

d) In relation with judicial agencies

The role of the NA over the People's Courts and the People's Procuracies is reflected in following aspects:

- The NA issues laws (including laws on organization and operation of judicial agencies as well as judicial procedure laws and substantive laws);
- The NA decides organizational structure, number of full-time staff, working conditions of the People's Courts and the People's Procuracies;
- The NA exercises the supreme oversight over activities of the People's Courts and the People's Procuracies.

Basically, there are not so many changes in the Draft compared to the current Constitution. The Draft continues to confirm that the NA has tasks and powers to elect, release from duty, remove from office the Chief Justice of the SPC, the General Prosecutor of the SPP (Section 7 of Article 75); the NA has the right to annul normative legal documents of the SPC and the SPP which are contrary to the Constitution, laws, resolutions of the NA; the NA exercises the right to oversight of activities of the SPP and the SPP, considering reports of the SPC and the SPP.

An outstanding issue of the Draft relates to the power of the NA *"to approve the appointment, removal, and dismissal of judges of the Supreme People's Court"* (Section 7 of Article 76 of the Draft). There are two schools of thought on this issue.

The first school of thought agrees with new provisions of the Draft, arguing that such provisions would increase the role and independence of judges of the SPC and are in line with the directions on reform of the structure of the SPC into a streamline model. However, it is recommended that provisions of relevant articles in the Draft should be revised and amended to ensure the unity and clarification.

Section 7 of Article 76 of the Draft prescribes the NA power to approve the appointment, removal, dismissal of judges of the SPC. Section 3 of Article 94 of the Draft prescribes the State President the power to appoint, remove, and dismiss

judges of the SPC based on resolutions of the NA. Two issues are noticed as follows:

(i) The Draft does not specify which actor will submit the approval resolution to the NA;

(ii) The Draft does not specify responsibilities of the State President and the Chief Justice of the SPC in cooperation with each other to exercise this power.

The two issues are clearly showed by comparison of procedures of exercising the similar power of the NA “to approve the appointment, removal, dismissal of Deputy Prime Ministers, ministers and other members of the Government”. Under the 1992 Constitution and in practice, procedures are as follows (1) the Prime Minister submits a request to the NA; (2) the NA approves the submission of the Government by approval of a resolution; (3) the State President issues a decision based on the approval resolution of the NA. Therefore, it is recommended as follows:

Firstly, the power of the Chief Justice of the SPC to submit the NA for approval of appointment, removal, dismissal of judges of the SPC is supplemented in the Draft.

Secondly, if provisions on appointment, removal, dismissal of judges of the SPC are maintained, it is necessary to supplement similar provisions on appointment, removal, dismissal of prosecutors of the SPP in order to ensure the balance between the People’s Courts, judges of the SPC and the People’s Procuracies, prosecutors of the SPP. Arguably, under the current Constitution and in practice, both are considered judicial agencies. At the same time, as the role of prosecutors is very important in judicial activities in general and at court in particular, it is necessary to ensure the balance between these two actors to avoid discrimination. Noticably, if there is such discrimination, the role of “oversight of judicial activities” of People’s Procuracies, prosecutors of the SPP will be affected.

The second school of thought recommends that provisions of the 1992 Constitution remain unchanged. It is argued as follows:

Firstly, there are not so many shortcomings arising in practice relating to this issue. It is noticed from practical implementation of the 1992 Constitution and

previous constitutions that provisions on appointment, removal, dismissal of prosecutors of the SPP and prosecutors at lower levels are often similar to those applied to judges of the SPC and judges at lower levels. Accordingly, prosecutors of the SPP and judges of the SPC are appointed by the State President (Section 8 of Article 103 of the 1992 Constitution); prosecutors and judges at lower levels are appointed and removed by the General Prosecutor of the SPP and the Chief Justice of the SPC respectively. It is noticed from practical implementation of the Constitution that such provisions are appropriate and ensure the legal status of prosecutors in exercising the power of oversight of judicial activities of judges. Therefore, it is not necessary to revise these provisions. This is also a guideline of the Party in revision of the Constitution at the Resolution of the 2nd session of the Central Party Committee (XIth term) which confirms *“revision and amendment of the Constitution should base on review of practical implementation of the 1992 Constitution and relevant laws; reserve appropriate provisions of the 1992 Constitution and previous constitutions; only revise and amend important issues in line with the new context and contents mentioned in the Resolution of the XIth National Party Congress”*;

Secondly, changes in the Draft do not really improve the independence of judicial agencies nor increase the role of judges of People’s Courts required by the judicial reform following conclusions at the 5th session of the XIth Central Committee. Although the power of “approval of the NA” is supplemented in the Draft, it is in fact only a procedural change but not a substance change. Accordingly, under the current constitution and provisions of the laws, there are two steps according to which the Chief Justice of the SPC requests the State President to appoint, remove, dismiss judges of the SPC. Meanwhile, it is inferred from the Draft that there would be three steps according which the Chief Justice of the SPC first submits proposal to the NA for approval and after the NA already approves, the State President appoints or removes judges based on the NA resolution. After all, the Chief Justice of the SPC has the most important power as subsequent approval of the NA and decision of the State President are “for form sake” only.

Thirdly, as the Draft only provides for additional power of approval of the NA but does not clarify the term of judges, it is unclear whether the judges are

appointed for life or only for a term of the NA. If the judges are appointed, removed, dismissed according to the term of the NA, it means that the NA has to exercise this power in every session. Meanwhile, as the NA only meets twice per year, the NA approval is also done in these two sessions. This will surely affect the trial effectiveness of judges of the SPC as it is not until the NA session that additional appointment of judges is approved.

Fourthly, the fact that the Draft only prescribes an additional power of the NA in approving the appointment of judges of the SPC but does not revise provisions on prosecutors of the SPP might result in imbalance of legal status of these two judicial agencies.

d) In relation with independent constitutional agencies

- Relating to the National Election Council (Article 121 of the Draft): under the Draft, the Council is an independent agency established by the NA while its organization and operation are in line with the Election Law. However, some people believe that it is necessary to provide for in the Constitution some main issues on the relation between the NA and the Council as follows:

Firstly, the principle of determination of organizational structure of the National Election Council should be supplemented. The Draft does not provide for this principle. The question here is that in an agency established by the NA with members elected by the NA, whether its members should be the NA members or not. It is thought that as the Council is a national agency but not a NA agency, its membership should include participation of other institutions especially representatives from Vietnam Fatherland Front.

Secondly, it is necessary to specify the term of the National Election Council to form the basis for the NA to implement tasks and powers to elect its members. The Draft does not provide for this issue. The question here is that if the term of the Council is the same with the NA term, it is difficult to perform the tasks and powers of the Council as the time of beginning and ending is not specified. If the term of the Council is not as same as the term of the NA, whether the NA re-elects the Council in its new term or not. Whether the National Election Council of the previous NA is established to support the election of the next term or not.

Thirdly, it is important to consider the provision on “members of the National Election Council are elected, removed, dismissed by the NA upon request of the NASC” (Section 1 of Article 22 of the Draft). This provision is not in line with the guideline on reform of organization and operation of the NASC as mentioned by the expert team as the role of the Council as a national independent constitutional agency is not highlighted (as the form of establishment is similar to the NA committees) while the role and responsibility of the Chairman of the Council are not specified. Therefore, it is recommended that the provision be revised and amended as follows:

(i) the NA elects the list of members of the National Election Council upon request of the State President or including some other actors following a certain proportion like that of the NASC – representatives of the NA; the Government or the Prime Minister; the Chief Justice of the SPC, the General Prosecutor of the SPP; Vietnam Fatherland Front.

(ii) the NA only decides to elect, remove, dismiss the Council Chairman while other titles are either elected by members of the Council or approved by the NA upon request of the Council Chairman;

Fourthly, in addition, it is thought that establishment of the National Election Council should be carefully considered or the working regime of the Council should be clarified as this agency is not working regularly. If the Council is provided for as a professional agency with full-time supporting staff, it would be a waste of money. Therefore, it is possible to provide for a certain proportion of full-time members and part-time members or the Council might work in a provisional manner.

- Relating to the State Audit (Article 123 and Article 124 of the Draft): like the National Election Council, the State Audit is only generally and briefly provided for in the Draft. It is thought that the biggest change relating to this institution is the improvement of its legal status; however, tasks and powers of the State Audit are already specified at the Law on State Audit and have been exercised in practice over the last few years. Therefore, it is recommended as follows:

Firstly, the Draft should have specific provisions on main issues relating to organizational structure such as leadership and its power, procedures to elect, remove, dismiss; relations with other institutions especially with the NA, the NASC, the Government, etc., especially the responsibility of reporting and use of audit results;

Secondly, similar to the provision on the National Election Council, it is recommended that the provision on “the Auditor General is elected, removed, dismissed by the NA upon request of the NASC” be added.

Thirdly, the provision on “the term of the Auditor General is the same as the NA term” should be carefully considered. That is because under the 2006 Law on State Audit, the term of the Auditor General is 7 years in order to ensure independence and objectiveness of this agency. It is noticed that the provision on this issue in the Draft is not in line with requirements and purposes of the Committee on drafting of the revised constitution in revision of this issue which is “to ensure the status and legal basis for this agency”;

Fourthly, it is recommended that the responsibility of the State Audit in relation with the NA in particular and with people-elected agencies in general should be supplemented with a focus on (i) governmental reports on state budget estimate, central state budget allocation plan, state budget balance submitted by the Government to the NA should be audited and commented by the State Audit. This institution can be found in the Constitution of many countries; (ii) responsibilities and powers of the State Audit in making decisions on important issues of the country especially decisions of the NA, the People’s Councils on financial and budgetary issues such as state budget estimate and budget allocation; (iii) the Auditor General is responsible for participation and giving opinions at sessions of the NA, the NASC on economic and financial issues.

Fifthly, technically, as Article 76 of the Draft already prescribes the NA power to elect, remove, dismiss the Auditor General, it is necessary to specify this issue again in Article 123 to avoid overlapping.

- Regarding the Constitutional Council, it is provided for in the Draft as follows:

“1. The Constitutional Council is an agency established by the NA, consisting of a Chairman, Vice chairmen, and members.

2. The Constitutional Council shall check constitutional compliance of normative legal documents issued by the NA, the State President, the NASC, the Government, the Prime Minister, the SPC, the SPP; request the NA to consider its normative legal documents if any violation to the laws is detected; request the State President, the NASC, the Government, the Prime Minister, the SPC, the SPP to revise and amend its normative legal documents or request the authorized agencies to annul legal documents contrary to the Constitution; check the constitutional compliance of international treaties signed on behalf of the country before submission to the NA, the State President for approval.

3. Organization, specific tasks and powers of the Constitutional Council, numbers of members, term of members of the Constitutional Council are provided for in laws.

Consequently, in relation with the Constitutional Council, the role, tasks and powers of the NA are reflected in aspects as follows:

- The NA decides the establishment of the Constitutional Council and prescribes organization and operation of this institution;

- Normative legal documents issued by the NA or international treaties approved by the NA should be checked for constitutional compliance by the Constitutional Council (pre-checking);

- If any normative legal document of the NA is found unconstitutional, the Constitutional Council has the power to request the NA to consider. Alternatively, the Council requests the NA to make decision on abrogation of unconstitutional documents issued by other actors but subject to the NA power of abrogation (post-checking).

It is thought by some people that the Constitutional Council should not be established (i.e. the current model remains unchanged but needs improving) as it would be inappropriate and infeasible to establish an independent constitutional protection agency given the principle of organization and operation of the state apparatus and specific political characteristics of our country. Other people suggest

selecting the model of Constitutional Court, arguing that this is a popular, absolute, and effective model for constitutional protection. According to these two types of opinions, it is necessary to comprehensively and entirely revise and amend tasks and powers of the NA. However, many people agree with the establishment of the Constitutional Council as mentioned in the Draft, arguing that constitutional protection is important, imperative and in line with guidelines of the Party. However, since it is a new issue, the Constitutional Council is a flexible and mediate model. In addition, it is thought that the model has the most appropriate working mechanism in the Vietnamese context. However, provisions of the Draft are too simple and would need further revisions as follows:

Firstly, Section 1 should not specify that “the NA establishes the Constitutional Council“. It is because if the Council is an independent constitutional agency, provisions of the Constitution acknowledging this institution are enough for “its establishment” similar to provisions on the NA, the Government, etc. It might be inferred from provisions of the Draft that the Constitutional Council is an NA agency but not an independent constitutional agency. Consequently, it is not necessary to provide for this institution or it will be mentioned in Chapter on the NA;

Secondly, Section 3 specifies the NA power to decide “*organization, specific tasks and powers of the Constitutional Council, numbers of members and term of its members*”. This provision giving the power to the NA is not appropriate as it is the basis for establishment of the constitutional protection model. At the constitutional level, it is important to provide for basic principles to identify structure and organization of the Constitutional Council and based on these principles, the NA identifies specific tasks and powers of the NA in relation with the Constitutional Council. It is recommended that the Draft specifies the structure of this Council in terms of number of members, proportions of power branches, procedures to select membership. This is a precondition to ensure the status of an independent constitutional agency and its certain independence. Accordingly, tasks and powers of the NA in relation with this institution include (i) specifying organization, operation; (ii) nominating candidates representing for the NA; (iii) electing the membership (it is possible to elect leadership titles or only elect the

Chairman while other titles are elected by members of the Council); (iv) supervising activities, etc.

Thirdly, it is recommended that in Section 2, (i) it is necessary to separate the power of the NA to consider request of the Constitutional Council once unconstitutional documents are found according to actors (the NA and other actors) and according to the power of the NA (pre-checking and post-checking). Obviously, settlement mechanisms for different actors issuing unconstitutional documents and having different powers are not the same. For example, unconstitutional documents issued by the NA are requested for revision and amendment by the Constitutional Council as the highest state authority. Unconstitutional documents of other actors are settled with stronger measures (suspension, request for revision and amendment, abrogation, cancellation, and reporting results to the NA at its earliest session), (ii) it is important to supplement the responsibility of the NA if the Constitutional Council requests the NA to review the unconstitutional documents issued by the NA. If the document is not issued yet, it is required that the NA reviews it at the earliest session. It is required a certain quorum (2/3) for the NA to continue to approval without revision and amendment of unconstitutional issues. If the document already enters into force, request of the Constitutional Council is reviewed by the NA at its earliest session. If the NA does not agree with recommendations of the Constitutional Council, it should approve a Resolution on this issue with a certain quorum. For documents issued by other actors, it is only required that the NA reviews and makes decision at its earliest session based on majority vote. Consequently, the provision not only ensures the principle of unified state powers according to which the NA is the highest state authority but also promotes the status of the constitutional protection agency.

Above is the Report on results of research on “***Further improvement of provisions of the draft revised 1992 Constitution on tasks and powers of the National Assembly and its Standing Committee***” of Component 2 implemented by the ILS with participation of the Expert Team.

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