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# Rule of Law for Human Rights in the Asean Region: A Base-line Study



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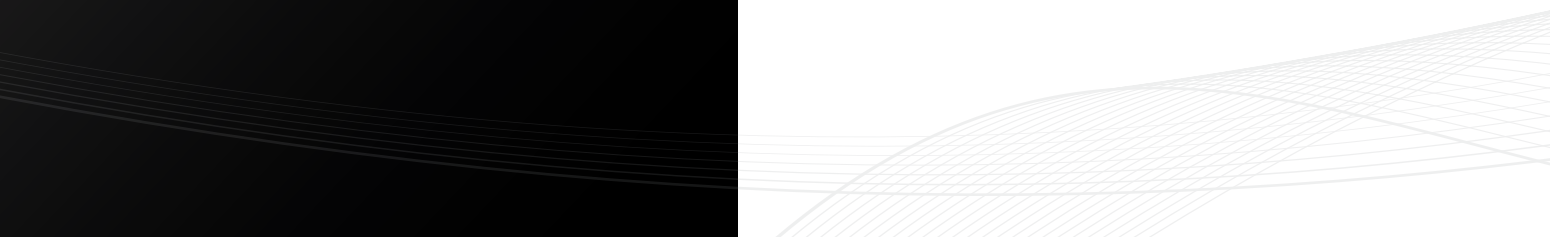


# The Socialist Republic of Vietnam



# Vietnam

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## Snapshot Box

Country Name	Socialist Republic of Vietnam
Capital city:	Hanoi
Independence:	1945
Historical Background:	<p>The Vietnamese trace the origins of their culture and nation to the fertile plains of the Red River Delta in northern Vietnam. After centuries of developing a civilisation and economy based on the cultivation of irrigated rice, in the tenth century the Vietnamese began expanding southward in search of new rice lands. Until the mid-nineteenth century, the Vietnamese gradually moved down the narrow coastal plain of the Indochina Peninsula, ultimately extending their reach into the broad Mekong River Delta. Vietnamese history is the story of the struggle to develop a sense of nationhood throughout this narrow, 1,500-kilometer stretch of land and to maintain it against internal and external pressures.</p> <p>China was the chief source of Vietnam's foreign ideas and the earliest threat to its national sovereignty. As a result of a millennium of Chinese control beginning in about 111 BC, the Vietnamese assimilated Chinese influence in the areas of administration, law, education, literature, language, and culture. Even during the following nine centuries of Vietnamese independence, lasting from the late tenth century until the second half of the nineteenth century, the Chinese exerted considerable cultural, if not political, influence, particularly on the elite.</p> <p>The conquest of Vietnam by France began in 1858 and was completed by 1884. It became part of French Indochina in 1887. Vietnam declared independence after World War II, but France continued to rule until its 1954 defeat by Communist forces under Ho Chi MINH. Under the Geneva Accords of 1954, Vietnam was divided into the Communist North and anti-Communist South. US economic and military aid to South Vietnam grew through the 1960s in an attempt to bolster the government, but US armed forces were withdrawn following a cease-fire agreement in 1973. Two years later, North Vietnamese forces overran the South reuniting the country under Communist rule. Despite the return of peace, for over a decade the country experienced little economic growth. Since the enactment of Vietnam's "Doi moi" (Renovation) policy in 1986, Vietnamese authorities have committed to increased economic liberalisation and enacted structural reforms needed to modernise the economy and to produce more competitive, export-driven industries.</p>
Size:	Vietnam is located in the Indochinese peninsula of Southeast Asia and occupies about 331,688 square kilometres. The S-shaped country has a north-to-south distance of 1,650 kilometres and is about 50 kilometres wide at the narrowest point.
Land Boundaries:	China, Laos, Cambodia
Population:	85.8 millions (National 2009 Census), 49.4% (men), 50.6 % (women)
Demography:	<p>0-14 years: 26.1% (male 12,069,408/female 11,033,738)</p> <p>15-64 years: 68.3% (male 30,149,986/female 30,392,043)</p> <p>65 years and over: 5.6% (male 1,892,505/female 3,039,078) (2010 est.)</p>
Ethnic Groups:	54 ethnic groups. The Kinh ethnic group equals 73.594 million people (account for 85.7%) while 12.253 million people (14.3%) belong to other ethnic groups.
Languages:	Vietnamese (official), English (increasingly favoured as a second language), some French, Chinese, and Khmer; mountain area languages (Mon-Khmer and Malayo-Polynesian)
Religion:	Buddhist 9.3%, Catholic 6.7%, Hoa Hao 1.5%, Cao Dai 1.1%, Protestant 0.5%, Muslim 0.1%, none 80.8% (1999 census)
Education and Literacy:	Literacy rate for the population aged 15 years and over increased by 3.7 percentage points (from 90.3% in 1999 to 94.0% in 2009). There are only nearly four million people who have never attended school (5.0% of the total population aged 5 years and over) (2009 Census)
Welfare:	the poverty rate in Vietnam has been reduced by more than half, from 58.1% in 1993 to 14.5% in 2008. The food poverty rate reduced by 2/3, from 24.9 to 6.9%.

**Gross Domestic Product (GDP):** Between 2001 and 2010, the average GDP growth rate per annum was 7.2 percent. The average GDP per capita in 2010 is expected to reach 1,200USD which would be three times that of 2000. Vietnam is now considered a lower middle income country.<sup>i</sup>

**Government Overview:**

**Executive Branch:** The Vietnamese President functions as head of state and also serves as the nominal commander of the armed forces and chairman of the Council on National Defense and Security. The Prime Minister of Vietnam heads a cabinet currently composed of three deputy prime ministers and the heads of twenty-six ministries and commissions, all confirmed by the National Assembly.

**Legislative Branch:** The National Assembly (or Quoc Hoi, having 493 seats and members elected by popular vote to serve five-year terms) is the highest representative body of the people and the only organisation with legislative powers.

**Judicial Branch:** At the apex of the judiciary of Vietnam is the Supreme People's Court of Vietnam (SPC), which is the highest court for appeal and review. The SPC reports to the National Assembly of Vietnam, which controls the judiciary's budget and confirms the president's nominees to the SPC and Supreme People's Procuracy of Vietnam. The Supreme People's Procuracy holds the authority to issue arrest warrants. Below the SPC are district and provincial people's courts, military tribunals, and administrative, economic, and labour courts. The people's courts are the courts of first instance. The Ministry of Defense (MOD) has military tribunals, which have similar rules to the civil courts

**Membership in International Organisations and Human Rights Human Rights Treaties ratified & incorporated by local legislation**

Vietnam is a party to five of the nine major international human rights treaties and has signed some others (see Part B).

## Overview

### Foundation, Evolution and Interpretation of the 'Rule of Law'

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In Vietnam, the rule of law must be understood in the context of a long history of foreign influence and struggle for self-determination. The main influence in pre-colonial history came from China, which ruled it during the first millennium AD, and continued to have considerable influence until the 19th century when France occupied Vietnam as the colonial power.

Confucian ideas supported the practice that virtuous morality would make laws unnecessary, and this suited a pre-colonial state with little ability to exert centralised control. Nearly a century of French rule (1867-1954) brought its own ideas of rule of law, but laws were geared towards the maintenance of colonial administration.<sup>ii</sup> Revolutionary changes in Republican France also introduced liberal ideas such as legal equality, liberty, religious freedom, freedom of speech, and these were eventually assimilated into anti-colonial struggles.<sup>iii</sup>

The third wave of influence came at independence of the Communist north, which purged the French-educated

lawyers and judiciary, and introduced Soviet-educated legal practitioners. The explicit role for the Communist Party as leader of the state under the Constitution was a direct result of Vietnam's war for independence. The Third Party Congress of 1960 formally adopted the Soviet socialist legality doctrine (*sotsialisticheskaia zakonnost*). This doctrine suggested that "law is part of the 'superstructure,' which reflects the 'will of the ruling class' (*ly chi cua giai cap thong tri*) and their domination over the means of production."<sup>iv</sup> Nevertheless, scholars have opined that Confucian "virtue-rule" continued to exert its influence outside the state apparatus.

The concept of a "rule of law state" was discussed at the 2nd plenum of the Communist Party of Vietnam (CPV) Central Committee of the 7th Tenure in the process of making amendments to the 1980 Constitution. Since then, developing a "rule of law state" was identified as a principle for reforming the State apparatus.<sup>v</sup> In the 8th Party Congress, the term "the socialist rule of law state" replaced the notion of "dictatorship of the Proletariat" and was finally accepted and noted in policy reports of the CPV and at the 9th National Congress of the CPV in 2001. Accordingly, the concept of the "rule of law state" was stipulated in amendments to the 1992 Constitution in December 2001 and is enunciated in Article 12 of the Constitution.

The question arises as to how the concept of the “rule of law state” is understood in this context and how it relates to the principles of the rule of law, good governance, and human rights as articulated in the ASEAN Charter.

As one might expect given the context in which it developed in the 1980’s and 1990’s, the concept of the “rule of law” in Vietnam derives from its relation to the state’s ruling political ideology. While sharing the same basic terminology the understanding of the “rule” carries some different connotations to the Western notion that is usually linked to democratic principles of governance, as indicated in the following table:<sup>vi</sup>

Western “rule of law” concept	Socialist rule of law
Pluralist democracy	Non-pluralist democracy
Separation of state powers	Centralisation of state powers
The superiority of individual rights	Individual rights subordinate to social interests
Judicial independence	Judicial subordination
Freedom of information	Qualifications on freedom of information (Guaranteed by Article 69 of the Constitution but qualified in other decrees)
Access to justice principles	limited access to justice principles

However, a fourth wave of influence came as neo-liberal ideas began to exert pressure from the outside. Economic reforms were already needed by the 1980s as the state-led economy struggled to meet local needs. It thus began reforms known as *Doi Moi*, “Renovation” in 1986. The collapse of European Communist states further eroded external support for Vietnam, and it began to look increasingly to ASEAN countries for investment. This required fundamental shifts in attitude to private property (while rejecting liberal ideas from French law, that carried colonial baggage), and creating predictability and stability needed for the operation of a capitalist market economy. As Gillespie has said,

“Command economic thinking strongly influenced the first drafting committee convened during the early stages of *doi moi*. *Nha nuoc phap quyen* (law-based state) doctrines introduced in 1991 opened lawmakers to new Western thinking about legality. After the Party endorsed international economic integration in 2001, many of the remaining epistemological objections to Western legality evaporated.”<sup>vii</sup>

Today, Vietnam is still in the midst of reforming its laws, and the multiple layers of influence have come to represent a challenge for reform as incompatible notions may exist in each of the Confucian, French, socialist and neo-liberal legal frameworks. Since 1986, the Vietnamese government has said it enacted or revised some 13,000 laws and by-laws.<sup>viii</sup> Draft laws and ordinances of the National Assembly are open to public comment in the mass media, and Vietnam has asserted that its efforts have been commended by the United Nations and international partners.<sup>ix</sup>

Despite reforms, Resolution 8-NQ/TW issued in January 2002 continued to emphasise the primacy of Marxist-Leninist legal theories combined with Confucian virtue-rule. The private sector, different ministries and judicial departments may also have different attitudes and the conception of “rule of law” is not uniform in the country. The central research question raised by the ideological context of the concept of the “rule of law state” in Vietnam is how these conceptual differences impact the administration of justice and implementation of the rule of law in judicial practices and institutions.

### Key Rule of Law Structures

The “socialist rule of law state” in Vietnam embodies some key principles widely associated with the rule of law:<sup>x</sup>

- Supremacy of Constitution and law,
- Equality of all people before the law,
- Respect of human rights as well as community values and social order,
- Democratic centralisation of state powers.

## Human Rights Treaties

Vietnam is a party to 5 major international human rights treaties, including:

- the Convention on the Elimination of All Forms of Racial Discrimination (in force 4 January 1969), Vietnam acceded 9 Jun 1982, reserved Article 22)
- The International Covenant on Civil and Political Rights (ICCPR) (in force 23 March 1976), Vietnam acceded 24 Sep 1982.
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) (in force 23 March 1976), Vietnam acceded 24 Sep 1982.
- The Convention on the Elimination of All Forms of Discrimination against Women (in force 3 September 1981), Vietnam acceded 17 Feb 1982, reserved paragraph 1 article 29.
- The Convention on the Rights of the Child (in force 2 September 1990), Vietnam acceded 28 Feb 1990.

In addition, Vietnam acceded and signed some other important international human rights conventions, which include:

- the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (acceded 9 Jun 1981)

- the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 1968 (acceded 6 May 1983)
- the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (acceded 9 Jun 1981)
- The Convention on the Rights of Persons with Disabilities, signed 22 Oct 2007).

The major international human rights treaties which Vietnam have not been signed or ratified include:

- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (in force 1 July 2003)
- The International Convention for all persons from Enforced Disappearance (entry into force 23 December 2010).
- the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (in force 26 June 1987)

The Vietnam government has stated it is in the process of acceding to the Convention against Torture<sup>xi</sup> and considering ratification of the Rome Statute of the International Criminal Court.<sup>xii</sup> Domestic legal documents are promulgated or amended to incorporate Vietnam's obligations under international treaties to which it is a party so as not to hinder their implementation (Articles 3 and 82 of the 2008 Law on the Promulgation of Legal Normative Documents).

## Administration of Justice Grid

Indicator	Figure
Number of judges in country: about 5,500	Gross ( per capita ): about 1/15,455
Number of lawyers in country: about 6,000 practising lawyers and 2,500 trainee lawyers.	Gross ( per capita ): about 1/10,000
Annual bar intake? No information is available	Gross (USD equivalent)
Standard length of time for training/qualification:	6.5 years (4 years in law school, 6 months for professional competence and 2 years' probation)
Availability of post-qualification training: Rarely	Not Required?
Average length of time from arrest to trial (criminal)	No information available
Average length of trials (from opening to judgment)	No information available
Accessibility of individual rulings to public:	Required and Accessible.
Appeals structure:	Lower Court -> Appellate Court
There is no national human rights institution.	
Complaints filed against police, judiciary or other state institutions (per year)?	No information available

## A. Country's practice in applying 4 principles for rule of law for human rights

### 1. The government and its officials and agents are accountable under the law

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#### a. Constitutional arrangements

The authority of the principal organs of government is established by the Constitution and other legal instruments. The Government is the executive body of the National Assembly and the highest administrative State body of the Socialist Republic of Vietnam.<sup>xiii</sup> It is responsible and accountable to the National Assembly which comprises 493 members selected in a nationwide general election, the Standing Committee of the National Assembly<sup>xiv</sup> and the President of State.<sup>xv</sup> The National Assembly decides on the establishment or abolition of ministries and ministerial-level agencies at the proposal of the Prime Minister.<sup>xvi</sup> The Prime Minister may be elected, relieved from office and dismissed by the National Assembly at the proposal of the State President.<sup>xvii</sup> The administrative arm of the government is the People's Councils, which are also formally elected to office (Article 119 of the Constitution). People's Councils are divided into geographical regions to manage provinces and cities.

The authority of the Executive also derives from the Constitution. The President is the head of state of Vietnam under Article 101 of the Constitution, and is responsible for appointing the Prime Minister and the Cabinet from among the members of the National Assembly, basing his or her decision upon indications from the Assembly itself. Other offices the president holds include (nominal) Commander of the Vietnamese military, and Head of the Council on National Defense and Security. He is also generally a high-ranking member of Vietnam's ruling Communist Party, and the Communist Party of Vietnam is the leader of the State under Article 4 of the Constitution. The Prime Minister is the head of the executive branch of the Vietnamese government. The Prime Minister presides over the Vietnamese cabinet, and is responsible for appointing and supervising ministers.

The judiciary is formally subordinate to the National Assembly and People's Councils (Constitution, Article 135). The appointment of the Chief Justice and Chief

Prosecutor is made by recommendation of the President to the National Assembly (Constitution, Article 103(3)) and he may appoint or dismiss other members of the judiciary without conferring with the National Assembly.

#### b. Laws, ordinances and amendments

Article 115 of the Constitution requires national issues, including laws, resolution and decrees, to be discussed collectively and decisions adopted by the majority of the National Assembly. According to Article 147 of the Constitution 1992 [On Amendments to the Constitution], the National Assembly alone shall have the right to amend the Constitution. An amendment to the Constitution must be approved by at least two-thirds of its total membership.

Vietnam has several tiers of laws and policies, however, beyond those spelled out in the Constitution and Acts. Critics have pointed out that many laws are too generically worded and just "frames" (*luat khung*), and secondary legislation is needed in order to enforce them.<sup>xviii</sup> Others have argued that the constitutions do not function as legally-enforceable texts.<sup>xix</sup> The most common secondary legislation are Decrees and Ordinances issued by the National Assembly and Standing Committee respectively, and while sometimes being instrumental for enforcement, have also resulted in inconsistencies in the law. The Strategy on Legal Reform to 2010 thus made it a policy to reduce the promulgation of laws by the National Assembly, ordinances by the Standing Committee, regulations guiding the implementation of the law by the Government, and legal normative documents by local government.<sup>xx</sup>

However, the judiciary has faced difficulties in seeking to properly understanding and interpreting the legal status and effect of these various instruments. According to John Gillespie, court officials often resort to consulting government officials as to how to apply the law in specific cases, which militates against the separation of powers between the various branches of government in Vietnam.<sup>xxi</sup>

At the Universal Periodic Review before the UN Human Rights Council, NGOs have criticised the inconsistencies between these decrees, national laws and the Constitution, especially where the inconsistencies are used to suppress



freedom of speech. The International Federation of Human Rights (FIDH), for example, has criticised the contradiction between press freedom guaranteed by Article 69 of the Constitution with the Press and Publication Laws that strictly prohibits publications that oppose the State of the Socialist Republic of Vietnam, require payment of damages to persons harmed by their articles even when the reports are true, and provisions for fines that attack the “prestige of the state.”<sup>xxii</sup> During its Universal Periodic Review in 2009, Vietnam rejected recommendations by several states to bring restrictions to press freedom and freedom of speech in line with the International Covenant on Civil and Political Rights, to which it was a signatory.<sup>xxiii</sup> It has also continuously rejected requests by UN Special Procedures to send rapporteurs to investigate specific allegations of human rights violations.<sup>xxiv</sup>

Because of the dominance of the Communist Party, multiple layers exist where the Party’s rules may supersede the state’s. As Salomon and Vu have argued:

The Law on the Promulgation of Legal Documents also stipulates a hierarchy of texts/rules regulating the state’s activities. Yet, in reality, this chain of command is still unclear, further complicating existing legislative inconsistencies and overlaps. The first challenge to this hierarchy is the role of the Party’s regulations. Although *Doi Moi* and PAR [Public Administrative Reform] were supposed to separate the state from the Party’s apparatus, in practice, party regulations still trump laws and are frequently the primary source of rules governing state regulation.<sup>xxv</sup>

One example they mention is that the Law on Elections allows any citizen to run for election, whereas the Party’s rules state that Party members must obtain support from their Party unit and hierarchy. The Vietnamese government itself conceded as much at the Universal Periodic Review:

Viet Nam is conscious of the shortcomings and difficulties and challenges to be addressed. The legal system of Viet Nam still lacks coherence while remaining overlapped and even contradictory in some areas. The development of the legal system has not matched the changes in life, leading to misinterpretation and difficulties in enforcement, affecting efforts to ensure constitutionality, feasibility

and transparency. The effectiveness of information provision, education and awareness enhancement in relation to the law remains limited. The system of law enforcement needs to be strengthened. A segment of public servants remain unfamiliar with the human rights treaties to which Viet Nam is party and occasionally have insufficient knowledge of government policies and the law.<sup>xxvi</sup>

The recognition that Vietnam needs to resolve internal inconsistencies in its law, but refusal to do so in spite of international pressure, has left open the question of its commitment to reforms in certain areas.

### c. Accountability of officials

Official misconduct is governed by Crimes Relating to Position (Chapter XXI) of the Penal Code. The language of Article 8 of the Ordinance on Judges and Jurors of the People’s Courts and Article 37 of the Law on the Organisation of the People’s Courts arguably opens judges to unusually open-ended liability for generic “damages” in carrying out their tasks.<sup>xxvii</sup> This potential liability could further affect judicial independence in making judgments. The media has increasingly played a role in exposing officials who abuse their power, and an increasing number of judicial officials have apologised for misdeeds.<sup>xxviii</sup> Several have also been charged and convicted under the Penal Code for law violations.<sup>xxix</sup> However, allegations of mistreatment, especially of political dissidents, have rarely been investigated or prosecuted.<sup>xxx</sup>

Although there is a lack of systematic research, the Government has manifested its concern for eliminating corruption by conducting a number of surveys on the issue, for example *The Diagnostic Study on Corruption in Vietnam*.<sup>xxxi</sup> This study found that nearly one-third of public officials and civil servants were willing to accept bribes. Over 50 per cent of public officials and civil servants responded that intermediate and higher-level offices are involved in corrupt activities. The situation of corruption was then examined by smaller scale surveys including the Investment Climate Survey Vietnam (WBI 2005), the Provincial Competitiveness Index 2006 (VCCI 2006), and the Evaluation of Corruption after two years of implementing the Anti-corruption Law (CECODES 2008).

## 2. Laws and procedures for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law

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### a. Accessibility and application of the law

The Criminal Procedure Code and other legal documents are publicly available in the websites of the National Assembly, Government of Vietnam and of various institutions. However, the multiple layers of codes have made accessibility and comprehensibility a real problem, especially where Ordinances and Decrees are incompatible or contradict fundamental law. The number of Ordinances and Decrees and the possibility that they may supersede laws make application difficult to conduct equally and fairly, and in practice, Ordinances or Communist Party policies take precedence over the law.

Nevertheless, the Judicial Reform Strategy has made improving the accessibility and transparency of judicial decisions a priority. This includes a plan for the publication of the judgments so as to enhance the accountability of the judiciary for issuing fair and professional judgments. A further step to promote transparency in the judiciary involves the establishment of the editorial board for the publication of judgments within the Supreme People's Courts. While such reforms are underway some commentators have opined that, "In general, the transparency of judgment remains low, as does the transparency of analysis leading to the judgments"<sup>xxxii</sup>. Whether or when the above-mentioned laws are subject to review will be indicative of the priorities of the Vietnamese state.

### b. Administrative/preventive detention and arbitrary treatment

Deterrent arrests are permissible where the accused might interfere with the investigation, prosecution or adjudication or continue to commit offenses under Article 79 of the Criminal Procedure Code. While the formal framework for the administration of justice provides basic guarantees against arbitrary detention and for the rights of the accused, the Strategy for the Development and Improvement of Vietnam's Legal System to 2010 and the Judicial Reform Strategy to 2020 have acknowledged

that problems of implementation persist. In this connection, the UN Human Rights Committee has recommended that Vietnam take steps to address problems associated with arbitrary restrictions of liberty.<sup>xxxiii</sup>

According to FIDH, Ordinance 44, "Regulating Administrative Violations" provides officials with the power to arrest and detain citizens. This extended the powers authorised by Decree 31/CP that allowed arrest and detention of citizens and further that they could be sent to mental institutions or "rehabilitation camps" without trial.<sup>xxxiv</sup> Article 120 of the Criminal Procedure Code allows up to four months detention for serious offenses, and this may be extended up to three times for four months each. Moreover, upon expiry, "other deterrent measures" may still be applied to detainees.

Article 298 of the Penal Code allows for prosecuting of those who use unlawful corporal punishment in the investigating, prosecuting, adjudicating or executing of a judgment. Article 282 also prohibits abuse of power that may damage the legitimate rights and interests of the citizens. Illegal detention by officials is prohibited in Article 123 of the Penal Code. Vietnam has stated it is in the process of joining the Convention against Torture.<sup>xxxv</sup>

### c. Presumption of innocence

The presumption of innocence is provided in Article 9 of the Criminal Procedure Code. Article 10 places the responsibility of investigating authorities to demonstrate guilt of the accused. Article 63 further details what facts must be established in order to prove the case. Authorities examining persons known to be innocent for penal liability may be punished under Article 293 of the Penal Code.

### d. Access to counsel

The Criminal Procedures Code (CPC) stipulates that all detainees and accused have the right to self-defence, by themselves or a counsel of their choosing (Article 11), and the right to choose and substitute attorneys (Article 57). Accused persons have an equal right to present before the court their evidence and to request and have debates before court (Article 19) as well as the right to ask for an alternative prosecutor (Article 43). Chapter IV of this Code elaborates the rights and responsibilities of detainees and the accused (Articles 48, 49, 50).

However, the Procuracy (which is functionally the state prosecutor) also has the right to grant or withdraw the defence counsel's certificates under Section 36(2)(c). This clause can be used to allow the procurators to deny permission to the defence counsel to visit the arrested person or be present during interrogations.<sup>xxxvi</sup>

#### e. Rights of defendants and accused persons

Section 49(2)(g) of the Criminal Procedure Code provides the accused with rights to receive decisions to institute criminal cases, to appeal against deterrent measures, receive written investigation conclusions, decisions to cease or suspend investigations and criminal cases against them, their indictments, decisions on their prosecution and other procedural decisions prescribed by the Code. Article 80(2) establishes that those executing a warrant must read the warrant, explain the warrant and rights and obligations of the arrestee, and record the minutes of the arrest when making arrests. Commune, ward or town representatives must be present to witness the arrest (alternatively, neighbours can be used as witnesses if the arrest is made at the person's residence).

In practice, however, charges are not always instituted or if they are, not made public. Human Rights Watch has listed at least 17 political and religious detainees for whom the charges have not been announced or are unknown.<sup>xxxvii</sup>

Time limits for investigation are stipulated in Article 121 of the Criminal Procedure Code. For less serious offenses, a maximum of two months for investigation is permitted, and for more serious offenses, three months is allowed. Extensions to this limit are permitted for serious cases provided the request is made at least 10 days in advance of the expiration date, and they may be extended only once for up to either two or three months depending on the severity of offenses. The time limit for a decision to prosecute is stipulated in Article 166, and should not exceed 20 or 30 days depending on the severity of the crime. They may be extended by 10 or 15 days. Trial preparation is limited to either 30 or 45 days under Article 176. These limits may be extended by 15 or 30 days again depending on the severity of the crimes.

The rights and obligations of the defence counsel are stipulated in Article 58 of the 1999 Criminal Procedure Code. These include the right to participate in questioning and arguing at court, to raise complaints about procedural decisions, and to access the client's file. However, according to one observer, these rights "are not widely implemented."<sup>xxxviii</sup> As a civil law system, the defence counsel of interested parties also has rights and obligations during trial, and these are stipulated in Article 59. The prosecution is not under obligation to answer questions or statements raised by the defence, and they typically do not.<sup>xxxix</sup>

Article 299 of the Penal Code prohibits coercion in gathering testimony, while Article 309 criminalises bribing or coercing witnesses or victims into making false declarations or to supply untrue documents. Furthermore, under Article 72 of the Criminal Procedure Code, confessions may not be used as the sole evidence for a conviction.

#### f. Right of appeal

Defendants, victims, plaintiffs and persons with interests have the right of appeal guaranteed under Articles 50, 51, 52, 53 and 54 of the Criminal Procedure Code. According to Vietnamese law, courts have a two-level trial regime where first-instance judgments may be appealed under Article 20 of the Code. Appellate court judgments have legal standing but can be reviewed if violations of the law are detected or new evidence emerges.

However, the nature of the appeal process is based on documents submitted by the parties. The court of appeal can be conducted without the presence of the parties, including counsel, although the court has the discretion to summon participants to hear opinions (Article 253). Appeals are also limited to a maximum of ten days before a decision must be reached.

#### g. Remedy

Current law provides for administrative court review of citizen's complaints in regard to arbitrary judicial decisions. The UN Human Rights Committee noted that while there appears to have been an increase in the number of complaints against the civil servants, some progress has

been made in dealing with people's complaints and petitions. Vietnam has stated that 80 percent of those making claims were granted cash compensations with the rest of the cases being settled.<sup>xl</sup>

The Law on State Compensation Liability 2009 provides for the State's liability to pay compensation to individuals and organisations suffering from damage caused by officials in the course of their official duties "in administrative management, legal proceedings and judgment enforcement activities, compensation procedures..." (Article 1). Future research will be needed to assess the effectiveness of the new legislation on handling abuse.

### **3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.**

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#### **a. Legislative proceedings**

An important step towards promoting transparency and improving public access to the process of legislation was through the amendment of the Law on the Promulgation of the Legal Normative Documents ("Law on Laws") which came into effect in January 2009. The key advantage of the Law on Laws is the requirement of mandatory public disclosure of the drafts of all legal normative documents within 60 days from the day it was proposed so as to allow public comment. This law provides a framework for increasing public participation in the legislative process, which according to some accounts previously had been quite low.<sup>xli</sup>

#### **b. Judicial hearings**

The CPC provides for the right to open court trials, except for special cases concerning matters of state secrets, national customs and traditions or at their own legitimate request (Article 18). However, public access to court decisions is not commonly provided for, despite requests especially from the legal profession for greater accessibility to rulings.<sup>xlii</sup> A court journal produced by the Supreme People's Court does exist (*Tap Chi Toa An Nhan Dan Toi Cao*), but does not produce full judgments and tends to be limited to case notes or summaries. The Judicial Reform Strategy has made it a policy to increase the publication of court judgments.<sup>xliii</sup>

Witnesses in criminal trials have the right to seek protection under Section 55(3)(a) of the Criminal Procedure Code during trial. Trial panels decide the measures to ensure the safety of witnesses and relatives under Section 211(5).

International PEN has raised concerns about the conduct and practice of "people's tribunals" used "to form orchestrated mock trials to criticise dissidents." During a trial in February 2007, a lawyer and Internet dissident was allegedly subject to a trial in which 200 people were mobilised to "insult and denounce him for being a 'traitor'."<sup>xliv</sup>

Lack of transparency over court decisions may be exacerbated by reports that the government decreed that statistics on capital punishment were considered state secrets. This runs counter to the calls for transparency in providing information on the death penalty in the UN's Moratorium on the Use of the Death Penalty, which Vietnam did not oppose.<sup>xlv</sup> However, Vietnam during its Universal Periodic Review stated that it had reduced the number of capital offences from 44 to 29 and is in the process of further reducing the number of offences that carry the death penalty.<sup>xlvi</sup>

#### **c. Equality before the law**

Equality before the law is guaranteed under Article 52 of the Constitution. Equal rights are implicitly or explicitly declared in other articles such as Articles 54 and 63 of the Constitution and Article 5 of the Civil Code. Civil rights are spelled out in Section 2 of the Civil Code. Freedom of religion is protected under Article 70 of the Constitution. Article 30 also requires that the State assume administration of cultural development, and certificates must be issued to allow practice. Those who practice "forms of superstition, causing serious consequences" (these consequences are unspecified) may be liable for a fine, non-custodial reform or imprisonment under Article 247 of the Penal Code. Furthermore, numerous human rights organisations raised serious concerns about the treatment of religious and ethnic minorities during Vietnam's Universal Periodic Review.<sup>xlvii</sup> These minority groups, particularly the ethnic Montagnard and Khmer Krom, Christians, and members of Falung Gong and the Unified Buddhist Church of Vietnam, faced difficulties in registration, assembly, and their leaders have been detained.

#### d. Access to justice and legal aid

Legal fees in Vietnam are still relatively high compared to incomes of the average Vietnamese. It has been suggested that legal fees could range between US\$20 to 300 depending on the firm and expertise of the lawyers.<sup>xlviii</sup> Even at the lower end of this scale, fees would be prohibitive where the annual GDP per capita is only US\$1200. However, Vietnam does have state-sponsored legal aid programs throughout the country, and these are augmented by NGO legal aid services, particularly training. 79 percent of respondents to a UNDP survey in 2004 cited cost as an important factor, and only 6 percent had used lawyers' services.<sup>xlix</sup>

The legal aid system in Vietnam was established in 1997 under Decision No. 734 of the Prime Minister. Since then legal aid services have been mainly provided by legal aid centres managed by provincial departments of justice (provincial units of the Ministry of Justice) with annual budget provided by the State. At present, there are 63 provincial legal aid agencies; five offices specialised on women affairs, 127 district branches, and 928 communes – level legal aids clubs<sup>l</sup>

To a certain extent, the state-run legal aid system has proved to be helpful in facilitating disadvantaged group's access to justice. However, in recent years, the need for legal aid of vulnerable groups has rapidly increased placing strains upon the resources of the system. As the state-run legal aid system becomes increasingly overloaded the Government is faced with difficulties in covering the increasing budget necessary for the system's operation.<sup>li</sup>

Another challenge increasingly encountered arises from the growing number of cases in which one party is a citizen while another is a state agency. Since the legal aid agency is state-run citizens may hesitate to bring their cases to the agency because of fears of lack of independence in regard to such matters such. Article 9 of the 2006 Law on Legal Aid prohibits legal aid providers from violating the interests of the State. Instead, people involved in litigation against state agencies often resort to legal consultancy centres run by non-state actors (NGOs, private law firms and school of laws, etc).<sup>lii</sup> Only four percent of Vietnamese

used legal aid centres, according to a UNDP report from 2004.<sup>liii</sup> However, the same survey noted 79 percent of respondents considered cost a significant factor in making the decision to commence proceedings.

In addition, where both parties of a case are eligible for legal aid but they have conflict interests, the state-run legal consultancy centres can only undertake to help one party, leaving the other without assistance. Such kind of cases can only be dealt with if there are legal aid systems run by non-state actors concurrently operating, so that one party can go to a state online legal aid centre while the other can receive legal assistance from non-state actors.

In the area of legal aid reform measures are also underway to address the problems noted above, The Government of Vietnam has recently initiated a policy to socialise legal aid activities in order to reduce financial burden for the State on the one hand and to create more choices for citizens to access legal aid services on the other hand. This policy may potentially reduce the conflicts of interest where state-sponsored legal aid supports petitions against a state agency. In addition, the Strategy of Developing Vietnam's Legal System to the Year 2010 also stresses the importance of the legal aid socialisation policy in Vietnam.<sup>liv</sup>

#### e. Difficulties with fair and equal enforcement

Article 146 of the Constitution requires all other laws to be consistent with it. As mentioned earlier (Indicator II), there are numerous problems in reconciling laws with the Constitution due to the large number of decrees and ordinances. Critics have further raised the problem of ambiguous language in the Penal Code for crimes relating to national security.<sup>lv</sup> Section 80(1)(c) of the Penal Code, that covers "Spying", includes prohibitions against "supplying information and other materials for use by foreign countries against the Socialist Republic of Vietnam." This law has been used to detain bloggers, human rights activists and critics on the basis of emails or other data from Internet usage. Article 79 on "activities aimed at overthrowing the people's administration" has also been used to detain numerous activities for making criticisms of the government. Similar language is found in Article 86 ("undermining the implementation of socio-economic policies"), Article 87 ("Undermining the unity

policy”), and Article 258 (“Abusing democratic freedoms to infringe upon the interests of the State”). Article 91 on “fleeing abroad or defecting overseas with a view to opposing the people’s administration” has also been used to arrest people on return from public engagements abroad where the state suspected them of issuing critical statements against the government. “Conducting propaganda against the Socialist Republic of Vietnam” is also illegal under Article 88.

Vietnam argues that “There are no so-called ‘prisoners of conscience’ and no one is arrested for criticizing the Government,” and that these laws are strictly related to national security and social stability.<sup>lxv</sup> The application of these laws thus depends on the determination of what constitutes a threat to state “security”, and how broadly these are seen as prosecutable offenses. What constitutes fair comment in this regard is the reserve of the State. Article 82 of the Constitution allows for foreign nationals, inter alia, “taking part in the struggle for freedom and national independence, for socialism, democracy and peace” to be granted asylum in Vietnam, and the factors that Vietnam considers valid for these criteria could be instructional for clarifying the laws on state security. The unspecific wording of these laws opens them to conflict with Article 19 of the International Covenant on Civil and Political Rights allowing freedom of opinion and expression, and Article 69 of the Constitution, guaranteeing freedom of speech, assembly and association. The frequent deployment of these laws to detain critics of the government has made it extremely difficult to conclude that laws are predictable, enforced consistently, and consistent with other applicable law.

#### **4. Justice is administered by competent, impartial and independent judiciary and justice institutions.**

##### **a. Judicial independence**

Judges in Vietnam are appointed according to criteria that requires loyalty to the motherland, good morality, a defender of socialist legality, a bachelor of law degree and training in trial work, judicial capacity, good health and requisite amounts of experience depending on the seniority of appointment (Law on Organisation of People’s Court, Article 37 and Ordinance on Judges and Jurors of People’s Courts, Article 5). They are typically chosen from among the Communist Party officials who work in the courts, and candidates must be endorsed by the Party.

Structural features of the organisation of the justice sector in Vietnam militate against a strong independent judiciary. Judicial institutions are subordinate to the National Assembly in several ways:

- The National Assembly possesses the authority to determine the organisation and activities of the People’s Court, and to abrogate texts adopted by the Supreme People’s Court which are incompatible with the Constitution, the laws and resolutions of the National Assembly.<sup>lxvii</sup>
- The National Assembly elects the President of the Supreme People’s Court and the Head of the Supreme People’s Office of Supervision and Control and may release them from duty or remove them.<sup>lxviii</sup>
- The National Assembly determines the budget of the court system based upon a budget plan submitted by the Government.<sup>lix</sup>
- The judiciary, through the Supreme People’s Court has to submit annual reports to the National Assembly. These reports have to be submitted to the N.A Standing Committee and the Legal Committee before examination at plenary sessions of National Assembly.

Under special circumstances the National Assembly may also decide to set up Special Tribunals.<sup>lx</sup> Changes instituted in 2002 have limited the previous practice of direct influence of the Government over the operation of court system.<sup>lxi</sup> The Government is responsible for drafting the judiciary’s budget plan.<sup>lxii</sup> The Ministry of Justice is still responsible for execution of civil judgments of the courts.<sup>lxiii</sup> However, under the mandate stipulated in Article 109 of 1992 Constitution, the Government still holds a position of authority vis-a-vis judicial bodies. An estimated 90 percent of judges were Communist Party members.<sup>lxiv</sup> However, others have argued that the Party’s role in the state is not necessarily contrary to judicial independence.<sup>lxv</sup> Nevertheless, the UNDP found just 38 percent of interviewees said that the judgments of the courts were fair, and 36 percent said judges were impartial and independent.<sup>lxvi</sup>

The Judicial Reform Strategy discussed above aims to promote judicial independence by reducing the interference of SPP in the rulings of the judiciary. Under these reforms the SPP would be restricted to its procuracy functions.

#### b. Training and qualification of judicial officials

The state-run Hanoi Law University and Ho Chi Minh City Law University conduct training for judicial officials. The Judicial Academy passes qualifications to join the legal profession, the equivalent of Bar exams in Western countries. The Vietnamese state is responsible for judicial training and education, and this was reaffirmed in the two resolutions on legal reform<sup>bvii</sup> by placing Hanoi Law University and Ho Chi Minh City Law University as focal institutions for continuing legal education. Resolution 49 stated:

“There is still a shortage of judicial and judicial support staff. The professional qualifications and political ability of some officials are low. Some of them even have very low personal qualifications, moral and professional accountability.”<sup>bviii</sup>

Access to information and other resources, even for judges, can be extremely poor. A 2006 UNDP survey suggested just 15.7 percent of district court judges had computer access to laws and legal commentary.<sup>bix</sup> The same survey found over 63.9 percent of judges had an “in-house” law degree issued by government institutions such as the Police College, Procuracy College, Security College or court training schools.<sup>bx</sup> While called a “law degree certificate”, these are not comparable to a normal Bachelor of Laws. This followed requirements for all judges to have a Bachelor of Law degree promulgated in the 1990s, but Resolution No. 37/NQ-TVQH9 passed in 1993 allows judges who have not met all the requirements (including academic qualifications and experience) to be appointed.

With approximately one lawyer per 10,000 people in the country (6,000 in total), legal representatives are few in number, and the level of qualifications and proficiency can vary. The Ministry of Justice had issued a target of 8,000 practising lawyers by 2010 and 20,000 by 2020.<sup>bxi</sup>

#### c. Impartiality of judicial proceedings

Article 130 of the Constitution stipulates that judges and people’s assessors are independent and subject only to the law. This should be understood in conjunction with Article 126 that requires an ideological commitment by the courts to protect socialist legality and the socialist system. Nevertheless, it was formally state practice that the court, procuracy and police would meet in pre-trial discussions (Joint Circular 06 1990 and Joint Circular 01 1994). This raised questions about the impartiality of judgments. As Nguyen has written:

In reality, many people within and outside the justice system believe that the fact that a court decides to hear a case is in itself an expression of its consent to the views of the procuracy, and that it is a foregone conclusion that the case constitutes a crime. This attitude seriously affects the independence of the judicial system, and, of course, the role of defense counsel.<sup>bxi</sup>

## Endnotes

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- vii. *Supra note iii*, 148.
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- xxiv. UN Human Rights Council, 2009, *Summary Prepared by the Office for the High Commissioner for Human Rights in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1*, A/HRC/WG.6/5/VNM/3, para.
- xxv. *Supra note xviii*.
- xxvi. *Ibid*, para. 22.
- xxvii. Gary Chan, 2005, “Judicial Immunity and Independence of Vietnamese Judges: Reflections on the Ordinance on Judges and



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- xxviii. *Supra note ii*, 229.
- xxix. *Supra note xxvii*.
- xxx. See for example, FIDH (International Federation for Human Rights), *ASEAN and Human Rights: A Vietnamese Perspective*, FIDH and Vietnam Committee on Human Rights mission to Indonesia, 27 February – 4 March 2011.
- xxxi. This survey was conducted by the Internal Affairs Committee of the Central Committee of the CPV (hereinafter CPV-IAC) in late 2005 with the support from Swedish International Development Cooperation Agency (SIDA). The objective of this Study was to identify the types and causes of corruption and the reasons for the limited impact of anti-corruption efforts to date. The study included quantitative and qualitative surveys in seven provinces and cities (Son La, Dong Thap, Hai Duong, Nghe An, Thua Thien-Hue, Hanoi and Ho Chi Minh City) and three ministries (Industry, Construction and Transport). It collected the opinions of nearly 5,500 public officials and civil servants, managers of enterprises and citizens in the seven localities. This is the first of its kind in Vietnam in terms of both CPV involvement and scope of coverage. It is also the first time the CPV has collaborated with the international donor community to assess corruption and anti-corruption activities.
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- xxxiii. UN Human Rights Committee, 2002, *Concluding Observations of the Human Rights Committee: Vietnam, 07/26/2002*, CCPR/CO/75/VNM, para. 8. These recommendations include that all persons deprived of their liberty are promptly brought before a judge or other officer authorized to exercise judicial power by law, and that they can only be deprived of their liberty on the basis of a judgment based on law, as required by article 9, paragraphs 3 and 4, of the ICCPR. The HRC also recommended that the government provide information on institutions where persons are detained and those detained there. (para. 8)
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- xxxix. *Supra note xxxvi*.
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- xlix. UNDP, 2004, *Access to Justice in Vietnam: Survey from a People's Perspective*, Hanoi: UNDP, 11.
- l. Support to the Legal Aid System in Vietnam, 2005-2009. Annual Progress Report (SIDA, SDC, Oxfam N(O)VIB, Save the Children, 2008).
- li. *Supra note xxxviii*, 194.
- lii. The Law on Legal Aid (adopted by the National Assembly in 2006 and in force from 1 January 2007), provides that non-state run legal consultancy centres are entitled to provide legal aid services for people. Such centres receive no financial support from the Government.
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- liv. To date, some mass organizations in Vietnam including the Vietnam Lawyers' Association, the Farmers' Union, the Youth Union, and the Veterans' Association have established their own legal consultancy centres which focus on providing legal aid to disadvantaged people. However, the legal aid services of mass organisations are normally limited to their members.
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- lvii. Constitution 1992, Article 84.9
- lviii. *Ibid*, Article 84.7
- lix. *Ibid*, 84.4
- lx. *Ibid*, Article 127 and Article 2, The Law on the Organization of People's Courts in 2002
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- lxii. *Ibid*, Art. 112,113,114
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