

# REGULATIONS ON THE PRESIDENT OF VIETNAM

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## Abstract

The term “*Head of State*” means the highest leader of a country. As a result of the difference in political regimes, organizational models and operation of supreme state power, this position is flexibly referred to as President, State President, King, Emperor, or Queen in different countries. In Vietnam, the Head of State is the President. This article analyzes Vietnam’s legal regulations concerning the office of the President.

## Keywords

Head of State, President, State President, King, Emperor, Queen, Constitution, Vietnam

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## I. Introduction

The term “*Head of State*” means the highest leader of a country.<sup>3</sup> As a result of the differences in political regimes, organizational models and operation of the supreme state power, this position is flexibly referred to as President, State President, King, Emperor, or Queen<sup>4</sup> in different countries.

For example, Article 80 of the Russian Federation Constitution clearly states that “*The President of the Russian Federation shall be the Head of State.*” According to Article 1 of the 1946 Constitution of Japan, the Emperor is the symbol of the State and of the unity of the People, deriving his position from the will of the people with whom resides sovereign power. The Japan’s Constitution does not stipulate that the Emperor is the head of state. However, as a symbol of the State and of the Japanese unity, performing the acts in matters of state under Article 7 of the Constitution on behalf of the people, the Emperor of Japan is the head of this country. In Vietnam, according to the 2013 Constitution, the head of state is the President.

## II. The President under Vietnamese law

### 2.1. Position and legal status

Article 86 of the 2013 Vietnam Constitution stipulates that: “*The President is the Head of State and represents the Socialist Republic of Vietnam both in domestic and foreign affairs.*” As a “*head of the State,*” the President expresses the State’s responsibility in relations with the people, other states and organizations. As a “*representator of the State,*” the President expresses the unity of state power in external relations. Under Article 86 of the 2013 Constitution, it is understandable that the President expresses the systematic and internal consistency in the state apparatus as well as in relations with other subjects.<sup>5</sup>

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<sup>3</sup> Hoang Phe (editor), Vietnamese Dictionary 672 (Da Nang Publisher).

<sup>4</sup> Noel Cox and Raymond Miller, New Zealand Government and Politics 133 (Oxford University Press 2006).

<sup>5</sup> Do Minh Khoi, The constitutional role of the Head of State, 3 Journal of Legal Science (2013).

Article 87 of the 2013 Constitution stipulates the President is elected by the National Assembly among its members. His or her term of office follows that of the National Assembly. At the expiration of the term of the National Assembly, the President shall remain in office until a new President is elected by the new legislature. According to this regulation, the President has to be a member of the National Assembly to ensure the cohesion between the head of state (the President) and the highest representative body of the People, the highest body of state power of the Socialist Republic of Vietnam (the National Assembly).

According to Clause 7, Article 70 of the 2013 Constitution, after being elected, the President, Chairman of the National Assembly, the Prime Minister, and the Chief Justice of the Supreme People's Court must declare an oath of loyalty to the Fatherland, the People and the Constitution.<sup>6</sup> However, it is different from the oath of the Chairman of the National Assembly (the head of the legislature), the Prime Minister (the head of the executive agency), the Chief Justice of the Supreme People's Court (the head of the judiciary).

The oath of the President (Head of State) has a lot of profound meanings. *First*, the President's oath in Vietnam meets common practice in the world. According to the Constitution of the Russian Federation (Article 82), when taking office the President of the Russian Federation has to take the oath of loyalty in the presence of members of the Council of the Federation, deputies of the State Duma and judges of the Constitution Court of the Russian Federation as follows:

I swear in exercising the powers of the President of the Russian Federation to respect and safeguard the rights and freedoms of man and citizen, to observe and protect the Constitution of the Russian Federation, to protect the sovereignty and independence, security and integrity of the State, to faithfully serve the people.

According to Article 130 of the Constitution of Poland, the President of the Republic of Poland has to swear to the National Assembly in the inauguration as follows:

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<sup>6</sup> The 2013 Constitution, Art. 70.7 stipulates: "After being elected, the President, the Chairman of the National Assembly, the Prime Minister, and the Chief Justice of the Supreme People's Court must declare an oath of loyalty to the Fatherland, the People and the Constitution."

Assuming, by the will of the Nation, the office of President of the Republic of Poland, I do solemnly swear to be faithful to the provisions of the Constitution; I pledge that I shall steadfastly safeguard the dignity of the Nation, the independence and security of the State, and also that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation.

*Second*, the President's oath is sacred. It is the inspiration for all people in society, creating the integrity of the apparatus of power and people's belief in the government. *Third*, the President's oath emphasizes the supremacy of the Constitution. The oath is a firm commitment of the President on his or her responsibility to protect the Constitution.<sup>7</sup>

However, it is not stipulated in the 2013 Constitution how the President of Vietnam would take the oath of loyalty and whom he or she would report to. According to Article 29 of the Resolution No 102/2015/QH13 on issuing Rules of the National Assembly sessions

The Chairman of the National Assembly, the President, the Prime Minister and the Chief Justice of the Supreme People's Court swear to be loyal to the Fatherland, the People and the Constitution. In addition to the oath of loyalty to the Fatherland, the People and the Constitution, the person taking the oath decides remaining content of the oath in accordance with assigned responsibilities. The person taking the oath has to stand before the national flag while swearing. The time for swearing is no more than 3 minutes.

Therefore, the President's oath must contain phrase "*be loyal to the Fatherland, the People and the Constitution*," and the President decides the remaining words of the oath. However, this issue may create inconsistency in works of the President. Implementation of the President's oath in practice has proved the inconsistency.<sup>8</sup>

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<sup>7</sup> Cao Vu Minh, The President in the 2013 Constitution and the formulation of the Law on the President, 23 Journal of Legislative Studies (2014).

<sup>8</sup> Speech of Le Minh Thong — Former Deputy General Secretary of the National Assembly: "Up to now, there are no specific regulation on oath. We do it and learn experience at the same time. Then it would become rules when being stable." VnExpress.net, "Which process of oath does Vietnam apply?", April 1, 2016. URL: <https://vnexpress.net/tin-tuc/thoi-su/tuyen-the-o-viet-nam-thuc-hien-theo-quy-trinh-nao-3379666.html> (last visited: 1 Jul., 2019).

Specifically, on 2 April 2016, the President Tran Dai Quang swore in his inauguration ceremony:

*In front of the sacred national flag, the National Assembly, the people and voters, I – Tran Dai Quang – President of the Socialist Republic of Vietnam – declare: Be absolutely loyal to the Fatherland, the People, and the Constitution of the Socialist Republic of Vietnam; strive to do my best to fulfill tasks entrusted by the Party, State and People.*<sup>9</sup>

Meanwhile, on 25 July 2016, taking the oath for the second time, Tran Dai Quang swore:

*Under the sacred national flag, the National Assembly, the People and voters, I – President of the Socialist Republic of Vietnam declare: Be absolutely loyal to the Fatherland, the People, and the Constitution of the Socialist Republic of Vietnam; strive to fulfill tasks entrusted by the Party, the State and the People.*<sup>10</sup>

In the inauguration ceremony on 23 October 2018, the President Nguyen Phu Trong put his hand on the Constitution and swore:

*Under the sacred national flag, in front of the National Assembly, the people and voters, I – President of the Socialist Republic of Vietnam – declare: Be absolutely loyal to the Fatherland, the People, and the Constitution of the Socialist Republic of Vietnam, strive to fulfill all tasks entrusted by the Party, State and the People.*<sup>11</sup>

Due to the solemn nature of the Head of State, the inauguration ceremony and the President's oath must be legalized. The sacred image of the inauguration ceremony of the President will reinforce the people's belief, and help the people overcome all difficulties.

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<sup>9</sup> Tienphong Online, Mr. Tran Dai Quang served as President, 2 April 2016. URL: <https://www.tienphong.vn/xa-hoi/ong-tran-dai-quang-lam-chu-tich-nuoc-987885.tpo> (last visited: 1 Jul., 2019).

<sup>10</sup> VOV (The Voice of Vietnam), "Mr. Tran Dai Quang for the second time sworn in as President of the country", 25 July 2016. URL: <https://vov.vn/chinh-tri/quoc-hoi/ong-tran-dai-quang-lan-thu-hai-tuyen-the-nham-chuc-chu-tich-nuoc-533640.vov> (last visited: 1 Jul., 2019).

<sup>11</sup> Nhan Dan newspaper, Comrade Nguyen Phu Trong took the oath of office as President, on 23 October 2018. URL: <http://nhandan.com.vn/chinhtri/item/38011002-anh-dong-chi-nguyen-phu-trong-tuyen-the-nham-chuc-chu-tich-nuoc.html> (last visited: 1 Jul., 2019).

## 2.2. The President's competence to promulgate legal documents

Promulgation of legal documents is an important competence of the President. Article 91 of the 2013 Constitution stipulates: "The President shall issue **orders and decisions** to perform his or her tasks or to exercise his or her powers." According to Article 88 of the 2013 Constitution, the President has the power to promulgate **orders and decisions** to regulate issues such as: Promulgation of Constitution, laws, ordinances; ratification or termination of international treaties; to promulgate or annul decisions to declare a state of war; to issue an order on general mobilization or partial mobilization, to declare or cancel a state of emergency.

According to Article 17 of the Law on the Promulgation of Legal Documents in 2015, the President issues orders and decisions to: declare full or partial mobilization; declare, cancel states of emergency according to resolutions of Standing Committee of the National Assembly; declare, cancel states of emergency nationwide or locally in case Standing Committee of the National Assembly is not able to hold a meeting; decide other issues within the competence of the President. However, according to Article 91 of the 2013 Constitution and Article 17 of the Law on the Promulgation of Legal Documents in 2015, it is unclear when the President issues an order and when he or she issues a decision. The answer for this question can only be "inferred" from relevant provisions.

According to Clause 5, Article 88 of the 2013 Constitution, based on the resolution of the Standing Committee of the National Assembly, the President issues **an order** on general mobilization or partial mobilization, to declare or cancel a state of emergency. Clause 6, Article 19 of the Law on National Defense in 2018 stipulates: "Based on the resolution of the Standing Committee of the National Assembly, the President shall issue **an order** to cancel the general mobilization or partial mobilization." Moreover, Clause 21, Article 21 of the Law on National Defense in 2018 also stipulates: "When political security, social order, and safety in one or several localities are seriously violated to the

extent that far beyond the control of the local government, the President shall issue orders to declare martial law according to the proposal of the Government.” In these emergency cases, the President must promulgate legal documents in the form of orders to ensure the effectiveness in management works. Besides, the President issues orders to promulgate the Constitution, laws, and ordinances as well.

Thus, according to Article 88 of the 2013 Constitution, orders of the President are used for solving issues such as: to promulgate the Constitution, laws and ordinances; based on the resolution of the National Assembly or the Standing Committee of the National Assembly to proclaim or retract the decision to declare the state of war; based on the resolution of the Standing Committee of the National Assembly to issue an order on general mobilization or partial mobilization, to declare or cancel a state of emergency. For example, Order No 18/2013/L-CTN dated 8 December 2013 of the President On promulgation of the Constitution; Order No 13/2015/L-CTN dated 9 July 2015 of the President on promulgation of the 2015 Law on State Budget.

As mentioned above, the law only stipulates that the President issues a decision to implement his or her duties and powers. However, with such regulations, the 2015 Law on Promulgation of Legal Documents does not specify what are the duties and powers that the President issues decisions to perform.

If the President issues orders to perform the issues mentioned above, following exclusion principle, the remaining duties and powers of the President in Article 88 of the 2013 Constitution will be performed by issuing decisions. For example, the President’s Decision is issued to ratify, accede to or terminate international treaties within his or her competence. The President also issues decisions to grant amnesty. For example, Decision No 332/2004/QD-CTN dated 7 June 2004 of the President on adhering the Berne Convention for the Protection of Literary and Artistic Works; Decision No 1366/2015/QD-CTN dated 10 July 2015 of the President on special amnesty.

### **2.3. The competence of the President in relation to the legislature**

Under Vietnamese law, the President must be a member of the National Assembly. This regulation explains the close relationship between the President and the National Assembly. According to Article 84 of the 2013 Constitution, the President has power to submit draft laws to the National Assembly. However, the President has never submitted any draft law to the National Assembly since 1992. In fact, in Vietnam, more than 95 % of laws are drafted by the Government. The Government then submits the draft laws to the National Assembly for consideration and promulgation.<sup>12</sup> As the highest administrative agency, the Government performs function of state management in all fields. Therefore, the Government can promptly identify problems that arise in social life. And promulgation law is one of the high-efficiency solutions to solve those problems. Thus, content and progress of the National Assembly's legislative program depends on demand to adjust social relations of the Government rather than demand to fulfill the President's role.

The President also has the following duties and powers in the relationship with the National Assembly:

1) to promulgate the Constitution, laws and ordinances; to request the Standing Committee of the National Assembly to reconsider its ordinances, within ten days of their passage; if those ordinances are still voted for by the Standing Committee of the National Assembly and disapproved by the President, the President shall refer the matter to the National Assembly for decision at its next session;

2) to propose to the National Assembly to elect, relieve from duty or remove from office the Vice President or Prime Minister; and, based on resolutions of the National Assembly, to appoint, relieve from duty or dismiss Deputy Prime Ministers, Ministers or other members of the Government;

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<sup>12</sup> Nguyen Dang Dung, Discussion on the principle: State power is unified, with the division of responsibility between the three power branches: legislative, executive and judiciary, 12 *Journal of Legislative Studies* (2011).



3) to propose the National Assembly to elect, relieve from duty or remove from office the Chief Justice of the Supreme People's Court or Procurator General of the Supreme People's Procuracy; and, based on resolutions of the National Assembly, to appoint, relieve from duty or dismiss Judges of the Supreme People's Court; to appoint, relieve from duty or dismiss Deputy Chief Justices of the Supreme People's Court, Judges of other Courts or Deputy Procurators General or Procurators of the Supreme People's Procuracy.

Unlike the President of the United States, the Vietnam's President has no power to veto laws of the National Assembly. The laws of the National Assembly will be passed when voted for by more than half of the total number of the National Assembly deputies. And no later than fifteen days from the date of adoption, the President must announce this law (Article 85 of the 2013 Constitution).

From legal perspective, competence includes tasks and powers (rights and obligations).<sup>13</sup> In the 2013 Constitution, there are regulations on rights of the President, but there are some regulations solely about the President's obligations. With that mindset, "*promulgation of the Constitution and laws of the National Assembly*" is a duty of the President. The reason is that the President simply must do this task without the ability to veto. However, promulgation of ordinances is not a duty of the President because he or she has power to "softly veto" ordinances. The President has the power to request the National Assembly's Standing Committee to reconsider its ordinances within ten days of their passage. If those ordinances are still voted for by the Standing Committee of the National Assembly and disapproved by the President, the President shall refer the matter to the National Assembly for decision at its next session. However, this soft veto is disabled by other regulations in the Vietnamese legal system.

According to Article 151 of the Law on Promulgation of Legal Documents in 2015, "the effective date of the whole or part of a legislative document shall be specified in the document. Nevertheless, the effective date is not sooner than 45 days from the day on which it is ratified or

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<sup>13</sup> Nguyen Cuu Viet, Administrative reform: about the concept of authority, 8 Journal of Legislative Studies (2005).

signed if it is promulgated by a central regulatory agency.” The Law on Promulgation of Legal Documents in 2015 regulates that the legal validity of legislative documents is started from the time of “*approval*,” not from the time of “*announcement*” as in the Law on Promulgation of Legal Documents in 2008.<sup>14</sup> However, in most cases, the effective date of a legislative document has been specified in the document itself.

For example, Clause 1, Article 371 of the Law on Administrative Procedure in 2015 stipulates: (this law was announced by the Order No 23/2015/L-CTN on 8 December 2015). Similarly, Clause 1, Article 77 of the Law on Compensation Liability of the State in 2017 stipulates: “*This Law shall take effect since July 1, 2016*”, (This Law was announced by the Order No 07/2017/L-CTN on 3 July 2017). The above provisions also demonstrate that, to a certain extent, duties and powers of the President in promulgation of the Constitution and laws is only a formality. Therefore, it is reasonable for the 2015 Law on Promulgation of Legal Documents to regulate effective date of a legislative document from the day on which it is approved, not the day on which it is “announced.”

However, the above regulations related to the Ordinance of the Standing Committee of the National Assembly still needs to be discussed more. Specifically, Article 85 of the 2013 Constitution stipulates that “Laws and ordinances must be promulgated within fifteen days of their passage, unless the President requests reconsideration of an ordinance.” With the above analysis, the promulgation of ordinance is not the duty of the President because he or she has the power to “softly veto” an ordinance.

The National Assembly only holds two regular sessions a year, each session lasts for more than a month. What would happen if after an ordinance has just been passed by the Standing Committee of the National Assembly, the President requests the Standing Committee to reconsider this ordinance, but is it still voted for? In this case, the President would submit this problem to the National Assembly for

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<sup>14</sup> Article 78 of the Law on Promulgation of Legal Documents of 2008 stipulates: “The effective time of legal documents is stipulated in documents but not earlier than forty-five days from the date of publish or sign for issuance.”

decision at its next session.<sup>15</sup> However, the question is whether this ordinance takes effect? Logically, this ordinance has not taken effect yet. However, according to the Law on Promulgation of Legal Documents in 2015, such an ordinance may come into force because it has been *passed* and the effective date is not sooner than 45 days from the day on which it is approved. The Law on Promulgation of Legal Documents in 2015 does not provide any exception; therefore, this possibility may occur.

One important thing is that there are many ordinances which the effective time is sooner than 45 days from the day of passage.<sup>16</sup> Especially, there are ordinances which take effect from the date on which they are signed.<sup>17</sup> In these cases, it is clear that the President's "soft veto" is greatly affected. In fact, the President has never requested the Standing Committee of the National Assembly to reconsider any ordinance since 1992. When enacting the ordinance, the National Assembly's Standing Committee has determined its effective date. The ordinance will automatically take effect on that day without any resistance from the President.

According to the 2013 Constitution, the President will propose to the National Assembly to elect, relieve from duty or remove from office the Vice President, Prime Minister, Chief of Justice's Court and Procurator General of the Supreme People's Procuracy. Thus, the impact of the President on selection these positions only stop at "the right to propose." The selection of the Vice President, Prime Minister, Chief Justice's Court and Procurator General of the Supreme People's Procuracy will be decided by the National Assembly through an election mechanism. It can be said that the right to propose to the President is

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<sup>15</sup> The National Assembly of Vietnam usually meets twice a year in May and October. If the Standing Committee of the National Assembly passed the ordinance in July, so it would be more than 45 days in September. Thus, according to the Law on Promulgation of Legal Documents in 2015, such ordinance has taken effect. If the President did not agree, he or she will submit to the National Assembly for its decision at the nearest meeting. However, the National Assembly cannot meet until October.

<sup>16</sup> Ordinance on amending and supplementing articles of 4 ordinances relating to planning in 2018 dated 22 Dec 2018 took effect on 1 Jan 2019. Thus, the period from passage to the effective date is only about 10 days.

<sup>17</sup> Ordinance on Order of, and Procedures for, Considering and Deciding on the Application of Administrative-Handling Measures at People's Courts in 2014 takes effect from the date of signing.

not a decisive factor but still is a necessary and important one because he or she is the person who connects works of agencies in the state apparatus.

Apart from the “*right to propose*,” based on the resolutions of the National Assembly, the President would appoint, relieve from duty or dismiss the Deputy Prime Ministers, Ministers, other members of the Government, and the Judge of the People’s Supreme Court. In general, this right is only a formality. It actually should be considered as the President’s obligation because when the National Assembly has approved, the President has no choice but to appoint, relieve from duty or dismiss Deputy Prime Ministers, Ministers, other members of the Government, and the Judge of the People’s Supreme Court.

According to Article 87 of the 2013 Constitution, the President is responsible, and report on his or her work to the National Assembly. Besides, as the head of state, the President is obliged to answer questions from the National Assembly’s delegates (Article 80 of the 2013 Constitution). This regulation is considered as necessary to bind the responsibility of the President in performing his or her duties and powers. However, the President has never reported to the National Assembly and has never answered questions from the National Assembly delegates directly. In particular, the President has never had to provide any explanation about decisions on his or her competence which has not been stipulated in the Constitution yet (such as the right to mitigate the death penalty).<sup>18</sup>

According to Article 61 of the Law on Organization of the National Assembly in 2014, “The Standing Committee of the National Assembly shall hold regular meetings once a month. **When necessary**, the Standing Committee of the National Assembly shall meet under the decision of the Chairperson of the National Assembly, or at the proposal of the President...” In addition, Article 90 of the 2014 Law on Organization of the National Assembly stipulates: “The National Assembly shall hold its sessions in public. The National Assembly may, **when necessary** and at the proposal of the President... decide to conduct a closed session.”

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<sup>18</sup> Cao Vu Minh, Authority of the President should be uniformly stipulated in the Draft Amendment of the Constitution, 237 Journal of Legislative Studies (2013).

*“When necessary”* is a very arbitrary regulation. Different subjects may understand the term “when necessary” in different ways. What will happen if the President supposes “*necessary*” and propose a meeting of the Standing Committee of the National Assembly, but this agency finds it is not necessary to meet? Similarly, what will happen if the President supposes “*necessary*” and requests a closed session, but the National Assembly does not hold? These questions have not been answered in current regulations.

Article 15 of the Law on Organization of the National Assembly in 2014 stipulates: “The National Assembly shall annul documents of its Standing Committee which contravene the Constitution, laws or resolutions of the National Assembly **at the proposal of the President.**” According to the Law on Promulgation of Legal Documents in 2015, the Standing Committee of the National Assembly promulgates ordinances and resolutions as legislative documents. Therefore, the National Assembly has the power to annul ordinances and resolutions of its Standing Committee if these documents are contrary to the Constitution, laws or resolutions of the National Assembly.

When the President request the National Assembly to annul its Standing Committee’s legislative documents which contravene the Constitution, the Law Committee of the National Assembly will verify the President’s proposal on documents which contravene the Constitution.<sup>19</sup> However, it is not easy to identify illegal regulations in legislative documents of the Standing Committee of National Assembly (especially in ordinances).

For example, according to the Law on Handling of Administrative Violations in 2012, district-level people’s courts are competent to decide on application of measures of consignment to reformatory, consignment to compulsory education institutions and consignment to compulsory detoxification establishment. Article 29 of Ordinance on Order of, and Procedures for, Considering and Deciding on the Application of Administrative-Handling Measures at People’s Courts in 2014 stipulates: “Decisions on application of the measures of consignment to reformatory, consignment to compulsory education institutions and consignment to compulsory detoxification establishment may be

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<sup>19</sup> Law on Organization of the National Assembly in 2014, Article 70.2.

complained.” However, the procedure for complaint and settlement of complaint for decisions on these administrative-handling measures does not comply with regulations on procedure for settlement of complaints in administrative procedures and state management.

In principle, the right to complain at the first time and the second time of people must be ensured by laws. This principle is regulated in both the Law on Administrative Procedures in 2015 and the Law on Complaints in 2011. However, the Ordinance on Order of, and Procedures for, Considering and Deciding on the Application of Administrative-Handling Measures at People’s Courts in 2014 only allows persons who are applied the measures of consignment to reformatory, consignment to compulsory education institutions and consignment to compulsory detoxification establishment to complain for the first time (and also the last time). In this case, is it possible to consider whether this Ordinance is contrary to the Law on Administrative Procedure in 2015 and the Law on Complaints in 2011? Next, who will verify the President’s proposal on ordinances which contravene laws of the National Assembly? Clause 2, Article 70 of the Law on Organization of the National Assembly stipulates in 2014 that the National Assembly’s Law Committee only verifies the President’s proposal on documents which contravene the Constitution, not verify the President’s proposal on documents which contravene laws. When there is no binding regulation, the Law Committee of the National Assembly may not take more task.

In fact, before proposing to the National Assembly to annul an ordinance of the National Assembly’s Standing Committee, the President must make sure about illegality of the ordinance. In our opinion, this is not an easy task. *“Proposing the National Assembly to annul documents of its Standing Committee”* is an important power of the President. However, proving the illegality of an ordinance must have great support from the Advisory Council.<sup>20</sup> In other words, the

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<sup>20</sup> Similarly, according to the Law on Special Amnesty in 2018, the President decides to grant special amnesty. However, before the President decides to grant special amnesty, there is a Special Amnesty Advisory Council to support him. The Advisory Council for Special Amnesty is a joint organization that includes representatives of relevant agencies and organizations decided by the President to implement decisions on special amnesty and to advise the President on implementation of special amnesty.

President will not be able to effectively perform this power without the Advisory Council's support. The Advisory Council will analyze, examine to prove the illegality of ordinances. Based on advices of the Advisory Council, the President will decide on proposing the National Assembly to annul its Standing Committee's documents. Who will be members of the Advisory Council? How will the Advisory Council work? How will the President propose to the National Assembly? How is the proposal? Who will verify the President's proposal?.. They are the issues that need to be specified in legal documents. If these regulations are unclear, the President will not be able to perform this important power.

According to Article 49 of the Law on Organization of the National Assembly in 2014, the President has power to propose the Standing Committee of the National Assembly to interpret the Constitution, laws and ordinances. Until now, the Standing Committee of the National Assembly has just interpreted the Constitution, laws and ordinances only 5 times, which is a very small number.<sup>21</sup> However, the President has never proposed the National Assembly's Standing Committee to interpret the Constitution, laws and ordinances because of not having a clear motivation. Normally, when there is no clear benefit or concern, state agencies will not perform their duties proactively and positively.<sup>22</sup>

#### **2.4. The President's competence in relation with executive bodies**

In Vietnam, the President has powers to propose to the National Assembly to elect, relieve from duty or remove from office the Vice President or Prime Minister; and, based on resolutions of the National

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<sup>21</sup> Resolution No 58/1998/NQ-UBTVQH10 dated 20 August 1998 on housing transactions established before July 1, 1991; Resolution No 746/2005/NQ-UBTVQH11 dated 28 January 2005, explaining Clause c Article 241 of the Commercial Law in 1997; Resolution No 755/2005/NQ-UBTVQH11 dated 2 April 2005 on the settlement of a number of specific cases of housing and land in the process of implementing housing and land management policies and social renovation policies before 1 July 1991; Resolution No 1037/2006/NQ-UBTVQH11 on housing transactions established before 1 July 1991 that relating to Vietnamese in overseas; Resolution No 1053/2006/NQ-UBTVQH11 dated 10 November 2006 on the explanation of Clause 6 Article 19 of the Law on State Audit.

<sup>22</sup> Nguyen Minh Duc, Mechanism to resolve conflicts between legal documents — from a regulation, 16 *Journal of Legislative Studies* (2012).



Assembly, to appoint, relieve from duty or dismiss Deputy Prime Ministers, Ministers or other members of the Government. These powers express the relationship between the President and the executive body (led by the Government). However, they are only formal powers.

According to Article 90 of the 2013 Constitution, “the President may attend meetings of the Government. The President may request the Government to meet to discuss issues that he or she considers necessary to fulfill his or her tasks or exercise his or her powers.” Before the time when the 2013 Constitution was passed, there was an opinion that the President should be entitled to attend and chair the Government’s meetings. On the one hand, it is not commensurate for the President to attend the Government’s meetings as a guest, on the other hand, the President has no competence to have an effect on activities of the Government.<sup>23</sup> However, in the current context, we believe that the regulation “*The President may request the Government to meet to discuss issues that he or she considers necessary to fulfill his or her tasks or exercise his or her powers*” has been a huge step in Vietnam.

*Firstly*, according to the 2013 Constitution, the President only is the head of the State, not is the head of the Government; therefore, he or she cannot chair meetings of the Government. *Secondly*, the Prime Minister is the head of the Government. He or she is responsible to the National Assembly for works of the Government (paragraph 2, Article 95 of the 2013 Constitution). If the Prime Minister makes inappropriate decisions as a chair of the Government’s meetings, his or her responsibility will be clearly defined. Meanwhile, when the President is the chair of the Government’s meetings and makes inappropriate decisions, he or she cannot blame for the Prime Minister. *Thirdly*, if the 2013 Constitution stipulated that the President were the chair of the Government’s meetings, there had been a transformation from the current model of Vietnam (which has many parliamentary characteristics) to the presidential or semi-presidential model. This issue may change not only state institutions but also political institutions.<sup>24</sup>

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<sup>23</sup> Vu Van Nhiem, Some comments on the state apparatus in the draft amendment of the 1992 Constitution, 3 Journal of Legal Science (2013).

<sup>24</sup> Do Minh Khoi, The constitutional role of the Head of State, 3 Journal of Legal Science (2013).



In order to specify this provision, Clause 3, Article 44 of the Law on Organization of the Government in 2015 stipulates that the Government shall convene the meeting as requested by the President to discuss issues that the President finds it necessary to perform duties and powers of the President.

However, this provision may be “obscured” by Clause 2, Article 44 of the Law on Organization of the Government in 2015: “In case the Government does not convene the meeting, the Prime Minister shall decide to ask for written opinions from its members.”<sup>25</sup> The Government performs its duties and powers under the collective working regime and the majority rule for important works. Therefore, it would be not reasonable if the Government decides to ask for written opinions from its members for important works. In fact, since the 2013 Constitution and the Law on Organization of the Government in 2015 took effect, the President of Vietnam has never exercised the power to request the Government to discuss issues that the President finds it necessary.<sup>26</sup>

Article 96 of the 2013 Constitution stipulates: “The President has the power to organize the implementation of the Constitution, laws and resolutions of the National Assembly, ordinances and resolutions of the Standing Committee of the National Assembly, and orders and decisions of the President.” According to the 2013 Constitution, it can be said that among legislative documents, the National Assembly’s documents are more effective than documents of the Standing Committee of the National Assembly. Similarly, documents of the Standing Committee of the National Assembly are more effective than the President’s documents. Following this logic, the President’s documents are more effective than documents of the Government and the Prime Minister. Thus, the Government must perform the President’s documents.

According to the Law on Promulgation of Legal Documents in 2015, promulgation of legal documents must ensure the consistency

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<sup>25</sup> Cao Vu Minh, *Government Governance Decision – Theory and Practice* 169 (National politic 2017).

<sup>26</sup> VOV.VN, the President has not asked the Government to hold a meeting because of a lack of mechanism, on March 22, 2016. URL: [https://vov.vn/chinh-tri/quoc-hoi / chu-tich-nuoc-sour-yeu-cau-chinh-phu-hop-ban-vi-thieu-co-che-492022.vov](https://vov.vn/chinh-tri/quoc-hoi/chu-tich-nuoc-sour-yeu-cau-chinh-phu-hop-ban-vi-thieu-co-che-492022.vov).

of the legal document system. This means legal documents issued by lower-level state agencies must not be contrary to documents of higher-level state agencies. Thus, a general principle is “legal documents of the Government and the Prime Minister are not contrary to legal documents of the National Assembly, the Standing Committee of the National Assembly, and the President.” However, there are cases when legal documents of the Government and the Prime Minister are contrary to legal documents of the National Assembly, the Standing Committee of the National Assembly, and the President. The important question is how to deal with these illegal documents of the Government and the Prime Minister.

Specifically, the National Assembly would annul documents of the Government, Prime Minister that contravene the Constitution, laws or resolutions of the National Assembly (paragraph 10, Article 70 of the 2013 Constitution). The Standing Committee of the National Assembly would annul documents of the Government, Prime Minister that contravene ordinances or resolutions of the Standing Committee of the National Assembly (paragraph 4, Article 74 of the 2013 Constitution). However, the President would not have power to annul documents of the Government and Prime Minister that contravene legal documents of the President. Who has the power to annul documents of the Government and Prime Minister that contravene legal documents of the President? This issue was not regulated in the 2013 Constitution. Therefore, it is impossible to identify who has the power to annul legal documents of the Government and Prime Minister that contravene the President’s orders and decisions.

The 2013 Constitution clearly stipulates the coordination of state agencies in the exercise of legislative, executive and judicial powers. However, when there is no regulation on the power to “suspend, to annul the legal documents of the Government and the Prime Minister that contravene the President’s orders and decisions,” the Constitution still lacks regulations relating to controlling state power as well as accountability of state agencies.

Clause 5 Article 88 of the 2013 Constitution stipulates: “The President assumes command of the people’s armed forces.” However, according to the Charter of the Communist Party of Vietnam, “The

Party leads the People's Army and the People's Police of Vietnam absolutely and directly in all aspects." It means that the Central Military Commission is the supreme commander of the armed forces. According to the Charter of the Communist Party of Vietnam, the General Secretary is the Secretary of the Central Military Commission, while the President is only a Standing Member of the Central Military Commission. What is the meaning of the regulation "The President assumes command of the people's armed forces"? With above analysis, it is forced to regulate that the President assumes command of the people's armed forces because the General Secretary has the real power to assume command of the people's armed forces in practice. The Prime Minister "shares" this power as well.

According to Article 23 of the Law on National Defense in 2018: "People's armed forces include the People's Army, the People's Police and the Militia and Self-Defense Force." According to Clause 2, Article 28 of the Law on National Defense in 2018, the Minister of Defense is the highest commander in the People's Army and the Militia and Self-Defense Force. According to Clause 2, Article 28 of the Law on National Defense in 2018 and Clause 1, Article 19 of the Law on People's Police in 2018, the Minister of Public Security is the highest commander of the People's Police. Meanwhile, Clause 1, Article 98 of the 2013 Constitution stipulates: "The Prime Minister leads the Government's work." This means the Prime Minister is the leader of the Government's members, including the Minister of Defense and the Minister of Public Security. Thus, the Prime Minister is the leader of the people's armed forces. This issue shows that, in Vietnam, the power to assume command of armed forces is "divided" between three different subjects: The General Secretary, the President and the Prime Minister. This fact leads to an unclear answer to the question who has the "real power" to assume command over the people's armed forces.<sup>27</sup>

According to the 2013 Constitution, the National Defense and Security Council is composed of the Chairperson, Vice Chairperson and members. The President is the Chairman of the National Defense and

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<sup>27</sup> Cao Vu Minh, The President's competence should be uniformly stipulated in the Draft Amendment of the Constitution, 237 *Journal of Legislative Studies* (2013).

Security Council. This agency works on a collegial basis and makes its decisions by a vote of the majority (clause 1, Article 89 of the 2013 Constitution). The question is how decisions would be made if the number of members of the National Defense and Security Council is an even number?<sup>28</sup> As a result, what would happen “if two parties vote equally.” There is no provision in the 2013 Constitution to resolve this issue. In our opinion, it should be stipulated: “In case the vote is equal, the Chairman of the National Defense and Security Council shall have the deciding vote.” On the one hand, this regulation highlights the collegial basis of the National Defense and Security Council; on the other hand, it enhances the individual role of the President as well. Unfortunately, this issue has not been regulated. Therefore, it leads to difficulties in operation of the National Defense and Security Council.

According to Clause 1, Article 26 of the Law on People’s Public Security in 2018, “The President has power to decide on the award, promotion of the rank of general to the Public Security officers.” This is entirely consistent with clause 5 Article 88 of the 2013 Constitution.<sup>29</sup> According to the Law on People’s Public Security in 2018, the Minister of Public Security has power to decide on the award, promotion to the rank of a rank of colonel and to appoint the Director, Deputy Director of the provincial-level Public Security Departments.

A new provision in the Law on People’s Public Security in 2018 is the highest rank that will be decided by position. Article 25 of the Law

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<sup>28</sup> According to Resolution No 141/2016/QH13 of the National Assembly dated 11 April 2016 approved the President’s proposal on Vice Chairperson and members of Defense and Security Council, the Defense and Security Council consists of 06 members:

1. Chairman of the Council: The President Nguyen Phu Trong.
2. Vice Chairman of the Council: Prime Minister Nguyen Xuan Phuc.
3. Member of the Council: Chairwoman of National Assembly Nguyen Thi Kim Ngan.
4. Member of the Council: Deputy Prime Minister — Minister of Foreign Affairs Pham Binh Minh.
5. Member of the Council: Minister of Defense — General Ngo Xuan Lich.
6. Member of the Council: Minister of Public Security — Senior General To Lam.

<sup>29</sup> Clause 5 Article 88 of the 2013 Constitution stipulates: “The President decides to decide on the award, promotion of the ranks of general officers in the people’s armed forces.”

on People's Public Security in 2018 states: "The highest rank for position of Directors of the Public Security Departments in Hanoi, Ho Chi Minh City is Major General, the highest rank for positions of the Directors of Public Security Departments in province-level administrative units that are categorized grade I, and are complex in security areas, large population is Brigadier General." Thus, the Minister of Public Security has no power to "decide on the award, promotion of the rank of general" but he or she could "set up" a person to be "awarded, promoted to the rank of general." If a police officer were appointed to the Director of Public Security Department in Hanoi or the Director of Public Security Department in Ho Chi Minh City, this person could be promoted to the rank of general, even to the Major General. Thus, the mechanism of coordination between the President and the Minister of Public Security in appointment of the Director of the Public Security Department in Hanoi or in Ho Chi Minh City must be clear. Of course, under leadership of the Party, there is no problem of power conflict; it is important to clarify this coordination mechanism in legal documents.<sup>30</sup> However, this problem has been "left" as well.

### **2.5. The President's competence in relation with judicial agencies**

In the relationship with the judiciary, the President has a very important power, which is the right to decide on a special amnesty. It is a special leniency of the State decided by the President to grant special amnesty for prisoners who meet requirements on occasions of great national events or anniversaries or in special cases.

According to Article 11 and Article 12 of the Law on Special Amnesty in 2018, the President has the power to decide other cases of being or not being proposed to grant special amnesty. It can be seen that the requirements for proposing or not proposing special amnesty are not closed lists. The President has the power to decide on supplement regulations. Personally, it is reasonable for the President to regulate other requirements for proposing special amnesty. However, the list of

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<sup>30</sup> Cao Vu Minh, The political and legal basis of the promulgation of the Law on the President, 1 Journal of Legislative Studies (2016).

requirements for not being proposed must be a close one. “Other cases decided by the President” is a regulation that totally depends on the President’s judgment. Currently, the Criminal Code of 2015 (amended and supplemented in 2017) and the Law on Handling of Administrative Violations of 2012 both stipulate that mitigating circumstances are open lists<sup>31</sup> and aggravating circumstances are close lists.<sup>32</sup> Therefore, it is necessary to abolish the provision “other cases decided by the President” in the requirements for not proposing special amnesty in Article 12 of the Law on Special Amnesty in 2018. This amendment would limit cases in which the President decides requirements for not being granted special amnesty unreasonably and sensitively.

Moreover, the 2013 Constitution does not stipulate that the President has power to commute capital punishment. However, the President still exercises this power in practice. Clause 4, Article 27 of the Law on Organization of People’s Courts in 2014 stipulates: “The Chief Justice of the Supreme People’s Court submits to the President his/her opinion on **cases in which convicts apply for commutation of capital punishment.**” Point C, Clause 4, Article 59 of the Law on Execution of criminal judgments in 2010 stipulates: “Before executing the capital punishment, the Chairman of the death penalty execution council announces... **the President’s decision to reject the application for commutation of the death penalty.**” Thus, in principle, the capital punishment only be executed when having the President’s decision to reject the application for commutation of the death penalty. However, there is no regulation stipulating when the

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<sup>31</sup> Clause 2 of Article 51 of the Criminal Code in 2015 (amended and supplemented in 2017) stipulates: “When deciding penalties, the Court may consider the animal **or other facts as extenuating circumstances** but must specify the reason for the mitigation in the judgment”. Similarly, Clause 8, Article 9 of the Law on Handling of Administrative Violations in 2012 stipulates: “**Other extenuating circumstances prescribed by the Government**”.

<sup>32</sup> Clause 1 of Article 52 of the Criminal Code in 2015 (amended and supplemented in 2017) stipulates: “Only the following circumstances are regarded as aggravating circumstances for criminal liability”. Similarly, Clause 1 of Article 10 of the Law on Handling of Administrative Violations in 2012 stipulates: “Only the following circumstances are regarded as aggravating ones”.

President must respond to accept or reject the application.<sup>33</sup> In our opinion, this issue must be clearly regulated in legal documents to limit arbitrary decisions of the President. Furthermore, it is necessary to regulate the specific principles, conditions for commutation of the death penalty, the procedure of execution and duration for the President to respond the application for commutation of the death penalty... in this legal document. It would contribute to demonstrating the powers of the President within the judicial branch.

### III. Conclusion

In 2011, *Law on the President* was mentioned in the Law and Ordinance making Program of the XIII National Assembly.<sup>34</sup> However, at the end of the term of the XIII National Assembly, this law had not been submitted to the National Assembly yet. Until now, there is no body to mention to the proposal of Law on the President in the Law and Ordinance making Program of the XIV National Assembly.

According to Clause 6, Article 70 of the 2013 Constitution, the National Assembly has the power to regulate organization and operation of the National Assembly, the President, the Government, the People's Courts, the People's Procuracy, the National Council of Election, the State Audit, local administrations, and other bodies created by the National Assembly. After the 2013 Constitution was approved, the National Assembly promulgated Law on Organization of the National Assembly in 2014, Law on Organization of the Government in 2015, Law on Organization of the People's Courts in 2014, Law on Organization of the People's Procuracy in 2014, Law on Organization of Local Governments in 2015, and Law on State Audit in 2015. At the beginning, the National Assembly has effectively exercised its power. However, until now, the National Assembly has not promulgated the *Law on the President* yet. The National Assembly has not fulfilled its responsibilities. Therefore,

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<sup>33</sup> According to Report No 122/BC-CP of the Government, since January 1, 2014, this right had been implemented very "cautiously" in practice because there were no specific regulations, especially provisions on procedure of implementation.

<sup>34</sup> Resolution No 20/2011/QH13 dated 26 Nov 2011 on the Law and Ordinance making Program of the XIII National Assembly.



promulgation of the *Law on the President* is not only the motivation but also the responsibility of the National Assembly, and this responsibility needs to be implemented soon. *The Law on the President* when being promulgated would solve the problems and shortcomings mentioned.

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