

## HUMAN RIGHTS WATCH

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October 21, 2013

Nguyen Sinh Hung  
Chairman  
National Assembly  
37 Hug Vuong St. Ba Dinh  
Hanoi, Vietnam  
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## Re: Amended Vietnam Constitution

Dear Chairman Nguyen Sinh Hung,

We write to you about Vietnam's constitutional amendment process.

Human Rights Watch is an independent, non-profit, non-governmental organization with more than 400 staff members around the globe, including country experts, lawyers, journalists, and academics of diverse backgrounds and 47 nationalities. We work in close partnership with local human rights groups worldwide. Each year, Human Rights Watch publishes more than 100 reports and hundreds more briefings on human rights conditions in approximately 90 countries.

Human Rights Watch has reported on the human rights situation in Vietnam for more than two decades. We have made recommendations to the Vietnamese government and National Assembly on subjects ranging from labor rights, health care, religion, and freedom of expression, association and assembly.

Vietnam's draft Constitution was officially opened for public and official comment on January 2, 2013, with the publication of draft amendments to the existing 1992 Constitution (amended in 2001). This reformulation process is in line with Directive 22-CT/TW of the Politburo of the Communist Party of Vietnam Central Committee, dated December 28, 2012.

We urge the National Assembly to ensure that the amendment process brings the constitution into conformity with Vietnam's obligations under

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international law so that it fully protects the rights and liberties of all people in Vietnam, which will contribute to the country's development.

The government's decision to consult with the general public on proposed amendments to the Constitution is a welcome development, however, this requires that the consultation be meaningful and that individuals are not harassed or punished for expressing their views.

We are concerned, however, that those who have had the courage to campaign for changes to the Constitution have been subject to an official campaign aimed at prohibiting views deemed unwelcome. This appears to have been a key factor in the December 27, 2012 arrest of lawyer Le Quoc Quan, who was sentenced on October 2, 2013 to 30 months in prison on trumped up charges of tax evasion. Other peaceful critics such as journalist Nguyen Dac Kien, Nguyen Huu Vinh and Le Cong Cau have also been targeted. In a reiteration of a repressive approach to freedom of expression, Prime Minister Nguyen Tan Dung said in a March 19, 2013 speech on constitutional revision that the Communist Party, the state and "every single citizen" must "fight against unconstructive speeches and actions that sow division and harm solidarity in the Party and society."<sup>1</sup> Reinforcing this, President Truong Tan Sang stated on March 27, 2013, that the new Constitution must reflect Communist Party aspirations.<sup>2</sup>

Though the Vietnamese Communist Party controls the process, by law it is the National Assembly that is empowered to amend the Constitution. As you approach a vote on a final text this month, we urge you and your National Assembly colleagues to use this historic opportunity to bring meaningful change to a constitutional and legal system that has systematically denied basic rights to the people of your country. Protection and promotion of human rights will require profound constitutional reforms, as well as many other determined steps.

## **I. International Law**

Vietnam is a party to many international human rights treaties and covenants. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All

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<sup>1</sup> "PM highlights public feedback on revised constitution," *Peoples Army Newspaper*, March 20, 2013, <http://en.baomoi.com/Home/society/www.qdnd.vn/PM-highlights-public-feedback-on-revised-Constitution/343578.epi>

<sup>2</sup> "New Constitution must reflect Party, people's aspiration," *Voice of Vietnam*, March 28, 2013, <http://en.baomoi.com/Home/society/english.vov.vn/New-Constitution-must-reflect-Party-peoples-aspiration/346299.epi> (accessed October 20, 2013).

Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child.

We urge the National Assembly to ensure that all provisions of the amended constitution meet Vietnam's international legal obligations. As a matter of general international law, every international agreement to which Vietnam is party is binding and must be carried out in good faith. As set out in the Siracusa Principles on the Limitations and Derogation Provisions in the ICCPR, adopted by the UN Economic and Social Council in 1985, the scope of a limitation on rights referred to in the ICCPR shall be interpreted strictly and in favor of the rights at issue, and shall not be interpreted in such a way as to jeopardize the essence of the right concerned.<sup>3</sup>

The draft amended Constitution should be revised to include a clause requiring that any limitations that are imposed on rights and freedoms be in conformity with international law. For instance, the ICCPR allows only narrowly defined restrictions that are laid down in law and are necessary in a democratic society for the pursuit of aims that are legitimate. This should be done in such a way as to prevent government entities or the courts to effectively undermine or abrogate the rights contained in the human rights treaties to which Vietnam is a party.

In addition, pending Vietnam's accession to other international human rights treaties, Vietnam's new constitution should affirm that customary international law and the general rules of international law have the force of law within Vietnam. It should clarify that Vietnam's laws should not be interpreted or implemented in a manner that is inconsistent with or undermines international human rights standards. The Constitution should include a general provision that the Vietnamese government, armed forces, other security forces and judiciary should seek guidance on human rights matters from United Nations and other bodies recognized as authoritative interpreters of such treaties. Such a provision would strengthen the process of reforming domestic legislation so that it protects and promotes human rights.

## **II. Welcome Aspects of Proposed Amendments**

The new text is envisaged to be the fifth constitution formulated under the auspices of the Communist Party of Vietnam. These include the previous constitutions of 1946, 1959, 1980

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<sup>3</sup> United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at: <http://www1.umn.edu/humanrts/instreet/siracusaprinciples.html>.

and 1992.<sup>4</sup> Officially approved media and its reports of public comments have highlighted the extent to which language in the proposed amendments places greater emphasis on democracy, the rule of law, and human and citizen rights than the Constitution now in force.<sup>5</sup>

A number of proposed amendments are welcome. These include:

- Whereas the 1992 Constitution only contains a single, pro forma, mention of human rights, the current draft refers to human rights repeatedly and in a manner indicating that they belong to everyone in Vietnam, including citizens and non-citizens.
- The right to life is now clearly stipulated in draft article 21.
- A new clause incorporated in draft article 17 bars discrimination on political, economic, cultural, or social grounds.
- Draft article 27 inserts a new prohibition against all acts of gender discrimination.
- Supplementary provisions in draft article 32 specify that anyone charged with a crime has the right to be tried by a court of law, and that any person accused of a crime has the right to legal assistance by defense counsel from the moment of arrest, detention, judicial investigation, prosecution or trial. Parallel new clauses in draft articles 107 and 111 provide for the first time that Vietnam's "people's courts" and "people's procuracies," respectively, are tasked to safeguard human rights. New language in draft article 108 prohibits "state bodies, organizations and individuals" from

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<sup>4</sup> "Constitution changes 'advance human rights,'" *Vietnam News*, March 18, 2013, <http://en.baomoi.com/Home/society/vietnamnews.vn/Constitution-changes-advance-human-rights/342942.epi> (accessed October 20, 2013).

<sup>5</sup> Official media online articles: "PM highlights public feedback on revised Constitution" *People's Army Newspaper Online*, March 20, 2013, <http://en.baomoi.com/Home/society/vietnamnews.vn/Constitution-changes-advance-human-rights/342942.epi> (accessed October 20, 2013); "NA Committee Discusses Constitution Amendments," *Vietnam*, March 11, 2013, <http://en.baomoi.com/Home/society/en.vietnamplus.vn/NA-Committee-discuss-Constitution-amendments/341614.epi> (accessed October 20, 2013); "Constitutional changes draw comments on human rights," *Vietnam News*, March 11, 2013, <http://en.baomoi.com/Home/society/vietnamnews.vn/Constitutional-changes-draw-comments-on-human-rights/343121.epi> (accessed October 20, 2013); "Workshops collect opinions on revised constitution," *Nhan Dan*, March 9, 2013, <http://en.baomoi.com/Home/society/www.nhandan.org.vn/Workshops-collect-opinions-on-revised-Constitution/341324.epi> (accessed October 20, 2013); "Feedback for draft revised constitution" *Nhan Dan*, February 28, 2013, <http://en.baomoi.com/Info/Feedback-for-draft-revised-Constitution/3/338996.epi> (accessed October 20, 2013); "Draft constitution pushes judicial reform," *Bao Moi*, <http://en.baomoi.com/Info/Draft-Constitution-pushes-judicial-reform/3/338013.epi> (accessed October 20, 2013); "Overseas Vietnamese representatives comment on 1992 Constitution amendments," *Nhan Dan*, January 18, 2013, <http://en.baomoi.com/Home/society/www.nhandan.org.vn/Overseas-Vietnamese-representatives-comment-on-1992-Constitution-amendments/331679.epi> (accessed October 20, 2013); "Draft revised Constitution made public for feedback," *Bao Moi*, <http://en.baomoi.com/Info/Draft-revised-Constitution-made-public-for-feedback/3/328349.epi> (accessed October 20, 2013); "Draft amended Constitution seeks public comments," *Hanoi Times*, January 15, 2013, <http://en.baomoi.com/Home/society/hanoitimes.com.vn/Draft-amended-Constitution-seeks-public-comments/330760.epi> (accessed October 20, 2013); and "Journalists give opinions to Constitution amendments," *Vietnam*, March 26, 2013, <http://en.baomoi.com/Home/society/en.vietnamplus.vn/Journalists-give-opinions-to-Constitution-amendments/344590.epi> (accessed October 20, 2013).

intervening in trial processes. Article 108 also includes new guarantees of adversarial proceedings and the possibility of appellate trials.

- Draft article 38 introduces prohibitions on forced labor and use of minors as laborers.
- Draft article 40 strictly prohibits forced labor and all “other acts which violate the rights of the child.”
- Draft article 120 provides for the National Assembly to establish a Constitutional Council to check on the constitutionality of legal and regulatory texts and, if finding them not in line with the Constitution, to annul them, request their amendment or suggest their reconsideration.
- Draft article 121 calls for the National Assembly to create a National Election Commission to organize or direct and guide election processes, depending on the level of the election.

### III. Negative Changes in Draft Constitution

Unfortunately, the new draft also contains several major changes that will weaken current constitutional protections:

- **Arbitrary arrests:** A major cause for concern is the elimination of provisions in article 71 of the 1992 Constitution that no one, except in cases of *flagrante delicto*, may be arrested in the absence of a decision by a court or the procuracy, and that in every instance the taking into or holding of anyone in custody must be done in correct accord with the law. This will leave individuals without any constitutional guarantee against arbitrary arrest by the authorities.
- **Expansion of the one-party state:** Proposed amendments to article 4 of the Constitution expand the Communist Party’s general claim to leadership of the country, making it the “vanguard” not only of the Vietnamese “working class,” as in the current Constitution, but now also of “the Vietnamese people.” Although the new language also includes a provision saying the Party is “supervised by the people,” it remains the sole designated “faithful representative” of the “rights and interests” of the whole Vietnamese nation. This makes pluralism and genuine periodic elections impossible. Article 25 of the ICCPR guarantees “Every citizen shall have the right... 2) 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, guaranteeing the free expression of the will of the electors.”<sup>6</sup> The UN Human Rights Committee, the international expert body that provides authoritative interpretations of the ICCPR, states in its General Comment No.

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<sup>6</sup> “Every citizen shall have the right and the opportunity, without [discrimination] and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen 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, 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.”

25 on the right to participate in public affairs, voting rights and the right of equal access to public service, states that, “The right to freedom of association, including the right to form and join organizations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25 [of the ICCPR].”<sup>7</sup> This recognizes the right to form independent political parties, something that is currently prohibited in Vietnam. Given the severe restrictions on the exercise of fundamental rights in Vietnam, it is a self-fulfilling and contrary to international law for Party authorities to claim that “no other political force but the Party gathers enough ability to lead” the country now or in the future.<sup>8</sup>

- **Constitutional control of the armed force and police by the Communist Party:** The revised article 4 also specifically extends the Party’s total control over organs of the state to the army and police. Whereas the 1992 Constitution stipulated that all such “people’s armed forces must show absolute loyalty to the motherland and the people,” the proposed new article 4 demands that they “must show absolute loyalty to the Communist Party of Vietnam.” According to the military newspaper *Quan Doi Nhan Dan*, this change is intended to head off any possibility of a “depoliticizing” of the armed forces to ensure this “weapon of the ruling party” is not somehow stripped from it. The goal appears to be to prevent the kinds of political changes associated with the collapse of the Soviet Union, other Communist regimes in Eastern Europe, and the states involved in the Arab Spring.<sup>9</sup> *Quan Doi Nhan Dan* has also stated that this provision is necessary to preclude the emergence in Vietnam of a “multiparty system” characterized by “a sharing of power among political forces.”<sup>10</sup>

#### IV. Omissions and Loopholes Insufficient to Improve Human Rights

Much of the proposed Constitution contains language that is open to broad interpretation that could justify wide-ranging limitations on key rights. Multiple qualifications and other loopholes weaken human rights provisions, sending a signal that international rights obligations can be circumvented. Examples include:

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<sup>7</sup> UN Human Rights Committee, General Comment No. 25, on the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), (Fifty-seventh session, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para.27.

<sup>8</sup> “Is it fair to confirm the Party’s leadership in Constitution,” *People’s Army Newspaper Online*, February 21, 2013, <http://en.baomoi.com/Home/society/www.qdnd.vn/It-is-fair-to-confirm-the-Partys-leadership-in-Constitution/337773.epi> (accessed October 21, 2013).

<sup>9</sup> “VPA objectively needs Party’s leadership,” *People’s Army Newspaper Online*, March 15, 2013, <http://en.baomoi.com/Home/society/www.qdnd.vn/VPA-objectively-needs-Partys-leadership/342662.epi> (accessed October 20, 2013); “The Party is selected to lead Vietnamese revolution,” *People’s Army Newspaper Online*, March 8, 2013, <http://en.baomoi.com/Home/society/www.qdnd.vn/The-Party-is-selected-to-lead-Vietnamese-revolution/341147.epi> (accessed October 21, 2013).

<sup>10</sup> “Is it unfair to impose alien views on Vietnam,” *People’s Army Newspaper Online*, March 8, 2013, <http://en.baomoi.com/Home/society/www.qdnd.vn/It-is-unfair-to-impose-alien-views-on-Vietnam/341146.epi> (accessed October 21, 2013).

- Draft article 15 states that “human rights and citizens’ rights are recognized, respected, protected and guaranteed by the state and the society according to the Constitution and law,” but then goes on to say that they can be “restricted in the case of necessity for the purpose of national defense, national security, social order, social safety, ethics and the community’s health.” Given Vietnam’s regular crackdowns on the peaceful exercise of rights such as freedom of expression, association and peaceful assembly—on broadly based grounds of national security or public order—the positive provisions in article 15 are easily open to being undermined by the exceptions, leaving citizens with little constitutional protection against arbitrary arrest.
- Draft article 23 states that individuals have the rights to personal privacy, including personal information and personal communication, but allows “the opening, control and seizure” of personal communications whenever “stipulated by law.”
- Draft article 24 states that individuals have the right to freedom of movement inside and outside the country, but this can be overridden by “provisions of the law.”
- Draft article 25 states that “the citizen shall enjoy freedom of belief and of religion,” but only if he or she does not “misuse beliefs and religions to contravene” unspecified laws.
- Draft article 26 states that “the citizen shall enjoy freedom of opinion and speech, freedom of the press, the right to be informed, and the right to assembly, form associations and hold strikes,” but then states that these fundamental rights are subject to “provisions of the law.”

## **V. Weak Guarantees of Independence of the Judiciary and Constitutional Council**

One of the pillars of a right-respecting society is an independent judiciary. As the UN Human Rights Committee has stated in a General Comment, “The requirement of competence, independence and impartiality of a tribunal ... is an absolute right that is not subject to any exception.”<sup>11</sup>

Since the founding of the Socialist Republic of Vietnam, the judiciary has not been independent. Instead, it has been an organ of the Communist Party.

While activists had hoped that steps would be taken to allow the judiciary to act independently, the official Vietnam News Agency has stated that the current draft Constitution is “basically perpetuating the provisions of the 1992 Constitution” regarding

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<sup>11</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

the judiciary.<sup>12</sup> While the draft uses the same language as the 1992 Constitution and says that during trials judges “are independent and shall only obey the law” (old article 130/draft article 108), this language has never guaranteed the independence of the judiciary.

The draft Constitution contains no provisions that would prevent the Communist Party or other authorities from exercising effective control over judicial decisions and judges. For example, under draft article 75 the National Assembly continues to have the power to elect and remove the president of the Supreme Court (whose tenure coincides with that of the assembly) and to approve the appointment and removal of all other Supreme Court judges. The Supreme Court continues to report to the National Assembly, which also still regulates the organization and operation of courts at all levels and has the power to abrogate all formal written documents from the Supreme Court if it deems them contrary to the law, the Constitution or the National Assembly’s resolutions. According to draft article 93, the president has the power to propose to the National Assembly to elect or remove the chief justice of the Supreme Court and, “based on resolutions of the National Assembly, to appoint, release from duty, dismiss” other Supreme Court judges. The president also enjoys the power to appoint and remove judges of other courts. Under draft article 109, the Supreme Court reviews the judicial conduct of other courts, but draft article 110 provides that local courts report to the local administration under people’s councils of the Communist Party. In these and other ways, the courts are subordinated to political entities controlled by the Communist Party.

## **VI. Key Recommendations to the National Assembly**

### **1. Guarantee Independence of the Judiciary**

The Constitution should incorporate the standards elaborated in the UN Basic Principles on Independence of the Judiciary<sup>13</sup> and the Bangalore Principles of Judicial Conduct.<sup>14</sup> In particular, the Constitution should provide that the “judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any

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<sup>12</sup> “Draft constitution presser pushes judicial reform,” *Vietnam*, February 22, 2013, <http://en.vietnamplus.vn/Home/Draft-Constitution-pushes-judicial-reform/20132/31895.vnplus> (accessed October 21, 2013).

<sup>13</sup> UN Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985). <http://www2.ohchr.org/english/law/indjuciary.htm> (<http://www.unrol.org/doc.aspx?d=2248>).

<sup>14</sup> Bangalore Principles of Judicial Conduct of 2002, reproduced in Report of the Special Rapporteur on the Independence of Judges and Lawyers, Annex, U.N. Doc. E/CN.4/2003/65 (Jan. 10, 2003), [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).



restrictions, improper influences, inducements, pressures, threats or inferences, direct or indirect, from any quarter for any reason.”<sup>15</sup>

The Constitution should also provide that “in the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status,” and that “judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties” according to “established standards of judicial conduct,” and generally as part of a process “subject to an independent review.”<sup>16</sup>

The Constitution should include mechanisms that will effectively shield judges from Party or other external political pressures in their appointment, discipline and assignment to cases. Political authorities should not have decisive powers over their careers. The objective should be to ensure real adherence to the requirement of article 14 of the ICCPR that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.” To this end, the Constitution should include an explicit clause that judges should interpret the law, including the Constitution, in a way that is consistent with international human rights law.

The independence of the proposed Constitutional Council and its members should be guaranteed by similar constitutional provisions. Finally, the Constitutional Council should allow individuals to challenge the constitutionality of laws on the occasion of disputes before courts and to challenge court judgments on the grounds that they are contrary to the rights and freedoms guaranteed by the Constitution.

## **2. Guarantee Freedom of Thought, Conscience, Religion and Belief**

The Constitution should specify that any limitations on freedom of thought, conscience, religion, and belief are consistent with international law. Article 18 of the ICCPR states that these freedoms may be subject to restrictions to protect public safety, order, health or morals. But as the UN Human Rights Committee has made clear in its General Comment on the right to thought, conscience and religion, these restrictions must “not be applied in a manner that would vitiate the rights guaranteed.”<sup>17</sup> The Human Rights Committee has stated that freedom of thought, conscience, religion or belief must be “protected

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<sup>15</sup> UN Basic Principles on the Independence of the Judiciary, principle 2.

<sup>16</sup> Bangalore Principles of Judicial Conduct of 2002.

<sup>17</sup> UN Human Rights Committee, General Comment 22: Article 18 on the right to thought, conscience and religion, (Forty-eighth session, 1993), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), para. 8.  
<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument>.

unconditionally” and cannot be derogated from, even in time of public emergency.<sup>18</sup> The terms “belief” and “religion” are to be “broadly construed” and not be limited in “application to traditional religions or to religious beliefs with institutional characteristics or practices analogous to those of traditional religions.”<sup>19</sup> In addition, “the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts,” including “the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays.”<sup>20</sup> This also includes the freedom of believers “to choose their religious leaders, priest and teachers” and to “distribute religious texts or publications.”<sup>21</sup>

### **3. Guarantee Freedom of Expression**

The Constitution should ensure that any restrictions on freedom of opinion or expression are limited. As the UN Human Rights Committee has explained in its General Comment on freedom of expression, any restrictions on the exercise of freedom of expression “may not put in jeopardy the right itself.”<sup>22</sup> The Constitution should provide that the right to freedom of expression includes “political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching a religious discourse”<sup>23</sup>; that exercise of this right requires the existence of “a free, uncensored and unhindered press or other media” (including the Internet)<sup>24</sup>; and that the rights of opinion and expression are accompanied by a right of access to information, including records held by a public body.<sup>25</sup>

### **4. Guarantee Freedom from Arbitrary Arrest or Detention**

Article 9 of the ICCPR prohibits arbitrary arrest and detention. The Constitution should restore language from article 71 of the 1992 Constitution to require a warrant issued by an independent tribunal before an arrest is made, except in cases of *flagrante delicto*. In addition, the Constitution should provide that anyone arrested or detained “shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” Persons arrested on a criminal charge shall “be brought promptly before a judge” and be entitled to contest the lawfulness of their detention. Although there is no set definition of “promptly” under international law, many states require under their constitution that an individual be brought before a judge within 48

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<sup>18</sup> Ibid., paras. 1 & 3.

<sup>19</sup> Ibid., para. 2.

<sup>20</sup> Ibid., para. 4.

<sup>21</sup> Ibid.

<sup>22</sup> UN Human Rights Committee, General Comment No. 34, Article 19 on the rights to expression and opinion, September 12, 2011, CPPR/C/GC/34, para. 21 <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>23</sup> Ibid., para. 11.

<sup>24</sup> Ibid., para. 13.

<sup>25</sup> Ibid., paras. 18-19.

hours. Pre-trial detention shall not be the general rule, but release may be subject to guarantees to appear for trial.<sup>26</sup>

## **5. Prohibit Use of Coerced Statements in Court**

Amended article 22 prohibits the use of torture and other coercive practices. The UN Human Rights Committee in a General Comment stated that “It is important for the discouragement of violations under article 7 [of the ICCPR prohibiting torture and other ill-treatment] that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”<sup>27</sup> The draft constitution should specifically prohibit the use in court of testimony, confessions or other evidence obtained by torture or other cruel, inhuman or degrading treatment or punishment.

## **6. Guarantee the Prohibition on Forced Labor**

In addition to forced labor, the Constitution should explicitly prohibit slavery and human trafficking. To preclude ambiguities, the Constitution should incorporate language from the International Labour Organization Convention on Forced Labor (No. 29) specifying that the forced labor prohibited includes “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>28</sup>

## **7. Guarantee the Right to Democratic Elections**

The Constitution should give real effect to the right to the holding of periodic and genuine elections by universal suffrage and by secret ballot embodied in article 21 of the Universal Declaration of Human Rights and article 25 of the ICCPR.

These rights are elaborated in various UN standards. The landmark UN General Assembly resolution of December 4, 2000 on “Promoting and consolidating democracy” recognized an “indissoluble link between human rights as enshrined in the Universal Declaration of Human Rights and in the international human rights treaties and the foundation of any democratic society,” that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing,” and that democracy requires “developing, nurturing and maintaining an electoral system that provides for the

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<sup>26</sup> ICCPR, art. 9.

<sup>27</sup> UN Human Rights Committee, General Comment 20 on Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), para. 12.

<sup>28</sup> International Labour Organization, Convention No. 29 Concerning Forced or Compulsory Labour, June 28, 1930, entry into force May 1, 1932, art. 2(1), [http://www.ilo.org/dyn/normlex/en/?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:Co29](http://www.ilo.org/dyn/normlex/en/?p=1000:12100:0::NO::P12100_ILO_CODE:Co29).

free and fair expression of the people’s will through genuine and periodic elections.” To such ends, the resolution called upon states to promote and consolidate democracy, including by “promoting pluralism.”<sup>29</sup>

On April 23, 2002, the former UN Commission on Human Rights, considering that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing,” affirmed that to be “free and fair” and thus genuine, elections “must be part of a broader process that strengthens democratic principles, values, institutions, mechanisms and practices, which underpin the rule of law.” In this context, it provided a non-exhaustive list of the “essential elements of democracy,” which included “a pluralistic system of political parties and organizations.”<sup>30</sup>

More recently, on April 19, 2012, the UN Human Rights Council resolution reaffirmed “that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.” It reiterated that “democracy includes respect for all human rights and fundamental freedoms, inter alia, freedom of association and of peaceful assembly, freedom of expression and opinion” and “to vote in a pluralistic system of political parties and organizations” in “free and fair elections” under guarantees of “respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration and decision-making and free, independent and pluralistic media.” It further specified that, in such elections, “persons entitled to vote must be free to vote for any candidate for election and free to support or to oppose government, without undue influence or coercion of any kind that may distort or inhibit the free expression of the elector’s will.” The resolution highlighted “the crucial role played by political parties in opposition in the proper functioning of a democracy.”<sup>31</sup>

In this regard, draft article 121 of the Constitution should state that the National Election Commission will be an independent and impartial body established to conduct genuine periodic national elections. Its members must be fully independent and not under the authority or control of any political party.<sup>32</sup>

## **Conclusion: Whose Rights Should the Constitution Protect?**

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<sup>29</sup> UN General Assembly, “Promoting and consolidating democracy,” Resolution 55/96, A/RES/55/96, adopted December 4, 2000, preamble, art. 1(a) & d), [http://www.demcoalition.org/pdf/55unga\\_promotion\\_democ.pdf](http://www.demcoalition.org/pdf/55unga_promotion_democ.pdf).

<sup>30</sup> UN Commission on Human Rights, “Further measures to promote and consolidate democracy,” Resolution 2002/46, E/CN.4-RES/2002/46, adopted April 23, 2002, preamble, arts. 1 & 3.

<sup>31</sup> UN Human Rights Council, “Human rights, democracy and the rule of law,” Resolution 19/36, A/HRC/RES/19/36, March 23, 2012, preamble, arts. 1, 2 and 6.

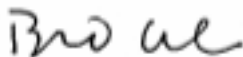
<sup>32</sup> UN Office of the High Commissioner for Human Rights, “Compilation of documents or texts adopted and used by various intergovernmental, international, regional and subregional organizations aimed at promoting and consolidating democracy,” nd,

Many of the constitutional shortcomings appear to reflect a mistaken official perspective on human rights, according to which all powers and rights naturally vest in governments, which then allocate them to citizens, rather than that powers and rights naturally vest in individual human beings. According to a media report dated March 19, 2013, an official of the Ministry of Home Affairs' Institute of Science of State Organization, speaking at a meeting on "human and citizen rights," affirmed that this view is reflected in the draft constitution. He said that "civil and political rights are not really considered as the basic inherent rights of people, but as rights that are set up and oriented by the State."<sup>33</sup> According to another media report, the Ministry of Justice agreed with the notion that the Constitution should not set forth general human rights principles if they are too "sensitive" or the authorities may not be willing to implement them in practice, and that instead more should be left to discretionary law.<sup>34</sup>

Such perspectives create opportunities for violations of human rights, the prevention of which requires recognition of the universal principle that respecting human rights necessarily means imposing limitations on the powers of the state, ruling political authorities, the executive branch, the armed forces and other security forces.

Mr. Chairman, you and your colleagues in the National Assembly stand at a historic crossroads. You can force through a constitution that fails to protect the basic rights of the Vietnamese people. Or you can embrace a reform agenda that protects basic rights and freedoms. To do this, the National Assembly will have to engage in a genuine consultation with all sectors of Vietnamese society, including those peacefully advocating reforms, and with United Nations and other international human rights experts and organizations about how to formulate a constitution that will truly advance human rights in Vietnam. We urge you and the National Assembly to do everything in your power to put Vietnam on the path to real and tangible progress in protecting human rights.

Yours sincerely,



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<sup>33</sup> "Constitutional changes draw comments on human rights," *Vietnam News*, March 19, 2013, <http://en.baomoi.com/Home/society/vietnamnews.vn/Constitutional-changes-draw-comments-on-human-rights/343121.epi> (accessed October 21, 2013).

<sup>34</sup> "Constitution: Just fixing 'ripe' issues," *Vietnam.net*, March 12, 2013, <http://en.baomoi.com/Home/society/english.vietnamnet.vn/Constitution-Just-fixing-ripe-issues/346852.epi> (accessed October 21, 2013).