

ACCESS TO JUSTICE FOR CHILDREN: VIETNAM

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Constitution of Vietnam¹ does not establish the position of international treaties in the hierarchy of domestic laws, however, the Law on Conclusion, Accession to and Implementation of appears to suggest that ratified treaties have the power of law.²

B. Does the CRC take precedence over national law?

Yes, under the Law on Conclusion, Accession to and Implementation of Treaties, in cases where a treaty and a domestic Vietnamese law contain different provisions on the same matter, the provisions of the treaty prevail.³ The same is provided in the Law on Child Protection, Care and Education 2004.⁴

C. Has the CRC been incorporated into national law?

It appears that the Convention is incorporated by virtue of being ratified. A report submitted by the State to the UN Committee on the Rights of the Child states that ratified international treaties, such as the CRC are considered an integral part of Vietnamese legislation.⁵

Furthermore, some provisions are incorporated in other specific legislation, such as the Marriage and Family Law,⁶ the Law on Child Protection, Care and Education of Children and the Civil Code.⁷

D. Can the CRC be directly enforced in the courts?

¹ Constitution of Vietnam, available at: <http://www.na.gov.vn/htx/English/C1479/>.

² Law on Conclusion, Accession to and Implementation of Treaties 2005, available at: http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Vietnam_Law_on_Accession-Conclusion-and-Implementation-of-Treaties.pdf.

³ Law on Conclusion, Accession to and Implementation of Treaties, Article 6.

⁴ Available at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=84243.

⁵ *Second periodic report of Vietnam to the UN Committee on the Rights of the Child*, CRC/C/65/Add.20, 5 July 2002, at para. 22, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f65%2fAdd.20&Lang=en.

⁶ Available at: http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=373.

⁷ Representing Children Worldwide, *Vietnam*, available at: <http://www.law.yale.edu/rcw/rcw/jurisdictions/asse/vietnam/frontpage.htm>.

In theory, courts should be able to cite and enforce the CRC since it forms part of national law.

- E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Research did not identify any case from the national courts which cites the CRC.

II. What is the legal status of the child?

- A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Yes, children through their representatives can bring cases to challenge violations of their rights, subject to the provisions referred to in part II.B.

- B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Children under six years of age have no civil procedural capacity, meaning they have no right to authorise a lawful representative to participate in civil procedures on their behalf.⁸ Children between six and 18 years of age can only bring cases through a lawful representative, but they have the right to authorise their representatives to act on their behalf.⁹ Children between the ages of fifteen and eighteen years old must also generally be represented, except in relation to labour or property law cases in their own name, where they have the right to participate, but the court may nonetheless choose to involve their parent.¹⁰

The term 'lawful representative' is not defined, but it is used independently from the term 'custodian' and, although parents are the default representatives of their children, children are permitted to have other persons as their representatives at law.¹¹ Since the term 'lawful representative' is used in other places in the Civil Procedures Code to mean attorneys or officers for organisations, these abovementioned provisions should be interpreted to mean that children cannot bring cases pro se, but can do so with an attorney.

- C. In the case of infants and young children, how would cases typically be brought?

As previously stated in part II.B, children under six years of age have no civil procedural capacity, meaning the child has no right to authorise their

⁸ Civil Procedures Code 2004, Article 57(4), available at:

http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=7842.

⁹ Civil Procedures Code 2004, Article 57(5).

¹⁰ Civil Procedures Code 2004, Article 57(6).

¹¹ The Marriage and Family Law 2000, Article 39, available at:

http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=373.

lawful representative to participate in civil procedures. In such cases, parents and guardians have the responsibility to represent children in civil transactions and legal actions to protect their rights and interests or a court can assign an individual or an organisation as the guardian of a child who has no parents.¹²

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Vietnam has two separate government agencies that provide free legal assistance to people with low income, people belonging to ethnic minorities, and certain other groups. The National Legal Aid Agency provides free representation to individuals or households with an income level below a certain threshold (depending on the Province).¹³

Pursuant to the Law on Legal Aid,¹⁴ legal aid may be requested by a legal representative on behalf of a child.¹⁵

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

Research did not identify any further limitations.

III. **How can children's rights violations be challenged before national courts?**

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

For a violation of any constitutional or other legal right, either the individual or a relevant organisation authorised by a specific law can bring a civil action against the violating party; for example, the People's Procuracy, child protection and care committees, and the women's unions could challenge violations of children's rights.¹⁶ The civil courts have jurisdiction over disputes concerning nationality, property ownership and inheritance, civil contracts, compensation for non-contractual damage, and others¹⁷ as well as jurisdiction over matters regarding recognition of custodians for children and restrictions of parental rights.¹⁸

¹² Civil Procedures Code 2004, Article 103.

¹³ Ly, Ta Thi Minh, *Expanding the Participation of Vietnamese Non-governmental Organisations in Legal Aid*, Fellow's Paper, Weatherhead Center for International Affairs, Harvard University, 2003, available at: <http://programs.wcfia.harvard.edu/fellows/files/ly.pdf>.

¹⁴ Law on Legal Aid 2006, available at:

http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=4753.

¹⁵ Law on Legal Aid, Article 11(1).

¹⁶ The Marriage and Family Law 2000, Articles 42 and 55.

¹⁷ Civil Procedures Code 2004, Article 25, available at:

http://vbqpp1.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=7842.

¹⁸ Civil Procedures Code 2004, Article 28.

Individuals and organisations can bring complaints regarding written decisions made by various state organisations, such as ministries, agencies, or procuracies to the Administrative Court.¹⁹ Minors can only exercise their procedural rights in such administrative cases through a representative.²⁰

B. What powers would courts have to review these violations, and what remedies could they offer?

People's Courts of relevant provinces, which have general jurisdiction over civil suits, can grant a number of remedies: an individual challenging a violation of civil rights can request a court to (1) officially recognise his/her civil rights, (2) order the termination of the act of violation, (3) order a public apology, (4) order a performance of a civil obligation, and (5) order compensation for damages.²¹ The same remedies are available in administrative cases.²²

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Research did not identify any legal provision permitting that a civil case is brought on behalf of an unidentified victim. However, this might be possible in administrative cases, as the Ordinance on Procedures for the Settlement of Administrative Cases, only requires that the administrative act complained is against the law and does not require specific victims to be named.²³

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The Civil Procedures Code allows a court to join cases together if doing so would ensure compliance with law.²⁴ However, since such merger would first require separate filings of individual cases, a class-action lawsuit which does not involve naming the individual victim would not be possible.

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Research did not identify any legal provision allowing NGOs to intervene in or to represent a child in civil law court proceedings. However, the Ordinance on the Procedures for the Settlement of Administrative Cases allows any individual, organisation or a state agency to challenge any written administrative action, which means the NGOs could in theory challenge laws

¹⁹ Ordinance on the Procedures for the Settlement of Administrative Cases 1996, Articles 5 and 11, available at: <http://www.wipo.int/edocs/lexdocs/laws/en/vn/vn055en.pdf>

²⁰ Ordinance on the Procedures for the Settlement of Administrative Cases 1996, Articles 20.2.d and 21.

²¹ Civil Code 2001, Article 9.2, available at: http://vbqpp.moj.gov.vn/vbqpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595.

²² Ordinance on the Procedures for the Settlement of Administrative Cases 1996, Article 3.

²³ Ordinance on the Procedures for the Settlement of Administrative Cases 1996, Article 4.

²⁴ Civil Procedures Code 2004, Article 38.

and administrative actions which infringe children's rights.²⁵

Nonetheless, it must be noted that establishing a non-governmental organisation is particularly difficult, as the formation of new associations is highly regulated and overseen, and the Ministry of Home Affairs wields wide discretion over the conditions for establishing new associations.²⁶ Furthermore, non-governmental organisations are explicitly prohibited from working in the areas such as economic policy, public policy, and other political issues.²⁷ As such, it is difficult for non-governmental organisations to bring challenges to violations of the rights of a child if such violation has relation to Vietnam's economic or public policy.

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Vietnam does not operate a specialised court for family and juvenile criminal matters,²⁸ although the Supreme People's Court has conducted a study and concluded that a specialised family and juvenile court system is necessary.²⁹

Civil case are typically filed in a provincial People's Court which is the court of general jurisdiction that can hear any civil disputes. If the case is administrative in nature, "the People's Court of the district, provincial capital or the city under the province" handles the first instance procedures for complaints against administrative decisions of agencies in the same district or province. The People's Court of the central province handles challenges against actions of the central government, including the ministries, the Supreme People's Procuracy, National Assembly, the President, etc.

The initial petition in any civil case requires the contents as listed in the Civil Procedures Code, such as the court of filing, names and addresses of the parties and their legal representatives, and the specific matters requested to be settled.³⁰

In the criminal justice system, the Penal Code provides general guidance as to the courts of first instance for juvenile matters, prescribing relatively lenient penalties as well as the state priorities in education and rehabilitation.

²⁵ Ordinance on the Procedures for the Settlement of Administrative Cases 1996, Article 1.

²⁶ Mark Sidel, 'Maintaining Firm Control: Recent Developments in Nonprofit Law and Regulation in Vietnam', (2010) 12(3) *International Journal of Not-for-profit Law*, 52, at p. 63, available at: http://www.icnl.org/research/journal/vol12iss3/ijnl_vol12iss3.pdf.

²⁷ *Id.* at 60 (explaining the impact of Decision 97/2009 and the recent crack-down of particular organisations that partake in policy commentary and criticism).

²⁸ UNICEF, *Consultancy Notice CP 2013-01- Technical support to development of Project on Establishment of Family and Juvenile Court in Viet Nam*, available at: http://www.unicef.org/eapro/Consultancy_Notice_Viet_Nam_Mar_13.pdf

²⁹ *Id.*, p.1.

³⁰ Civil Procedures Code 2004, Article 312.

³¹ The Criminal Procedure Code also sets forth procedural rules for arrest, custody, and the defense of minors in juvenile criminal proceedings, including the participation of families, schools, and youth unions.³²

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

Persons in financial difficulty can be exempted, in whole or in part, from paying court costs at the Court's discretion.³³ Also, since a "social organisation which starts a legal action for public interest" is explicitly exempted from having to pay court charges, a non-government organisation can expect to pay no court charges.³⁴

Furthermore, the Ministry of Justice operates a legal aid agency that provides free legal aid to certain groups of people, including lower income and ethnic minority groups.³⁵

Defendants in criminal proceeding have the right to ask other persons to defend them, but they do not have the right to free legal assistance.³⁶

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Various political-social organisations provide pro bono legal aid in Vietnam, the main ones include the Lawyers' Association, Vietnam Trade Union, Bar Association, the Women's Union, and the Youth's Union, among others. Local Lawyers' Associations and Bar Associations.³⁷ In addition, several international non-governmental organisations have been cooperating with governmental legal aid agencies to provide further funding and other resources. Notably, Save the Children Sweden (Radda Barnen) supports the Legal Aid Center in Hanoi.³⁸

³¹ Penal Code 1999, Chapter 10, available at:

http://www.moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=610.

³² Criminal Procedure Code 2003, Chapter 32, available at:

http://www.moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=8236.

³³ Decree No.70-CP of 12 June 1997 on Court Charges and Fees, Article 13, available at:

http://www.moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=2440.

³⁴ *Id.*

³⁵ Ly, Ta Thi Minh, *Expanding the Participation of Vietnamese Non-governmental Organisations in Legal Aid*.

³⁶ Criminal Procedure Code 2003, Article 50.

³⁷ Ly, Ta Thi Minh, *Expanding the Participation of Vietnamese Non-governmental Organisations in Legal Aid*, at pages 36-39.

³⁸ *Id.*, p. 27.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The Civil Code and Civil Procedures Code provide that the statute of limitations for civil disputes is two years from the date the legitimate rights and interests of the individual(s) were infringed upon; for violations of children's rights, their representatives must also bring a complaint within two years of the occurrence.³⁹ However, an exception to the general two-year rule provides that, there is no statute of limitations for civil transactions contrary to "provisions of law or contravening social ethics", since they are deemed invalid.⁴⁰

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The rules on evidence are contained in the Civil Procedure Code. A wide range of materials may be presented as evidence, including written documents, testimony, expert testimony, appraisals and other exhibits.⁴¹

Testimony by children must be heard in the presence of their representatives at law or guardians.⁴² All civil and administrative cases are carried out publicly, however, the court may conduct the trial in secret "at legitimate requests of the involved parties."⁴³

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Administrative cases have strict timelines set forth in the ordinance. Within 7 days from the registration of the case, the court must notify the defendant, who then has 15 days to answer the petition. The judge must open the trial within 90 days. From then, the court must have an open session within 30 days.⁴⁴ Therefore, it would take a maximum of 142 days from the registration of the case to having an open court session. After the presentations in the courtroom, the judges or the jurors have up to 5 days to deliberate.⁴⁵ As such, one can expect to reach a final decision by a court in 147 days, assuming that no delays occur.

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Appeal applications must be submitted within 15 days of the court of first-instance issuing its judgment, and must specify the sections of the judgment which are being contested and the grounds for the appeal. In

³⁹ Civil Code 2001, Articles 129-136 and Civil Procedures Code, Articles 157-160.

⁴⁰ Civil Code 2001, Article 129.

⁴¹ Civil Procedure Code 2004, Article 82.

⁴² Civil Procedure Code 2004, Article 86 and 87.

⁴³ Civil Procedure Code 2004, at Article 15.

⁴⁴ Ordinance on the Procedures for the Settlement of Administrative Cases 1996, Article 37.

⁴⁵ Civil Procedures Code 2004, Article 236.

addition to the parties involved with the dispute, the procuracies have the right to contest any decision of a civil dispute and intervene at the appellate level. Since Vietnam has a two-tier court system, the appellate court issue the final judgment.⁴⁶ The appellate litigation procedures are set forth in the Civil Procedure Code.⁴⁷

- H. **Impact.** What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Since precedents do not have any effect of law in Vietnam and are rarely published, negative decisions do not have long term impact for other cases. However, the Constitution of Vietnam does not set up a truly independent court system – the National Assembly has unitary power to appoint, suspend, and remove every officer of the government, including the Chief Justice of the Supreme People’s Court.⁴⁸ Also, local People’s Court judges can be dismissed by an agreement by the Chief Judge of the Supreme People’s Court and the local People’s Council, which creates further doubt concerning the independence of local judges against the acts of local governments.⁴⁹ As such, it is highly unlikely for a litigant to obtain a positive decision if such decision would be contrary to the Vietnamese government’s policy.

- I. **Follow up.** What other concerns or challenges might be anticipated in enforcing a positive decision?

In any administrative case, the Prime Minister has the right to ask the Supreme People’s Court and the Supreme People’s Procuracy to revise and settle the case, then report back to the him within 30 days.⁵⁰ This provision essentially nullifies any challenge against the state action if the central administration condones such state action. As such, any high-impact, high-profile decisions may – legally – face invalidation at the discretion of the state.

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

It must be noted that the Vietnamese Penal Code forbids almost all arrays of conducts that display criticism of the Communist Party of Vietnam, regardless of how peaceful or otherwise lawful the form of the conduct may be.⁵¹ As such, there may be some risk of facing criminal charges for the

⁴⁶ Globalex, *Vietnam Legal Research*, available at: http://www.nyulawglobal.org/globalex/Vietnam.htm#_Judicial_System.

⁴⁷ Civil Procedures Code 2004, Chapter 15.

⁴⁸ Constitution of Vietnam, Article 84(7).

⁴⁹ Law on Organisation of the People’s Courts 2002, Article 40, available at: http://vbqpp1.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10226.

⁵⁰ Ordinance on the Procedures for the Settlement of Administrative Cases, Article 8.

⁵¹ Penal Code 1999, Articles 79 (Activities aiming at overthrowing the People’s Government), 87 (Undermining the Unity Policy), and 258 (Abusing democratic freedoms to infringe upon the interest of the State, the rights and legitimate interest of organisations and citizens).

individual attorneys and/or the organisations that bring legal challenges against violations of a child’s rights, if such violations arise from state actions. Furthermore, Freedom House reports that many lawyers “reluctant to take on human rights and other sensitive cases for fear of harassment and retribution—including arrest—by the state.”⁵²

This report is provided for educational and informational purposes only and should not be construed as legal advice.

⁵² Freedom House, *Freedom in the World 2014: Vietnam*, available at: <http://www.freedomhouse.org/report/freedom-world/2014/vietnam-0#.VFDXNK1CHtQ>.