

Ensuring the Rights of Juvenile Offenders in Vietnam's Juvenile Justice – Towards Better Compliance with the Convention on the Rights of the Child

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Abstract

The article elaborates on and analyzes international standards relating to the treatment of juvenile offenders. The elaboration and analysis can be served as a guideline for States with a view to bring their juvenile justice system into compliance with international standards relating to four leading principles and rights of juvenile offenders recognized under the United Nations Convention on the Rights of the Child of 1989. On that basis, the article seeks to assess the compatibility of Vietnam's regulations on the rights of juvenile offenders with international standards. It provides a comprehensive analysis and assessment of the Vietnam juvenile justice system to examine whether it meets the international standards. Finally, the conclusion will sum up achievements and shortcomings faced by Vietnam's juvenile justice system, and provide recommendations for better compliance with the Convention on the Rights of the Child.

Keywords: Children's rights, juvenile offenders, rights of juvenile offenders, children's rights, best interest of the child, Vietnam's juvenile justice.

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I. Introduction

It has been long recognized that children's physical and mental immaturity renders themselves vulnerable to various external factors. As a whole, the general society 'owes to the children the best it has to give' to protect them from overt and covert perils.¹ Among many things, an effective and juvenile-friendly justice system is needed to ensure their survival and development. Such system has been set up in several Western countries in the early twentieth century. The idea for a separate system of justice is set in stone of the legal doctrine of *parens patriae*. That is, the State is the ultimate guardian of its children.²

However, the administration of juvenile justice in many States is often overlooked and neglected, thus, risking violations of the international standards laid down in the United Nations Convention on the Rights of the Child (CRC) and its supervising body, the Committee on the Rights of Children.³

Vietnam was the first Asian country to ratify the CRC in 1990. Ever since, Vietnam has exerted enormous efforts to realize and safeguard children's rights. The State of Vietnam has placed an emphasis on child protection and care as one of its 'national traditions and focuses of human rights in Vietnam.'⁴ Make no mistakes, child protection in the justice system also tops on the Vietnamese lawmakers' agenda.

On this account, the paper sets forth two main research questions as follow: (i) what are the international standards on the rights of juvenile offenders, and (ii) whether the Vietnamese legal framework relating to the treatment of juvenile offenders is in accordance with international standards.

The research paper employs black letter and interview methods. It analyzes how international standards on the protection of juvenile offenders' rights are

1) G.A. Res. 1386(XIV), *Declaration of the Rights of the Child*, at 1 (Nov. 20, 1959); G.A. Res. 44/25, *Convention on the Rights of the Child*, at 1 (Nov. 20, 1989); See Michael Freeman and Philip E. Veerman, *The Ideologies of Children's Rights*, 1992, at 31 (International Studies in Human Rights Ser. Vol. 23, 1992); Wendy Stainton-Rogers and Jeremy Roche, *Children's Welfare and Children's Rights: A Practical Guide to the Law* (Hodder Arnold H&S 1994); Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998).

2) Eric L. Jensen and Jørgen Jepsen, *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems 2* (Hart Publishing 2006).

3) *Id.* at 16.

4) See Committee on the Rights of the Child, *Periodic reports of States parties due in 1997 Viet Nam* 66, CRC/C/65/Add.20 (Jul. 5, 2002).

incorporated into Vietnam's domestic law. At international level, core instruments for the assessment include the CRC and the guideline elaborated by the CRC Committee with regard to juvenile justice and children's rights, namely General Comment No. 10 (GC No. 10). In spite of the non-binding nature of the outputs by human rights treaty bodies, it is argued that *de facto* legal force and impact of such outputs depend on how persuasively human rights treaty bodies argue.⁵ Therefore, General Comment No. 10 on Children's Rights in Juvenile Justice, which is the most salient authoritative document in this respect, might carry certain legal weight. The '*UN Standards and Norms in Juvenile Justice*' can be of complementary nature to the CRC, including "The Standard Minimum Rules for the Administration of Juvenile Justice (*Beijing Rules*),"⁶ "The Guidelines for the Prevention of Juvenile Delinquency (*Riyadh Guidelines*),"⁷ and "UN Rules for the Protection of Juveniles Deprived of Their Liberty (*Havana Rules*)."⁸ At national level, the article will focus mainly on the most recent and prominent laws in the field of juvenile justice, namely "The 2015 Penal Code (Amended in 2017)" and "The 2015 Criminal Procedure Code (referred as "New Codes")." The assessment is conducted with reference to and comparison with "The 1999 Penal Code (Amended in 2009)" and "The 2003 Criminal Procedure Code (referred as "Old Codes")" which are already out of effect. The comparison helps shine a light on Vietnam's efforts in bringing its laws in line with international standards. Since the empirical data on juvenile offenders in Vietnam is limited, interview method is employed to fill the literature gap regarding the practice of protection of juvenile offenders' rights.

The article aims to provide readers a comprehensive understanding of international standards and how Vietnam has transformed its legal framework in respect of treatment of juvenile offenders. Nevertheless, given the word limit and resources constraint, the author acknowledged the limitation that few parts of the article lack, to certain extent, in-depth analysis.

Before further reading, there is a need to clarify the term 'juvenile offender.' It indicates all juveniles who are alleged to have committed or who have been found to have committed an offence, also referred to as "child in conflict with the law."⁹ In particular, it covers suspects, arrested, detainees, accused, and

5) Kerstin Mechlem, *Treaties Bodies and the Interpretation of Human Rights* 905, 42 Vand. J. Transnat'l L. 905 (2000).

6) <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf> (last visited Nov. 20, 2018).

7) <http://www.un.org/documents/ga/res/45/a45r112.htm> (last visited Nov. 20, 2018).

8) <http://www.un.org/documents/ga/res/45/a45r113.htm> (last visited Nov. 20, 2018).

defendants at pre-judgment stages, as well as juvenile inmates after the judgment of a court of law have taken effect.

II. Children in CRC and in the Context of Vietnam

Article 1 of the CRC provides that a child is a human being below the age of 18, yet States parties are flexible to adopt a lower age threshold. The CRC Committee and other organizations, however, increasingly encourage State parties to ensure the rights of those aged below 18.¹⁰ Notably, juveniles are not defined under the CRC, however, the CRC Committee suggested that every person under the age of 18 years at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.¹¹

Under the 2004 Law on Child Protection, Care and Education of Vietnam and the 2016 Law on Children, a ‘child’ (tre em in Vietnamese) indicates any person below the age of 16. Meanwhile, the concept of ‘juvenile’ (ngươi chưa thành niên) means any persons, regardless of sex, aged below 18.¹² In general, age limitation to categorize a child under Vietnamese law is in conformity with CRC and relevant instruments. However, there is a difference in the use of each term in Vietnam context. The child (tre em) is the term employed in legal documents that prescribe general issues of child protection and care. In other words, the use of the term tre em aims to stress on the vulnerability and rights of children. Whereas the term ‘juvenile’ (ngươi chưa thành niên) is more frequently used in documents that specify his or her legal rights, obligations, and duties towards others.¹³ This type of thinking might get in the way of handling the best interests of children when they are on criminal trials.

9) G.A. Res. 40/33, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“The Beijing Rules”), 2.2(c) (Nov. 29, 1985).

10) UN Committee on the Rights of the Child (CRC), *General Comment No. 14 on the Rights of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, CRC/C/GC/14 (May 29, 2013); UN Committee on the Rights of the Child (CRC), *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4 (Jul. 1, 2003).

11) UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children’s rights in juvenile justice*, 4, CRC/C/GC/10 (Apr. 25 2007), ¶30-9.

12) Sac Lenh 97-SL của Chủ tịch Chính Phủ về Sửa Đổi một số Quy Định và Chế Định trong Dân Luật, §7 (1950) [Edict 97-SL issued by the President of the Government on Amending a Number of Rules and Regulations in the Civil Law, §7 (1950)]; Vietnam Civil Code of 1995 and 2005.

13) See Vietnam Civil Code of 2005; Vietnam Civil Procedure Code of 2004; The Law on Handling of Administrative Violations of 2012.

III. International Human Rights of Children

A. General Principles of Handling Juvenile Offenders

1. The Principle of Non-Discrimination

The right of non-discrimination is a human right. Accordingly, the child is the right-holder, meanwhile State party is the corresponding duty bearer. This right is considered as an umbrella right to add protection to the sectorial rights in Article 2 of CRC that expands the forbidden grounds of adverse distinctions more than any other human rights treaties.

The right of non-discrimination has a particular stake in the administration of juvenile justice. Research shows that children in conflict with the law who have background of poverty, homelessness, ethnic minorities or other vulnerable groups, are usually the victims of discrimination.¹⁴ The CRC Committee affirms that it is the obligation of State parties to take all necessary measures to ensure that all children in conflict with the law are treated equally.¹⁵ Furthermore, to guarantee an equal treatment under the law for children and adults, States parties are also required to factor in children's psychological immaturity and behavioral problems to ensure that 'any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.'¹⁶

2. The Principle of Best Interests of the Child

Despite its vagueness, the best interest principle plays a crucial role in realizing and implementing children's rights.¹⁷ In respect of the administration

14) Barry Goldson and John Muncie, *Towards a Global Child Friendly Juvenile Justice?*, 40(1) International Journal of Law Crime and Justice, 55 (2012).

15) UN Committee on the Rights of the Child, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child, 4, CRC/GC/2003/5 (Nov. 27, 2003).

16) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶8; G.A. Res. 45/112, §56 (Dec. 14, 1990).

17) Javaid Rehman, *International Human Rights Law*, 564-5 (Pearson 2010) (2003); Michael Freeman, *A Commentary on the UN Convention on the Rights of the Child*, Article 3: The Best Interest of The Child (Martinus Nijhoff Publishers, 2007); In some case law, this principle is recognized as a principle of customary international law, *See more Beharry v. Reno*, 181 F. Supp 2d 584, 603-5 (E.D.N.Y. 2002) discussed in Aleinikoff and Chetail,

of juvenile justice, the best interest of the child should be the primary consideration. The principle has three roles. Firstly, in the situation where different interests are at stake, the best interest of the child should be of first consideration. In other words, it would be ‘*an aid to construction, as well as an element which needs to be taken fully into account in implementing other rights.*’¹⁸ Secondly, where a legal provision is vague and open to different interpretations, the interpretation, which is most beneficial and fruitful for children, should take priority. The last fold suggests that ‘*in all matter not governed by positive rights in the Convention, Article 3(1) will be the basis for evaluating the laws and practices of States Parties.*’¹⁹

In respect of the administration of juvenile justice, the best interest of the child should be of primary consideration. The protection of the best interest of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.²⁰ The low minimum age of criminal responsibility is a concern in relation to the best interest principle of the child,²¹ which will be elaborated in the next section. Furthermore, the best interest principle covers lesser culpability under the penal law, and alternative measures and procedures specifically dealing with juvenile offenders.

a. Minimum Age of Criminal Responsibility (MACR)

MACR is the key issue that racks law-makers’ brains for striking the balance between maintenance of public order and protection of children’s rights. The MACR denotes the lowest age at which a person may be subject to criminal liability for breaking the penal law. Defining the MACR is fundamentally subjective and arbitrary since there is no uniform and consistent formula.²² In

Migration and International Legal Norms, 101 (Asser Press, 2003).

18) H. Reece, *The Paramountcy Principle: Consensus or Construct?*, 49 Current Legal Problems 16 (1996).

19) Philip Alston, *Children’s Rights*, 183-97 (Michael Freeman ed., Ashgate/Dartmouth, 2004).

20) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 10.

21) UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: China*, CRC/C/15/Add.56, ¶ 13 (Jun. 7, 1996); UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Kuwait*, CRC/C/15/Add.96, ¶ 15 (Oct. 26, 1998); UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Egypt*, CRC/C/15/Add.5, ¶ 14 (Feb. 18, 1993).

State practice, the MACR varies and ranges ‘*from a very low level of age 7 or 8 to the commendable high level of age 14 or 16.*’²³

Article 40(3) of CRC obliges States to establish a minimum age, below which children shall be presumed not to have the capacity to violate the penal law; however, a specific minimum age is left open for States to decide. Rule 4 of Beijing Rules recommends that the departure point of MACR shall not be fixed at too low an age level. In addition, authorities must take into account the facts of emotional, mental and intellectual maturity of children. The CRC Committee complements the Beijing Rules by stating that a MACR below the age of 12 years is not regarded internationally acceptable, and therefore goes against the principle of best interests of the child.²⁴

3. The Right to Life, Survival and Development

This principle requires an interpretation of Article 6 to take into consideration all the other human rights enshrined in CRC.²⁵ It is recognized that delinquency has a very negative impact on the child’s development.²⁶ Therefore, for the sake of children, State parties should take initiatives to develop effective national policies and programmes for the response to juvenile delinquency in ways that support the child’s development. For instance, the deprivation of liberty must be used in only a limited number of cases. This is to ensure that children are able to easily reintegrate into society, and furthermore, to refrain from inflicting negatively on the child's mental and physical health.

4. The Right to Be Heard

The gravity of this right is important in the realization of children’s rights as stated by the CRC Committee in its General Comment No. 12.²⁷ This right has a connection to other general principles, and particularly is inter- dependent

22) Katarina Tomasevski (eds.), *Children In Adult Prisons: An International Perspective*, 5, 57 (Frances Pinter Publishers, 1986).

23) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 30.

24) *Id.* ¶ 32-3.

25) Manfred Nowak, *A Commentary on the UN Convention on the Rights of the Child, Article 6 The Right to Life, Survival and Development*, 2 (Martinus Nijhoff Publishers 2005).

26) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 5.

27) UN Committee on the Rights of the Child, *General Comment No.12 (2009) The Right of the Child to Be Heard*, CRC/C/GC/12 (Jul. 1, 2009).

with the principle of best interests of the child.²⁸

This is not only a right, but also the leading principle - running like a thread throughout the juvenile justice process, from the pre-trial stage to court hearings and implementation of the imposed measures. It is vital for a fair trial and might be implemented either directly by the child or through his representative or an appropriate body in a manner consistent with the procedural rules of national law. The CRC Committee has noted that ‘the voices of children involved in juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfillment of their rights.’²⁹ Therefore, due weight must be given to the voices of children in accordance with their age and maturity throughout every stage of the process of juvenile justice. It requires authorities to not only be attentive when dealing with juvenile offenders, but also to possess knowledge, understanding, and competence in handling children who are in conflict with the law.

B. Rights of Juvenile Offenders

Articles 37 – 40 of CRC enumerate a wide range of rights and guarantees to ensure that every child alleged or accused of having violated the penal law receives fair treatment and trial. Such guarantees can also be found under Article 14 of the International Covenant on Civil and Political Rights of 1966 (ICCPR), and have been subsequently elaborated by the Human Rights Committee in its general comment No. 32.³⁰ The implementation of these guarantees for juveniles, however, has some specific dimensions as addressed by the CRC Committee in its general comment No. 10.

Firstly, a country’s juvenile justice shall not be retrospective (Article 40(2)(a) of CRC). This general rule provides that a juvenile offender shall not be imposed to a heavier penalty than the one applicable at the time of commission of the crime. However, if an adjustment of law provides for a lighter penalty, the child should benefit from such adjustment.

Secondly, the presumption of innocence is vital to the protection of the human

28) *Id.* ¶ 68-79.

29) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 12; UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 166 (2002).

30) UN Human Rights Committee, *General Comment No. 32 Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32 (Aug. 23, 2007).

rights of children. Alleged juvenile offenders should have the benefit of doubt and is only guilty if the charges ‘have been proven beyond reasonable doubt’ by the prosecution.

Thirdly, the right to be heard is fundamental for a fair trial, and might be implemented either directly by the child or through his representative or an appropriate body in a manner consistent with the procedural rules of national law. Furthermore, the right is a thread throughout all stages of the procedural process, from the pre-trial stage to court hearings and implementation of the imposed measures. This requires authorities to not only be attentive when dealing with juvenile offenders, but also to obtain knowledge, understanding and competence in handling children who are in conflict with the law.

Fourthly, to guarantee a fair trial, the child needs to comprehend all relevant information regarding their charges and penalties. Besides, Rule 14 of the *Beijing Rules* requires that a child-friendly environment and atmosphere should be established during the proceedings to allow children to participate and to express themselves freely.

Fifthly, juvenile offenders have the right to be informed promptly and directly of the charges against them. The notice that was given in the form of an official document does not suffice to the requirements. Moreover, the authorities should not excessively rely on the role of the parents or legal guardians, but orally inform children on the matters concerning them. The time between the commission of the offence and the final response to the act should be as short as possible. This is important in preventing the child from being exposed to criminal proceedings and minimizes adverse effects on his/her psychological, mental and physical health and development.³¹

Sixthly, juvenile offenders also have the right to legal or other appropriate assistance. CRC requires that the child should be provided with assistance whether it has legal or other appropriate nature. States are recommended to provide an adequately trained legal assistance with free of charge. Other appropriate assistance, such as a social worker, is encouraged; additionally, the staff working with the child concerned must have sufficient knowledge and understanding of the process of juvenile justice.

The involvement of parents or legal guardians in the judicial process is strongly recommended because of their psychological and emotional assistance to the child.³² However, this does not mean that parents can act in defense of the

31) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶47-55.

32) *Ibid.*, ¶18-19, 40, 48, 51-55.

child or be involved in the decision-making process. States are encouraged to explicitly set forth the maximum possible involvement of parents or legal guardians in the proceedings against the child.

Seventhly, the right against compulsory self-incrimination should be seen in the broad manner. On the one hand, all testimony, including confessions or acknowledgement of guilt, which is gathered by illegal means, such as torture, shall be held inadmissible as evidence.³³ On the other, the term “compelled” in Article 40(2)(b)(iv) of CRC should not be limited to physical force but other coercive forms of interrogation, such as a promise of rewards that might affect the child’s decision due to his or her immaturity should also be considered.

Finally, the right of children to privacy shall be respected during all stages of the proceedings. To prevent stigmatization of children, it is required that no information that may lead to the identification of a child offender and the possible impact on his/her ability to rehabilitate and re-integrate into society shall be published.³⁴ Any violations of the right to privacy of a child must be punished. As a rule, proceedings involving a child should take place behind closed doors. Exceptions to this rule should be limited and clearly provided in the law. Furthermore, the records of child offenders should be kept strictly confidential and closed, unless otherwise provided.

C. Measures Applicable to Juvenile Offenders

1. Interventions and Diversions

State parties are recommended to have two types of interventions in place for dealing with child offenders,³⁵ namely measures without resorting to judicial proceedings and measures in the context of judicial proceedings. These measures include care, guidance and supervision, counseling, probation, foster care, educational and training programmes, and other alternatives to institutional care.³⁶ In their discretion, States decide on the nature and content of measures for dealing with child offenders without resorting to judicial

33) See G.A. Res. 39/46, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, §15 (Dec. 10, 1984).

34) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶66.

35) *Id.* note 13 ¶ 22-29; UN Guidelines for Action on Children in the Criminal Justice System, ¶ 15 (Jul. 21, 1997); G.A. Res. 40/33, *Supra* note 11, Rule 11.

36) G.A. Res. 44/25, *Supra* note 1, §40(3)(b), §40(4).

proceedings. States can benefit from national experiences in this regard, such as community service, supervision and guidance by social workers or probation officers, family conferencing, and other forms of restorative justice including restitution to and compensation of victims.

In case where a judicial proceeding is inevitable, the national juvenile justice should be able to adopt other social or educational measures, and strictly limit the use of deprivation of liberty against juvenile offenders.

2. Death Penalty and Life Imprisonment

Death penalty against juveniles is explicitly prohibited under Article 6(5) of ICCPR and Article 37(a) of CRC. Admittedly, the prohibition on imposing the death penalty on juveniles constitutes customary international law and, thus, all States are under the obligation to observe it.³⁷ The death penalty shall not be imposed for a crime committed by a person under 18, regardless of his or her age at the time of the trial, sentencing, or execution of the sanction.³⁸ In contrast, life imprisonment is not strictly prohibited. The imposition of the life sentence is only forbidden in the case where possibility of conditional release is not prescribed.

3. Deprivation of Liberty, Including Pre-trial Detention and Post-trial Incarceration

a. Legal Requirements Regarding Deprivation of Liberty of Children

In this regard, it is consistently stressed in international legal instruments that:

- (i) No child shall be deprived of his or her liberty unlawfully or arbitrarily;
- (ii) The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.³⁹

37) UN International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 8, HRI/GEN/1/Rev.7 (May 12, 1994).

38) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶75.

39) G.A. Res. 2200A (XXI), §9 (Dec. 16, 1966); G.A. Res. 44/25, *Supra* note 1, §37; G.A. Res. 40/33, *Supra* note 11, Rule 17.1; G.A. Res. 45/113, UN Rules for the Protection of Juveniles

Generally, there are three prominent principles regarding deprivation of liberty, namely lawfulness, prohibition of arbitrariness, and deprivation of liberty as a measure of last resort.

The requirement of lawfulness or legality entails that a parliamentary statute or an equivalent, unwritten norm of common law, accessible to all individuals subject to the relevant jurisdiction of the State party must provide clearly the grounds for deprivation of liberty as well as the related procedures.⁴⁰ Administrative acts or decrees can meet the requirements of the principle of legality, only when the restriction on liberty of person takes place in enforcement of a law that provides for such interference with adequate clarity and regulates the procedure to be observed.⁴¹ The HRC, in light of Article 9(4) of ICCPR, held that the scope of the principle of legality includes both domestic and international law.⁴² The CRC Committee has also taken a similar approach to this principle.⁴³

Prohibition of arbitrariness is directed at both the national legislature and the organs of enforcement. In other words, the law shall be neither itself arbitrary nor enforced arbitrarily in a given case. A person shall be brought before a judge or ‘other officer authorized by law to exercise judicial power.’⁴⁴ A judicial officer must be independent and also have the authority to direct pre-trial detention or to release the person arrested.⁴⁵ In addition, it may be justified to detain people on the ground of mental illness. This would be characterized as treatment in a psychiatric institution or hospital, which is acknowledged as a legitimate form of deprivation of liberty under Article 9 of ICCPR.⁴⁶

The principle of last resort focuses on the use of adequate alternatives to the deprivation of liberty in light of the assumption that the deprivation of liberty is a restriction of the fundamental right to liberty of a person. The principle has

Deprived of Their Liberty (Havana Rules) Rule 1 (Dec. 14, 1990).

40) Manfred Nowak, *U.N. Covenant on Civil and Political Rights Commentary*, 224, 271-72 (NP Engel Publisher, 2007).

41) *Id.* at 232.

42) Human Rights Committee, No. 1014/2001 (*Baban et al. v. Australia*); Human Rights Committee, No. 560/1993 (*A v. Australia*); Human Rights Committee, No. 900/1999 (*C. v. Australia*); Human Rights Committee, No. 1069/2002 (*Bakhtiyari et al. v. Australia*).

43) UN Committee on the Rights of the Child, *Concluding observations: Kazakhstan*, CRC/C/15/Add.213, ¶ 67(d) (Jul. 10, 2003).

44) Nowak, *supra* note 42.

45) Human Rights Committee, No. 521/1992 (*Kulomin v. Hungary*).

46) Human Rights Committee, No. 754/1997 (*A v. New Zealand*).

two dimensions: it requires States to design, develop and use alternatives to the deprivation of liberty; on the other hand, States must establish legal limitations of the legal use of deprivation of liberty. The latter dimension overlaps with the principle of legality and the prohibition of arbitrariness, and is directed at the legislator and the enforcement authorities. The similar starting point can be found in light of Article 9(3) of ICCPR, stating that ‘it shall not be the general rule that persons awaiting trial shall be detained in custody.’⁴⁷

Furthermore, deprivation of liberty of the child shall be imposed for the shortest appropriate period of time. It must be at the discretion of a competent, independent, and impartial authority or judicial body to decide an appropriate duration on a case-by-case basis.⁴⁸ The HRC has clarified that lawful and non-arbitrary detention may become arbitrary after a period of time if the State cannot provide appropriate justification.⁴⁹ Pre-trial detention, which has been unduly prolonged for many months or even years, constitutes a grave violation of Article 37(b) of CRC. The duration of detention should be limited and subject to judicial review.⁵⁰ However, international law does not establish the maximum length for pre-trial detention and youth imprisonment. In practice, it is statistically shown that in some countries, such as the Netherlands, youth imprisonment longer than two years is not imposed frequently; or in Germany, the maximum length is five to ten years.⁵¹

The international human rights law embodies the principle of segregation of children deprived of liberty from adults.⁵² States are under obligation to observe this requirement regardless of any reasons.⁵³ Article 37(c) of CRC establishes an exception to the separation of children from adults that “unless it is considered in the child’s best interests not to do so.” This exception means

47) See Human Rights Committee, General Comment No. 8 (1982).

48) UN Committee on the Rights of the Child General Comment No. 10, *supra* note 13, ¶ 28.

49) See *more A. v. Australia*, *supra* note 43.

50) UN Committee on the Rights of the Child General Comment No. 10, *supra* note 13, ¶ 80; Nowak, *supra* note 42, at 235-7.

51) Ton Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, 357-84 (Intersentia Antwerp – Oxford – Portland, 2008); Jensen & Jepsen, *supra* note 2, at 120.

52) G.A. Res. 2200A (XXI), *Supra* note 41, §9, §10(2)(b), §10(3); International Committee of the Red Cross, *Protocols Additional to the Geneva Conventions of 12 Aug 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, §77(4) (Jun. 8, 1977).

53) Human Rights Committee, General Comment No. 9 (16), ¶ 5-6, CCPR/C/21/Add.1 (1982).

States have to conduct the assessment with deliberation.⁵⁴ It does not mean that a child placed in a facility for children has to be moved to a place for adults upon reaching 18 years of age. The continuation of his or her stay in the facility for children should be considered if it is in his or her best interest and not contrary to the best interests of other child offenders in the facility.

b. Conditions of Deprivation of Liberty and Enjoyment of Rights

In this regard, the CRC Committee has drawn the attention of State parties to the 1990 United Nations Rules for the Protection of Juveniles Deprived of Liberty (JDLs) and the Standard Minimum Rules for the Treatment of Prisoners, with the purpose to emphasize principles and rules in cases of deprivation of liberty of children.⁵⁵

Regarding physical environment and accommodations, it must 'meet all the requirements of health and human dignity' with the rehabilitative aims of residential placement.⁵⁶ The needs for 'privacy, sensory stimuli, opportunities to associate with peers and participation in sports, and physical exercise and leisure time activities' must be regarded.⁵⁷

In respect of personal and health care, detention facilities are required to ensure that 'every child received food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirement.'⁵⁸ In addition, Article 24(2)(c) of CRC provides that clean drinking water should be available to every juvenile at any time. Moreover, Article 24(1) of CRC provides children's right to the enjoyment of the highest attainable standard of health is still applicable regardless of their deprivation of liberty. Every child has the right to be examined by a physician and shall receive adequate medical care throughout his/her stay in the facility.⁵⁹ If a child has a mental or physical disability, the CRC Committee has recommended that State parties should be very reluctant to place him or her in the detention centre.⁶⁰

54) UN Committee on the Rights of the Child General Comment No. 10, *supra* note 13, ¶ 85.

55) *Id.* ¶ 88.

56) G.A. Res. 45/113, *supra* note 41, Rule 31.

57) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 89.

58) G.A. Res. 45/113, *supra* note 41, Rule 37.

59) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 89.

Regarding education, every child of compulsory school age has the right to education suited to his/her needs and abilities, as well as to receive vocational training to prepare him/her for future employment.⁶¹

In respect of contact with the family, Article 37(c) of CRC established that children have the right to maintain contact with the family through correspondence and visits. This right is seen as a measure 'required for reasons of humanity,'⁶² which is important for the child's reintegration.⁶³ Therefore, the child should be placed in a facility that is as close as possible to the place of residence of his or her family.⁶⁴

D. The Organization of Juvenile Justice

In order to ensure the full implementation of the said principles and rights above, it is necessary to establish an effective organization for the administration of juvenile justice and a comprehensive juvenile justice system.⁶⁵ Article 40(3) of CRC requires State parties to promote the establishment of laws, procedures, authorities, and institutions specifically applicable to juvenile offenders.

Although State parties enjoy wide discretion in prescribing the laws and procedures for handling juvenile offenders, international standards also shed a light to assess if such laws and procedures meet its threshold. In particular, for effectively handling juvenile offenders, relevant regulations should be laid down in special chapters of the general criminal and procedural law, or to be enacted as a separate act or law on juvenile justice.⁶⁶ Beside, State parties are required to establish specialized units within the police, the judiciary, the court system, the prosecutor's office as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

60) UN Committee on the Rights of the Child, *General Comment No. 9 (2006) The Rights of Children with Disabilities*, ¶ 74(c) CRC/C/GC/9 (Feb. 27, 2007).

61) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 89; G.A. Res. 45/113, *supra* note 40, Rule 38, 45, 46.

62) HRC, GC No. 9, ¶ 3. Interestingly, the HRC deleted this phrase in GC No. 21, which replaced GC No. 9.

63) G.A. Res. 45/113, *supra* note 41, Rule 79.

64) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 87.

65) G.A. Res. 44/25, *supra* note 1, §40(3); G.A. Res. 40/33, *supra* note 11, Rules 12, 22; G.A. Res. 45/113, *supra* note 41, Rule 81; Economic and Social Council Res. 1997/30 (Jul. 21, 1997).

66) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶91.

Moreover, juvenile courts should be in place to deal with juvenile criminal cases.⁶⁷

IV. Vietnam's Laws on the Rights of Juvenile Offenders

A. General Principles of Handling Juvenile Offenders

1. The Principle of Non-discrimination

The principle of non-discrimination has been long recognized under the Vietnamese legal system. Article 16 of the Constitution recognizes that everyone is equal before the law. Both the Old and the New Penal Code ("PCs") and Criminal Procedure Code ("CPC") have embodied this principle by stating that all persons are equal before the law and the court of law regardless of ethnic, sex, religion, social status and class.⁶⁸ Therefore, Vietnam's laws on paper are in accordance with the CRC in this regard.

2. The Principle of Best Interests of the Child

Both the Old and the New PCs provide general principles on the handling of juvenile offenders. Generally, the treatment must be based on age, maturity, and understanding of juvenile offenders and the seriousness of offences committed against society. The Old PC does not explicitly provide the principle of best interest; however, Article 69(1) gives way to rehabilitation and restorative justice objectives by stating that principles of handling juvenile offenders mainly aim to help them repair the harms done and avoid future deviation. Article 91(1) of the New PCs and Article 414(1) of CPC reaffirm this principle. Moreover, it is even pushed further in that the handling of juvenile offenders must ensure '*the best interest of offenders aged under 18 years.*'

Nonetheless, the new provision might be confusing and problematic when it comes to interpretation. What does it mean by 'the best interest of offenders aged under 18 years'? Other than the best interest of the child in the CRC, there is no such principle under either international law or Vietnamese national law.⁶⁹

67) *Id.*, ¶92.

68) The Old and New Vietnam Penal Code (PC), §3(2) and §5; The Old and New Vietnam Criminal Procedure Code (CPC), §5 and §9 respectively.

It appears that Vietnamese lawmakers imply the CRC principle of best interest of the child with a minor modification because they are seemingly reluctant to adopt the concept of a child aged below 18.⁷⁰ It has two implications. On the one hand, with the realization of the vulnerability of children, Vietnam has recognized the best interest of children not only in general fashion, but also shed light on the justice system directly dealing with children. This fact indicates that Vietnam is fully aware of its international commitment under the CRC and is willing to translate it into practice. The principle might be helpful for procedure-conducting persons when looking at the choice of appropriate measures applicable to juveniles, and is thus consistent with Article 3 of CRC. On the other hand, this might also raise a question with respect to the Vietnamese definition of the child. There are many vulnerable groups of people, such as women and disabled persons, none of them, however, possess this type of privilege. The best interest of children stems from their vulnerability, fragility, and special needs and is reserved to them only. The best interest of ‘persons aged under 18’ in the New PC implicitly shows that Vietnamese lawmakers have seen young people below 18 years as children.⁷¹ This way of thinking might turn around and challenge the current concept of the child aged below 16 in Vietnam’s 2016 Law on Children.

a. Minimum Age of Criminal Responsibility (MACR)

In general justice system, the PC and CPC regulate matters relating to crimes, punishments and relevant procedures. Crimes are categorized into four types based on their severity and nature: less serious (the ceiling of punishment is imprisonment for up to 3 years), serious (up to 7 years), very serious (up to 15 years) and severely serious (from 15 years, life imprisonment or death penalty).

Article 12 of the Old PC provides that persons aged 16 or older shall bear penal liability for all crimes they committed; meanwhile those aged 14 or older but under 16 shall be held criminally responsible for very serious crimes which were intentionally committed or severely serious crimes. Presumably, persons

69) The 2016 Law on Children provides the principle of best interests of the child, not of “*those aged under 18.*”

70) The 2016 Law on Children provides a child is a person aged under 16.

71) Duc Tien Nguyen, *Nguyen tac vi loi ich tot nhat cua tre em trong phap luat hinh su Viet Nam [The Principle of Best Interests of the Child in Vietnam’s Juvenile Justice]*, 8 Journal of Legislative Study 3 (2016).

below 14 presumably do not have the capacity to violate penal law and persons below 12 do not have the capacity to break administrative law. Hence, the MACR in Vietnamese justice system is 14 years. This provision is aligned with the international standards set out by CRC.

<i>Age /Crimes</i>	<i>Less Serious</i>	<i>Serious</i>	<i>Very Serious</i>	<i>Severely Serious</i>
<i>Under 14</i>	<i>Exemption</i>	<i>Exemption</i>	<i>Exemption</i>	<i>Exemption</i>
14 - 16	AH Administrative handling where administrative laws are applicable to handle the violations	AH	CH Criminal Handling (RS) (Reduced Sentence)	CH (RS)
16 – 18	CH (RS)	CH (RS)	CH (RS)	CH (RS)
18 or older	CH	CH	CH	CH

Source: The New PC; The 2012 Law on Handling Administrative Violations⁷²

There were concerns regarding crimes committed by juveniles that would provoke public outrage, such as the Ngoc Bich Jewelry case where Le Van Luyen, a juvenile, intentionally slaughtered an entire family to rob properties. Furthermore, it is statistically shown that the number of crimes committed by juveniles has been rampant recently.⁷³ Such concerns led to suggestions to lower the MACR and place harsher criminal penalties upon juveniles.⁷⁴

72) See more Duc Tien Nguyen, *The Development of Four Leading Principles of the Convention on the Rights of the Child In Vietnam's Juvenile Justice*, 4(2) *Bergen Journal of Criminal Law and Criminal Justice* 275 (2016).

73) Tong Cuc Canh Sat PCTP, *Bao Cao Tinh Hinh, Ket Qua Cong Tac Phong, Chong Toi Pham Nam 2011, [Report on the Implementation of Preventing and Combating Crime of 2011]* (Ministry of Public Security, 2011); Vietnam Lawyers Association (VLA) and UNICEF Vietnam, *Report of the Proposed Amendments to the Penal Code and the Criminal Procedure Code*, at 1-2, UNICEF Seminar (2015) (unpublished internal material).

74) VLA and UNICEF Vietnam (2015), *Id.* at 2-3; See more Xuan Hung, *Giam Tuoi Vi Thanh Nien de Chong Toi Pham Tre Em [Decreasing the Juvenile Age to Prevent Child Crimes]*, (last visited May 2, 2018), <http://www.tinmoi.vn/giam-tuoi-vi-thanh-nien-de-chong-toi-pham-tre-011096568.html>; Hong Thuy, *Can Nhac Tang Hinh Phat doi voi Nguoi Pham*

Besides, some debated that Article 12 of the Old PC regarding penal liability of persons aged from 14 to 16 is too general and has not manifested the humane policy towards the handling of juvenile offenders or embodied the spirit of CRC.⁷⁵ Meanwhile, the phrase “very serious crimes which were intentionally committed or severely serious crimes” is far broad and unclear because it essentially covers all crimes.

Eventually, the New PC was amended in particular ways. Firstly, it was contended that serious cases, like Le Van Luyen, were not typical, thus, it is not necessary to impose more stringent regulations on juvenile offenders. Hence, the MACR from 14 years under the New PC remains unchanged.⁷⁶ Those aged from 16 years are responsible for all types of crimes.

Secondly, persons aged from full 14 to below 16 shall be held criminally responsible for two specific groups of crimes. The first group is certain crimes regardless of the seriousness of such crimes, namely: murder, intentional infliction of harm onto others, rape, raping persons aged under 16, forcible sexual intercourse with persons aged from 13 to under 16, property robbery, and kidnapping to appropriate property. The second group includes very serious crimes committed intentionally or severely serious crimes, namely: (i) forcible sexual intercourse; illicit trading in human, and persons aged under 16; (ii) plundering property, stealing property, property robbery by snatching, intentional vandalism of property; (iii) illegally producing, trading in, stockpiling, transporting or appropriating narcotic drugs; (iv) organizing and participating in illegal motor races; (v) producing, trading in, giving away devices, gadgets and software for illegal purpose of use; (vi) terrorism; destruction of national security infrastructures; illicit manufacturing, stockpiling, transporting, using, trading in or appropriating military weapons, technical military devices.⁷⁷

Both the Old and the New PCs provisions are applicable at the time the crime was committed. In other words, the substantive and procedural laws pertaining

Toi Chua Thanh Nien [Consideration of Increasing Harsher Punishment Possible Applied to Juvenile Offenders], Phap Luat & Xa Hoi (online), (visited May 2, 2018), <http://dantri.com.vn/phap-luat/can-nhac-tang-hinh-phat-voi-nguoi-pham-toi-chua-thanh-nien-718153.htm>.

75) VLA and UNICEF Vietnam, *supra* note 75, at. 3.

76) The New PC, §90; See more Committee on the Rights of the Child, *The Fifth and Sixth State Report on Viet Nam's Implementation of the UN Convention on the Rights of the Child*, at 44, ¶ 160, CRC/C/VNM/5-6 (Dec 17 2018).

77) The New PC §12(2).

to juveniles are still applicable to adults if they were juvenile at the time of commission of a crime. Among many efforts, Vietnam's Supreme Court and authorities have issued guidelines in order to clarify the age of an offender in cases where he has no records of exact date of birth.⁷⁸ The New CPC supplements a new provision specifically dealing with the method for age clarification of juvenile accused and victims.⁷⁹ Such provisions have dispelled the vagueness, paved the way for legal application, and are fully in accordance with the CRC standards regarding the MACR.

In practice, the Appellate Court overruled a first-instance judgment because the defendant had not reached the age of criminal responsibility at the time of commission of the crime.⁸⁰ Similarly, the Appeal Court revoked the death penalty on an offender, since he had not reached 18 years old when the crime was committed.⁸¹

3. The Right to Life, Survival and Development of the Child

It is conceded by Vietnamese scholars that custodial penalties are at a high risk of harming juveniles' ability to rehabilitate and re-integrate into the community.⁸² Therefore, the criminal handling of juvenile offenders must be done with much deliberation. Charges for criminal responsibility of juvenile offenders are conducted in cases of necessity only. However, Article 69(4) of the Old PCs suggests otherwise: "*Courts, if deeming it unnecessary to impose penalties on juvenile offenders, shall apply one of the judicial measures.*" In other words, the court shall consider penalties first, and if they find it unnecessary to do so, they shall apply judicial measures which are substitutes to penalties and more humane towards the convicted. This provision goes against the spirit of CRC, which regards judicial proceedings as inevitable and the deprivation of children's liberty as the last resort only. The same stipulation can be found in Article 307(2) of the Old CPC with regard to Jury Panels' verdict.⁸³

78) Official Dispatch 81/2002/TANDTC and the Joint Circular 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLDTBXH on Juvenile Cases.

79) The New CPC, §471.

80) Judgment No xxx/2014/HSST issued by the Court of XXX city.

81) Nga Le, *Thoat An Tu Sau Hai Lan bi Tuyen Tu Hinh [Espaced Death from Two Death Sentences]*, Thanh Nien online, (Dec. 16, 2013).

82) VLA and UNICEF, *supra* note 75, at 5.

83) Note that the concept of 'Jury Panel' in Vietnam justice system is different, for example, to the U.S. justice system where Jury Panel is a composition of 6-12 jurors who hold citizenship. A

In this respect, a new amendment to the New PCs provides that the Courts only impose penalties on juvenile offenders in cases where other measures are proven ineffective for educational and deterrent purposes. This amendment will be helpful in guiding courts and judges when considering measures applicable to juvenile offenders. Ironically, Article 423(6) of the New CPC, nevertheless, still retains the old stipulation that *'the Jury Panels, if deeming it unnecessary to impose penalties on juvenile offenders, shall apply educational measure in reformatory school.'* This provision once again follows the traditional objectives of criminal justice that is a retributive and punitive approach, and definitely fails to align with either the New PCs provision or the CRC standards.

This is rather confusing and contradictory when it comes to the practical application of the law. The New CPC stipulates that the Jury Panel shall consider criminal penalties in the first place. Generally speaking, a Jury Panel is always established in criminal cases unless it is a summary procedure, which is very rare. On the other hand, the term *'Courts'* employed under the New PCs leads to a very general understanding, which might refer to a judge or a jury panel, shall prioritize monitoring and educational measures. However, I propose that in such cases, applying the principle of best interest of the child can help remedy the problem. As manifested above, if legal provisions suggest different understandings, the provision that is most fruitful and beneficial for children shall take precedence. In this case, it is the New PCs provision prioritizing other alternatives to criminal handling measures.

In Vietnam, it has been long recognized legally that death penalty and life imprisonment shall not be imposed on juvenile delinquents. This rule has been embodied under Article 69(5) and 91(5) of the Old and the New PCs, respectively. Moreover, the Courts shall always consider reducing the punishment on juvenile offenders.

A new list of procedure-conducting principles are introduced under Article 414 of the New CPC to ensure (i) the procedures are friendly and suitable for psychology, age, maturity and understanding of persons aged under 18 years; (ii) the right to privacy; (iii) the right to participate in the proceedings of his or her representatives; (iv) the right to participate, and express his or her views; (v) the right to legal counsel and defense; (vi) a timely and prompt handling of cases involving juveniles. Such supplementary is consistent with international standards elaborated above.

Jury Panel in Vietnam comprises three to five members, including one to three judges, and jurors who have equal voice on all matters. Decisions are rendered on the majority basis.

B. Rights of Juvenile Offenders

Firstly, the general rule of non-retroactivity is guaranteed under Article 7 of the Old and the New PCs. The rule is applicable to not only adults, but also to child offenders, and generally in accordance with the international standards.

Secondly, the principle of presumption of innocence is recognized in Article 31(1) of the Constitution and can be found in Article 9 of the Old CPC and Article 13 of the New CPC. Besides, public procurators have the burden of proof for the charges and the defendant has the benefit of doubt.

Thirdly, children's right to be heard is newly recognized as a general procedure-conducting principle. Hence, it is understood that the right is like a thread throughout all stages of the process, starting with the pre-trial stage when the child has the right to remain silent, as well as the right to be heard by the police, the public procurator and the investigating judge. Nevertheless, the practice of this right still remains questionable since the principle is quite general. Through her observation on the implementation of the Old CPC in this regard, Nga Pham has found that 'juvenile offenders in Vietnam seem not to freely express their views' due to their lack of understanding, knowledge, and the fear of unknown consequences or of a suggested possibility of imprisonment.⁸⁴ Therefore, this principle would be meaningless if authorities are not trained properly in handling children in conflict with the law.

Fourthly, according to the Old and the New CPC, detainees, accused or defendants have a number of procedural rights:⁸⁵

- (a) The entitlement to information regarding their detention, offences charged against them, rights and obligations; receipt of all decisions concerning their offense and to make complaints against procedural decisions and acts of procedure-conducting bodies and persons;
- (b) The right to present their statements, evidence, and requests during the course of proceedings;
- (c) The right to participate, defend and present arguments in the trial; legally align with procurators, defense counsel, victims, and others involved in the proceedings in providing evidence, requests, and arguments before the court; to appeal the judgment and decision of the court.

84) Thi Thanh Nga Pham, *Developments in the Right to Defense for Juvenile Offenders Since Vietnam's Ratification of the Convention on the Rights of the Child*, 9 U. Pa. East Asia L. 83 (2014).

85) The Old CPC §48(2), 49(2), and 50(2).

Furthermore, the New CPC finally has taken a leap over oppositions to supplement explicitly the right to remain silent, freedom from self-incrimination.⁸⁶ However, as a cultural norm and common sense, a Vietnamese person is supposed to try all alternatives to prove himself/herself innocent. If the accused chooses to remain silent, whether procedure-conducting bodies would make an adverse inference from such circumstances might be a question. Thus, how this right is implemented in practice remains to be seen.

1. The Right to Freedom from Torture

Some juveniles reported that they had been threatened or beaten by the police intentionally to extract confessions while being detained without the knowledge of their parents or guardians.⁸⁷ It is reported that violence employed by the police caused severely serious injuries; in extreme cases it even resulted in death of its victims.⁸⁸

86) The New CPC, §58(2), 59(2), 60(2), and 61(2).

87) People's Supreme Court and UNICEF Vietnam, *Investigation and Court Proceedings Involving Children and Juveniles: An Assessment of Child-Sensitive Procedures* 60 (Thanh Nien, 2007); Human Rights Watch, *Public Insecurity in Vietnam (2014)*; Tran Vu, *Trieu Phu Hao Anh Bi Nghi An Trom Tai San* ['Millionaire' Hao Anh Suspected of Stealing Properties], [http://dantri.com.vn/phap-luat/trieu-phu-hao-anh-bi-nghi-an-trom-1364789117 .htm](http://dantri.com.vn/phap-luat/trieu-phu-hao-anh-bi-nghi-an-trom-1364789117.htm), Dantri, 2013, (last visited May 10, 2018).

88) Tran Vu, *Vu Hao Anh Nghi An Trom: Hao Anh Co Chung Cu Ngoai Pham?* [*The Case of Hao Anh Suspected of Theft: Hao Anh Had an Alibi?*], <http://dantri.com.vn/phap-luat/vu-hao-anh-bi-nghi-an-trom-hao-anh-co-chung-cu-ngoai-pham-1364870380.htm>, Dantri, 2013, (last visited May 10, 2018); Hai Anh, *Khoi To Bat Giam Cong An Danh Chet Hoc Sinh* [*Arresting and Prosecuting A Former Police for Beating A Pupil to Death*], <http://dantri.com.vn/su-kien/khoi-to-bat-giam-cong-an-vien-danh-chet-hoc-sinh-1390421678.htm>, Dantri, 2013, (last visited May 10, 2018); Hoang Anh, *Cong An Xa Bi To 'Tra Tan' 7 Thanh Nien* [*Commune Police Accused for 'Torturing' 7 Youths*], <http://vnexpress.net/tin-tuc/phap-luat/cong-an-xa-bi-to--tra-ta-n-7-thanh-nien-2241603.html>, Vnexpress, 2013, (visited May 10, 2018); Trinh Van Ho, *Co hay Khong Viec Bat, Danh Tre Em Vo Co, Gay Thuong Tich* [*Did the Arrest, Beating and Injuring A Minor Without a Reason Occur?*], <http://baobaovephapluat.vn/phap-luat-ban-doc/dieu-tra-theo-don-thu/201305/ea-hleo-dak-lak-co-hay-khong-viec-vo-co-bat-danh-tre-em-gay-thuong-tich-2240979/>, Baovephapluat, 2013, (last visited May 10, 2018); Tan Loc, *Mot Hoc Sinh Bi Cong An Danh Nhap Vien* [*A School Pupil Beaten by the Police and Hospitalized*], <http://plo.vn/thoi-su/xa-hoi/mot-hoc-sinh-bi-cong-an-danh-den-nhap-vien-49786.html>, Phapluat TP, 2012, (last visited May 10, 2018); H. Anh, *Cong An Xa Bi To Dung Nhuc Hinh Voi Tre Em* [*Commune Police Accused of Using Corporal Punishment Against Children*], <http://nld.com.vn/phap-luat/cong-an-xa>

On this matter, the author conducted an interview with Director of the Vietnam Programme of Norwegian Centre for Human Rights, Gisle Kvanvig, in 2016.⁸⁹ The programme has its focus on, *inter alia*, criminal justice reform and legal aid in Vietnam. Torture could be used a method to extract confessions during police interrogations, partially because it was viewed as a cultural norm that criminals deserve such punishments. The bias might cause greater risks to juvenile offenders. The programme has attempted to introduce other effective methods of interrogation and investigation to the Vietnam Ministry of Public Security and People's Police Academy (PPA). In the course of the last several years, Gisle had witnessed a number of positive developments in Vietnam. The programme triggered and drew attention from many stakeholders, including the National Assembly, to the debates relating to police brutality and torture to forced confessions and wrongful convictions. Vietnam's 2015 ratification of Convention against Torture and the introduction of the provision regarding the use of cameras and recorders during interrogations (Article 183(6) of the New CPC), among other things, were a positive signal. A number of workshops and training sessions designed by the programme in cooperation with the PPA helped initiate the competence building process and strengthen the capacity of officers who directly handle criminal offenders.

Neither of the CPCs provides explicitly that testimony, confession or acknowledgment of guilt extracted as a product of torture, cruel, inhuman, or degrading treatment is precluded. However, this rule can be interpreted in light of fundamental principles set forth under both CPCs. First of all, the CPC strictly prohibits all forms of coercion and ill-treatment against people during all procedural stages.⁹⁰ Article 131(4) of the Old CPC provides that investigators or procurators, who use any forms of coercion or ill treatment against the suspect and accused, shall be charged criminally under Articles 298 or 299 of the Old PC. Secondly, the use of evidence, including testimony, confession, or acknowledgment of guilt is assessed on the basis of three elements: (i) objectivity, (ii) relevance to the case, and (iii) legality.⁹¹ A testimony or

-bi-to-dung-nhuc-hinh-voi-tre-em-20120712111721761.htm, Nguoi Lao Dong, 2012, (last visited May 10, 2018); Van Nguyen, *Cau Be 11 Tuoai Nhap Vien Sau Khi Tro Ve Tu Don Cong An* [An 11 year-old Boy Hospitalized After Coming Back from The Police Station], <http://vnexpress.net/tin-tuc/thoi-su/cau-be-11-tuoi-nhap-vien-sau-khi-tro-ve-tu-don-cong-an-2197831.html>, Vnexpress, 2012, (last visited May 10, 2018).

89) The interview was conducted at the Norwegian Centre for Human Rights (Mar. 2016).

90) The Old CPC §6, 10, and 131(4).

91) The Old CPC §66.

confession, as a result of an illegal act, fails to satisfy the requirement of legality, hence shall be held inadmissible before the court. The same provisions can be found in Articles 10, 15, 108 and 183 of the New CPC. However, in my opinion, the law should prescribe this principle explicitly. Furthermore, in cases where it is alleged that testimony or statement obtained is a result of coercion or torture, the procuracies shall be under the burden to prove the otherwise.

2. Legal and Appropriate Assistance

The CPC stipulates that defense counsels can be the child's representatives, lawyers, legal aid providers or people's advocates.⁹² The Vietnamese approach allows parents or legal guardians of child offenders to act in their defense, and it does not go against the international standards. The problem only arises where the parents or legal guardians lack of legal knowledge, thus putting the child's case in jeopardy. This is usually the case in Vietnam. According to the Children's Legal Centre, there is a high risk of procedure-conducting bodies suggesting juvenile offenders, and their families to relinquish the right to defense counsel, and bring up the defense on their own.⁹³

Besides, where the legal status and professional skills of people's advocates are not specified under the law, this might not be in line with international standards in terms of professional requirements. People's advocates' participation at procedural stages is fairly formalistic. Studies have shown that many advocates did not study the case beforehand and barely said a word in court trials.⁹⁴ Thinh Do argues that the law should specify lawyers as only defense counselors eligible, and thereby excluding people's advocates from defending offenders before the court.⁹⁵ However, such a solution is considered

92) People's advocates are Vietnamese citizens from 18 years of age, pledging allegiance to the Nation, possessing good moral quality, having legal knowledge and sound health to fulfill assignments. Such advocates are assigned by the Committee or affiliations of the Vietnam Fatherland Front to defend their personnel facing charges, New CPC §72(3).

93) See Children's Legal Centre, *Bao Cao Danh Gia Cac Quy Dinh cua Bo Luat Hinh Su Lien Quan Den Ngươi Chưa Thành Niên va Thuc Tien Thi Hanh [An assessment Report into the provisions relating to juveniles of the Penal Code and practical implementation]* 44 (2010); Nicholas Booth, *Implementing Human Rights in Practice - some Observations*, The 1st Legal Policy Dialogue in 2012: "Improvement of Laws on Human Rights", 32, 33-4 (2012).

94) Children's Legal Centre, *Id.*

95) Thinh Do Ngoc, *Da Den Luc Bo Bao Chua Vien Nhan Dan [It is time to remove the*

not pragmatically appropriate since the number of lawyers, compared to the population, do not suffice to serve in all criminal cases as defense counselors.⁹⁶ Therefore, the rationale behind the institution of people's advocates appears that 'it is better to have a weak defense than nothing at all.'

The People's Supreme Court has claimed that 'in 100 percent of the cases where appointed counsels were statutorily required, the defense was conducted by lawyers.'⁹⁷ In her case study; however, Nga Pham found that it is common for a non-lawyer to defend a juvenile offender, thus rebutting said claim.⁹⁸ Moreover, in practice, the status of lawyers does not align with the procedure-conducting bodies, as legally provided. Many of them have not received much cooperation from the public bodies, and experienced challenges while conducting their professional business, for example contacting detainees or requesting for related documents; even some had to wait more than six months to meet the detained offender.⁹⁹ In contrast, the counselors appointed at procedure-conducting bodies' requests have received more favorable treatment.¹⁰⁰

Besides, the Old CPC requires the interrogation of juvenile offenders to be undertaken with the presence of their parents, legal guardians or teachers for their psychological support. In practice, a survey by the Supreme Court of Vietnam however, reveals that this regulation is regularly breached. In some cases, parents, or legal guardians are not allowed to participate in the

institution of People's Advocate], Baomoi.com, 2012, <http://www.baomoi.com/Da-den-luc-bo-bao-chua-vien-nhan-dan/58/7850689.epi>, (last visited May 10, 2018).

96) Bo Tu Phap [Ministry of Justice], *Bao Cao Tong Ket 5 Nam Thi Hanh Luat Luat Su [The Report on the Review of the Five-year Implementation of the Law on the Lawyer]* 15-7 (Ministry of Justice, 2012).

97) Chanh An Toa An Nhan Dan Toi Cao [President of People's Supreme Court], *Bao Cao Nhiem Ky 2007-2011 [Term Report 2007-2011]*, 2012.

98) Thi Thanh Nga Pham, *The Rights of The Child in Judicial Sector in Vietnam: Compliance with International Legal Standards* 204-5, (Faculty of Law, Humanities and the Arts, University of Wollongong, 2015), <http://ro.uow.edu.au/theses/4524> (last visited May 10, 2018).

99) Hoai Trung Phan, *Thuc Trang va Dinh Huong Hoan Thien Phap Luat nham Bao Dam Quyen cua Luat Su Tham Gia Tranh Tung trong Vu An Hinh Su [The Current Situation and Direction to Improve the Law in order to Ensure Lawyer's Right to Participate in Criminal Proceedings]* (Publisher, year); Booth, *supra* note 86; Vietnam Lawyers Association, *Bao Cao Tong Ket Cong Tac Nam 2011 va Phuong Huong Hoat Dong nam 2012 [Summary Report on Implementing the Tasks in 2011 and Direction in 2012]* (2012).

100) UNDP, *Report on the Right to Counsel in Criminal Law and Practice in Vietnam*, 51 (2012).

interrogation; in other cases, some signed the interrogation record, despite they did not show up during the interrogation.¹⁰¹ Albeit regulations are in place, teachers play no role at all in criminal process.

Neither the Old nor the New CPC mention about “other appropriate assistance” as applicable to child offenders. However, the author had the opportunity to intern at UNICEF Vietnam during 2015, where he gained a firsthand insight into the models of social work centers, which are currently being established in Vietnam. Generally, the mandate of social work centers and social workers is to provide help and assistance to vulnerable groups of people, including but not limited to children in conflict with the law. After attending a field trip to the pilot social work centers with the UNICEF expert, it was concluded that the social workers still lack sufficient capacity, knowledge, and expertise in dealing with major problems relating to children in conflict with the law. The major problem is the lack of funds for education and training for social workers. This might set forth a question on the State’s compliance with its obligation to fulfill human rights of children.

3. The Right to Privacy

The Old CPC provides that in case of necessity, courts may conduct the hearing behind closed doors.¹⁰² However, the term ‘necessity’ is legally undefined. This provision may lead to different and inconsistent understanding. Furthermore, the current laws concerning press and media do not provide for either the general protection of privacy of children in conflict with the law or the restriction on publishing information and pictures of child offenders at all procedural stages.

The New CPC has supplemented the right to privacy of child offenders as a basic procedure-conducting principle. Article 423(2) of the New CPC has also specified that courts have the power to hear the case behind closed doors, if there is a special need to protect child defendants and victims. However, this provision is not fully in line with the CRC. The CRC Committee recommends cases to be heard privately unless in exceptional cases, and such exceptions should be clearly stated in the law.¹⁰³ Article 9 of the 2016 Law on Press has also supplemented certain restrictions to ensure the privacy of child offenders.

101) People’s Supreme Court and UNICEF Vietnam, *supra* note 89, at 62-3.

102) The Old CPC, §307(2).

103) UN Committee on the Rights of the Child, General Comment No. 10, *supra* note 13, ¶ 64-7.

In Vietnam, trials are deemed to be public, and there is no record of closed-door cases. Some criminal cases have provoked public outrage, in which the public might request to have access to the courtroom. In such cases it is very challenging to strike the balance between the right to privacy of the child and the right to information of the public when they collide. However, as the rule of thumb, States shall ensure no harm is caused by undue publicity or by the process of labeling that may lead to the stigmatization and identification of a child offender, thus impacting on the exercise of his or her rights.

C. Measures Applicable to Juvenile Offenders

For each stage of the procedural process, different measures can be employed to handle a juvenile case. According to the old regulations, deterrent measures, including arrest, temporary detention, ban on traveling out of place of residence, guarantee, and deposit of money or valuable property as bail, can be used before and during judicial proceedings. A juvenile can be exempted from criminal responsibility in certain circumstances, thus the court can apply judicial measures, including monitoring and education at ward or commune, or reform in a reformatory school. Notably, although transferring to a reformatory school is a judicial measure, this is regarded as institutionalization, and as such, a form of the deprivation of liberty. In case of a guilty verdict, the judge will impose one or a combination of penalties against the juvenile. Only four types of penalties can be applied, namely warning, fine, non-custodial reform, and termed imprisonment.

1. Interventions and Diversions

As mentioned above, deprivation of liberty must be applied with much deliberation; as a result, there are two types of interventions and diversions that should be employed by States, namely measures without resorting to judicial proceedings and measures in the judicial process.

a. Measures without Resorting to Judicial Proceedings

Article 69 of the Old PCs provides that juvenile criminals may be exempt from criminal responsibility if they commit less serious or serious crimes with extenuating circumstances, which causes no severe damage, and their families

or relevant organizations guarantee to supervise and educate them.

In the Vietnamese justice system, neither the judge nor the jury panel has the power to divert child offenders from a criminal proceeding. Even if there is clear evidence showing that the child offender can be exempt from criminal responsibility, the case may not be dropped by the judge, and he or she has to carry on until a judgment is rendered. Generally, a child offender still has to undergo through the entire criminal process. This regulation is inconsistent with international standards to minimize the child's contact with the justice system.

Besides, only courts have the power to apply the measure of supervision and education at ward or commune. However, this measure is considered ineffective to address juvenile crimes. During the period from 2007 to 2013, only 52 juvenile offenders were sent back for education at their ward or commune.¹⁰⁴ Firstly, supervision and education at the ward or commune is considered only in cases of less serious or serious crimes. Hence, the scope of this measure is very limited and does not extend to those between 14 and 16 years of age, who intentionally commit very serious crimes or severely serious crimes. Secondly, the attitude of judges towards handling criminal cases is still prone to the retributive or punitive approach.¹⁰⁵ Thirdly, the roles of families, organizations, and agencies in supervision and education of juvenile offenders are very formalistic. Supportive services for juvenile offenders, such as consultation, tutorship, training, have been little mentioned in the law.

The New PCs has broadened the types and scope of application of supervision and education measures. Three types of measures are introduced; chiding, community-based conciliation, and education at ward or commune. Authorities, empowered to apply such measures, include not only courts, but also investigating bodies and public procurators. This provision indicates that at different stages of the criminal process, different competent actors can divert the child offender from judicial proceedings, through determining other applicable measures. The role of the police and public procurators is properly enhanced with more powers to divert child offenders out of the criminal process. The amendment is totally in accordance with the spirit of the CRC.

104) Thi Thanh Nga Pham, *supra* note 100, at 195.

105) *Id.* at 196.

b. Measures in the Context of Judicial Proceedings

Depending on the nature and seriousness of crimes and personal details of child offenders, non-custodial measures can be applied, including (a) ban on travel out of place of residence, (b) guarantee, and (c) deposit of money or valuable property as bail. The first measure requires the child offenders to pledge in written form with the presence of their parents or legal representatives, to abide the law and appear where there is a court subpoena.¹⁰⁶ Guarantee and bail, are deterrent measures alternative to temporary detention, requires at least two relatives of the child offenders or organizations to which they are a member. Such relatives or organizations must have good conducts and qualities and pledge not to allow the offenders to continue committing offences. Furthermore, they must ensure the offender's appearance in response to the summons of investigating bodies, procuracies, or subpoenas of courts.¹⁰⁷ Case studies indicate that the measures "ban on travel out of place of residence" and "guarantee" are applied frequently.¹⁰⁸

In the general justice system, if an offender is found guilty, the judge may apply one of the following penalties: seven principal penalties (including warning, fine, non-custodial reform, expulsion, termed imprisonment, life imprisonment, and death penalty) and seven additional penalties (including ban from holding certain posts, practicing occupations or doing certain jobs, ban on residence, probation, deprivation of some civic rights, confiscation of property, fine, and expulsion).¹⁰⁹ Those who suffer mental illness or disorder at the time the offense was committed shall undergo mandatory medical treatment in a psychiatric institution.

For juvenile offenders, Article 71 of the Old PCs provides: "*Juvenile offenders shall be subject to only one of following penalties for each crime: 1. Warning; 2. Fine; 3. Non-custodial reform; 4. Termed imprisonment.*"

The first two penalties are applicable for less serious crimes and non-custodial reform is for less serious or serious crimes. As a result, termed imprisonment is the only alternative for the judge to apply against those aged from 14 to below 16 years who bear criminal responsibility for very serious crimes committed intentionally or severely serious crimes. This provision does

106) The Old CPC, §91.

107) The Old CPC, §91, 92.

108) Thi Thanh Nga Pham, *supra* note 100, at 194.

109) The Old PC, §28(1)(2).

not take into account age, maturity, and understanding of the child offender when a judge considers applicable penalties; thus, does not align with international standards in this respect.

The New PCs has broadened the application of non-custodial penalties. Of these, fines are applicable for less serious and serious crimes against people aged from 16 to 18. Non-custodial reform can be applied to: (a) persons aged from 16 to 18 who have committed less serious, serious, or unintentionally very serious crimes; (b) persons aged from 14 to 16 who have committed very serious crimes intentionally. Such penalties applied to juvenile offenders are no more than a half of the penalty which applies to adults for the same crime.¹¹⁰

Besides, the word 'only' in Article 71 might get judges tied up in cases where juvenile offenders are foreigners. Some argue that only four penalties are applicable without including the possibility for expulsion of foreign juvenile offenders.¹¹¹ In other words, they interpret the word '*penalties*' in the provision in the broadest sense which cover both principal and additional penalties. My interpretation suggests a reading of the PCs as a whole, arguing that the word '*penalties*' is not specified; thus, it is possible to understand either principal or additional penalties. However, all four types of penalties applicable to juvenile offenders above possess the same nature with other principal penalties as provided in Article 28 of the Old PCs. Therefore, it only indicates principal penalties and does not prevent the imposition of an additional penalty. As a result, expulsion can be imposed on foreign juvenile offenders as an additional penalty.

Nonetheless, the problem still remains in cases where the offenders are sentenced to termed imprisonment. It would be challenging for the State of Vietnam to fulfill their right to education, health, religion, and family contact due to language and cultural barriers. The New PCs or other laws do not provide for any regulations in this regard. Therefore, this still remains a challenge for the State of Vietnam when a foreign juvenile offender comes in conflict with Vietnamese law.

110) The New PC, §99, 100.

111) Van Thuc Dang, Van Manh Hoang, *Hoan Thien Quy Dinh cua Bo Luat Hinh Su ve Quyet Dinh Hinh Phat doi voi Nguoi Chua Thanh Nien Pham Toi* [Suggestions for the Penal Code Regarding Deciding Penalties Against Juvenile Offenders], 10 *Tap chi Nha Nuoc va Phap Luat* [State and Law Review] 2 (2015).

2. Deprivation of Liberty

a. Prohibition of Unlawful or Arbitrary Deprivation of Liberty

Under Article 20 of the 2013 Constitution of Vietnam, no one shall be deprived of liberty in the absence of a court's or a public procurator's decision or approval, except in case where caught in the act. The arrest, keeping in custody and detention of a person shall be provided by parliamentary statutes. The same regulation can be found in Articles 6 and 10 of the Old and the New CPC respectively. All forms of deprivation of liberty are based on the PC and CPC, both statutory laws, thus the lawfulness requirement is satisfied.

There is no difference on legal grounds regarding arrest, police custody and pre-trial detention for adults and children. However, the rules in terms of enforcement and procedural aspects are somewhat different.

Regarding prohibition of arbitrary deprivation of liberty, neither the Vietnamese Constitution, nor the PC and the CPC contain an explicit prohibition of arbitrary deprivation of liberty. While the PC and CPC cannot be regarded as arbitrary, their enforcement however, might be the case, particularly where the law leaves much discretion to different authorities. This point will be examined below.

i. Arrest and Police Custody

Under the Old CPC, a child under suspicion of committing an offence can be arrested and taken to the police station. In case that children are caught in the act they can be arrested by anyone who witnessed the offence. A warrant for arrest of a person not caught in the act can be issued by heads and deputy heads of investigating bodies, however, such warrant needs to be approved by the public procurators at the same level. Duration of custody is three days with a maximum extension of 6 days more. Thus, the legal ground for arrest in the latter case is the suspicion of the child. Extension of remand in police custody can only be ordered if strictly necessary. The same regulations can be found in Articles 117-118 of the New CPC.

Under the Old CPC, there is no difference on a legal basis for application of arrest and custody between adult and child offenders. Similarly, the New CPC does not provide specific grounds for arresting and taking juvenile offenders

into custody, even though it is prescribed that such deterrent measures should be very restrictively employed.¹¹²

Investigating bodies, such as police, and public procurators have been given a large discretion. Although the CPC provides that persons kept in custody, detainees, accused, and defendants have the right to challenge the legality of their deprivation of liberty, it does not mention the maximum length of detention time before they are brought to a court or judge. The prolongation of custody time might become arbitrary if the authorities cannot provide appropriate justifications. The New CPC has not given more clarifications in this regard either.

ii. Temporary or Pre-trial Detention

Temporary detention can be ordered by: (a) heads or deputy heads of investigating bodies with approval by the public procurators at the same level; (b) chairmen and vice-chairmen of procuracies, and (c) presidents and vice-presidents of courts. Generally, the cases and grounds for temporary detention are exhaustively provided by the CPC and apply equally to adults and to children (Article 88 of the Old CPC and Article 119 of the New CPC). Under the New CPC, those aged from 16 to 18 years who committed less serious crime or serious crime unintentionally, can be exempt from being arrested, kept in custody, and detained unless they continue commission of the crime, or flee (Article 419(4) of the New CPC).

Depending on the nature and severity of crimes, temporary detention can be applied at all stages of the criminal process. The duration of detention is proportionate to the severity of crimes with renewals and duration based on requests from investigators and procurators.

Table 1: Old Regulations on Temporary Detention

Stages/Crimes	Less Serious	Serious	Very Serious	Severely Serious
Investigation	2 months + 1 month	3 months + 2 months + 1 month	4 months + 3 months + 2 months	4 months + 4 months + 4 months + 4 months
Prosecution	20 days	20 days	30 days	30 days

112) New CPC §419.

	+ 10 days	+ 10 days	+ 15 days	+ 30 days
Trial Preparation	30 days	45 days	2 months	3 months
	+ 15 days	+ 15 days	+ 15 days	+ 15 days
	+15 days	+ 15 days	+ 30 days	+ 30 days
	+ 15 days	+ 15 days	+ 15 days	+ 15 days
Total	195 days	300 days	435 days	660 days
<i>Source: Articles 119-121, 166, 176-177 of the Old CPC</i>				

However, there is no difference in duration of custody and temporary detention between adult and juvenile offenders under the Old CPC. This is clearly inconsistent with the international standards. The New CPC has not only significantly reduced duration of detention, but also provided that custody and detention duration of juvenile offenders shall not exceed two thirds of the applicable time to adult offenders. The legal basis for detention is the same for arrest and police custody mentioned above.

Table 2: New Regulations on Temporary Detention

Stages/Crimes	Less Serious	Serious	Very Serious	Severely Serious
Investigation	2 months + 1 month	3 months + 2 months	4 months + 3 months	4 months + 4 months + 4 months
Prosecution	20 days + 10 days	20 days + 15 days	30 days + 30 days	30 days + 30 days
Trial Preparation	30 days +15 days + 15 days	45 days + 15 days +15 days	2 months + 30 days + 15 days	3 months + 30 days + 15 days
Total	180 days	240 days	375 days	555 days
Duration for Juvenile Offenders	120 days	160 days	250 days	370 days
<i>Source: Articles 172-175, 240-241, 277-278, and 419 of the New CPC</i>				

iii. Re-Education at Reformatory Institution

This is the judicial measure applicable in cases where a child offender is exempt from criminal responsibility. An educational institution's mandate is to monitor, re-educate, and re-direct child offenders to repair their wrongdoings. Generally, child offenders who have been sent to an educational institution are under supervision and have to strictly abide by internal rules. For example, they have to ask for prior permission in order to visit their home. As a result, this is considered as a form of deprivation of liberty. Normally, the application of this measure is at the discretion of courts.

According to the old administrative regulations, persons aged from 12 to 18, who committed administrative violations or petty crimes, may be put in the same reformatory institution by an administrative decision by the Chairman of People's Committee at the commune, ward, district, and city levels.¹¹³ This was clearly a violation of international human rights law in respect of competent authorities. As stated above, authorities that have the power to issue an order of deprivation of liberty must be independent, objective, and impartial to the executive. People's Committee is an executive organ at local level, thus cannot have such competence. Furthermore, such an administrative decision might deprive the accused of his or her right to legal defense. The 2012 Law on Handling Administrative Violations has replaced a number of authoritative documents in this regard and provides that only courts have the competence to send child offenders to reformatory institutions if they are exempt from criminal responsibility; as a result, the accused will have the right to defend by himself or through his representatives in a proper manner before the court.¹¹⁴ The same provision can be found in Article 96 of the New PCs.

iv. Termed Imprisonment

Articles 74 and 101 of the Old and the New PCs generally prescribe that termed imprisonment shall be imposed in case where:

- (a) Persons aged between 16 to 18 years at the time the crime was committed, if the applicable law provisions stipulate life imprisonment or the death sentence, the highest penalty applicable shall not exceed eighteen years of

113) Nghi dinh Chinh Phu [Government Decree] No. 142/2003/ND-CP. Note that: this decree is out of effect and replaced by The 2012 Law on Handling Administrative Violations.

114) Duc Tien Nguyen, *supra* note 73, at 1-7.

imprisonment; if it is termed imprisonment, the highest penalty applicable shall not exceed three quarters of the prison term prescribed for the same crime committed by an adult;

- (b) Persons aged from 14 to 16 at the time of the commission of crimes, if the applicable law provisions stipulate the life imprisonment or death sentence, the highest penalty applicable shall not exceed twelve years; if it is the termed imprisonment, the highest penalty applicable shall not exceed a half of the prison term prescribed for the same crime committed by an adult.

The imposition and duration of imprisonment must be proportionate in light of the seriousness of the committed crime, the circumstances of the case, and the personality of the child offender. The court has great discretion on this matter. In light of the lack of guidance by the international human rights framework regarding maximum sentences, it is hard to tell whether Vietnamese regulations in this regard are in conformity with that framework. In other words, it is difficult to assess whether Vietnam regulations on duration of imprisonment have met the principle of ‘last resort and for the shortest period of time.’ UNICEF, nevertheless, has supposed that Vietnamese justice law is more punitive than other countries in the region.¹¹⁵

Not all youth imprisonments lead to deprivation of liberty; a number of imprisonments are not executed under conditions. It is called suspended imprisonment (Article 60 of the Old PCs; Article 65 of the New PCs) requiring three elements: (i) only for less serious crime; (ii) the offender has good personal details; and (iii) extenuating circumstances. The offender shall be under supervision and go through a ‘period of challenge’ (2 to 5 years) and must meet a number of conditions set out by the Court.

The New PC has put in a new provision regarding early (conditional) release. Persons aged under 18 years who have been serving termed imprisonment may be released early under conditions: (i) first time of commission of a crime; (ii) demonstration of improvements, good reformatory attitude; (iii) served at least one third of the imprisonment term; and (iv) specific place of residence. This new provision has shown the conformity of Vietnam penal law with international standards.

115) UNICEF Vietnam, *Report on Analysis of the Situation of Children in Viet Nam* 2010 234 (UNICEF Vietnam, 2011).

b. Deprivation of Liberty as a Measure of Last Resort and for the Shortest Appropriate Period of Time

Both the Old and the New CPCs are based on the principle of necessity, indicating that arrest and detention against juvenile offenders are the last resort, should be used only if other monitoring measures are proven ineffective.¹¹⁶ In cases where deprivation of liberty of the child is unavoidable, the use of arrest, detention, or imprisonment must be for ‘the shortest appropriate period of time’ so that it does not interfere negatively with the best interest of the child.

The arrest, police custody, and temporary detention is primarily at the discretion of the police. Besides, public procurators are also involved in overseeing this activity by approving or disapproving arrest warrants by investigating bodies, thus their role is also vital in the implementation of the principle of last resort. The legal grounds for taking into custody and temporary detention are set forth more explicitly in the New CPC, which are the firm platform to prevent arbitrary detention, and a good indicator to assess the performance of investigating bodies and public procurators in employing deprivation of liberty as a last resort.

The duration of temporary detention presented above is the maximum period of time applicable in case of necessity. In practice, not all children in conflict with the law have to go through that amount of time in custody and detention. Case studies have shown that juvenile offenders are often released on conditions, such as guarantees by their relatives or ban on travel out of place of residence.¹¹⁷ However, to ensure deprivation of children’s liberty ‘for the shortest appropriate period of time,’ judicial review, and checks and balances are necessary. This still remains a problem since as mentioned in the introduction part, public procurators are the main actor in both prosecuting criminals and overseeing related judicial activities.

c. Conditions of Deprivation of Liberty

In this regard, the applicable law is the 2015 Law on Execution of Temporary Custody and Detention (ETCD) and the 2010 Law on Execution of Criminal Judgments (ECJs), in which it establishes a separate section dealing with

116) For the old regulation, *See* Joint Circular 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP -BLDTBXH on Juvenile Cases. For the New regulation, the New CPC, §419.

117) Thi Thanh Nga Pham, *supra* note 100, at 192-6.

juvenile detainees and inmates. Accordingly, the principle of segregation must be ensured, and juvenile detainees and inmates shall not be placed in an adult prison or other facilities for adults.¹¹⁸

In respect of environment and accommodations, regulations are quite thin and limited. It appears that the general regulations are applicable equally to adult and to juvenile inmates under which they will be placed in dormitories. Each inmate has minimum 2 meters square for sleeping placement.¹¹⁹ Besides, time and forms of leisure activities and physical exercise suitable to juveniles will be provided.¹²⁰ Nevertheless, it neither elaborates the minimum duration in detail nor specifies any particular activities. Moreover, the law does not mention about disabled juvenile detainees and inmates and their needs. Vietnam has ratified the Convention on the Rights of Persons with Disabilities in 2015, hence the State is under international obligation to protect and ensure the full and equal enjoyment of all human rights by persons with disabilities. Such vagueness might leave too much discretion in the hands of authorities and raise doubts with regards to the conformity with international standards.

Regarding personal and health care, food portion for juvenile shall be guaranteed the same as for adult inmates. Extra food can be provided to meet juveniles' needs.¹²¹ Besides, clothes and personal items will be offered annually to juvenile inmates. This can be seen as compliance in light of international standards.

Regarding education and vocational training, every child of primary school age is guaranteed to complete his/her education in the facility, and secondary school is optional.¹²² Furthermore, vocational training is provided to juvenile inmates with the purpose of better re-integration into society. Prison labor is mandatory under the law; however, juvenile inmates will not have to carry out harsh and dangerous work or will not be in contact with hazardous substances.¹²³ The maximum length of the work is 8 hours per day, and no more than 40 hours per week. The results of prison labor will be dispensed partially to inmates' meals or to reward inmates who have good labor records.

118) 2015 Law on Execution of Temporary Custody and Detention, §33(1); 2010 Law on Execution of Criminal Judgements, §51(3).

119) 2010 Law on Execution of Criminal Judgements, §42(4).

120) *Id.* §52(3).

121) 2015 Law on Execution of Temporary Custody and Detention, §33(1); 2010 Law on Execution of Criminal Judgements, §52(1).

122) *Id.* §51(2).

123) *Id.* §51(3).

In respect of contact with family, juvenile inmates have the right to meet their family no more than three times a month, no more than three hours each time; in special circumstances, it shall not exceed 24 hours. Contact through phone calls shall be made no more than four times a month and no more than 10 minutes each time.¹²⁴

D. The Organization of Juvenile Justice

The Old CPC reserved a separate chapter for special procedures dealing with juvenile offenders, yet its provisions dealt with general issues, such as participation of family members, teachers, and school representatives in the proceedings. It can be said that the adult and juvenile systems normally overlap, and the majority of general regulations of the CPC are also applicable to juvenile offenders. The representative of the Supreme Court also admitted that there were no distinctions in procedures between juvenile and adult cases.¹²⁵

Up to now, there is shortage of specialized police forces or public procurators who are trained to deal with juvenile offenders. As mentioned above, the New CPC has introduced the principle of best interest of the child and explicitly obligates procedure-conducting persons to be trained and obtain psychological and educational knowledge and experience before handling juvenile offenders.¹²⁶ A pilot child and juvenile-friendly investigation model is being launched with the support from international organizations in a number of provinces, in which it requires:

- (i) Frequent training for police officers and investigators who have contact with juvenile offenders. Specialized police forces should be established to deal with issues in connection with juvenile offenders;
- (ii) Where possible, taking of statement of children and juveniles should be conducted at their homes;
- (iii) A juvenile-friendly investigation room should be created to suit the psychology of juveniles. During the interrogation, the police officers must be wearing

124) *Id.* §53.

125) Van Do Tran, *Bao Cao Tong Quan ve Co So Ly Luan va Thuc Tien cua Su Can Thiet Thanh Lap Toa An Chuyen Trach doi voi Nguoi Chua Thanh Nien o Viet Nam [General Report on the Theoretical and Practical Rationale for Establishing Specialized Courts for Juveniles in Vietnam]*, 119-120 (Toa An Nhan Dan Toi Cao [The People's Supreme Court] and UNICEF Vietnam ed, Thanh Nien, 2012).

126) The New CPC, §414 (1), §415.

civilian clothes;

- (iv) The place for custody and detention of juveniles should be improved to prevent detrimental impact on juveniles' psychology.

An identical problem has also persisted within the court system. So far, there is neither professional judicial staff to deal with juvenile cases nor a body of judges specifically trained for the job.¹²⁷ The Jury Panel often lacks a teacher or a Youth Union cadre who understands the psychology of juveniles.¹²⁸ The 2014 Law on Organization of People's Courts stipulates that family and juvenile courts shall be organized from the central level to the district level; however, it has taken a long time to establish such type of court. In 2016, the Supreme People's Court issued a resolution to run a pilot family and juvenile court model in Ho Chi Minh city.¹²⁹ Accordingly, it is recommended that:

- (i) The courtroom should be decorated in a friendly manner to avoid juveniles' obsession of their illegal acts; the default setting is a closed hearing;
- (ii) All the participants are required to wear casual clothes, including litigation-conducting persons; handcuffing of the juvenile offenders is restricted;
- (iii) The language used during the trial must be comprehensible and understandable for juvenile offenders.¹³⁰

In this regard, Vietnamese regulations are already in line with the international standards, however it needs more time for pilot running and re-assessment on the practical basis in order to apply models on a larger scale.

V. Conclusion and Recommendations

In general, it is fair to say that Vietnam has done a good job in bringing its law into compliance with international standards. The change in paradigm with regards to handling juvenile offenders, from a punitive to a restorative system

127) People's Supreme Court and UNICEF Vietnam, *supra* note 89, at 40.

128) *Id.* at 119-20.

129) Thi Diem Toa An Gia Dinh Theo Mo Hinh The Gioi [Running Pilot Family and Juvenile Court in Accordance with the World Model], ISL VASS, March 21 2016, http://isl.vass.gov.vn/noidung/vanban/Lists/GioiThieu/View_Detail.aspx?ItemID=78, (last visited Apr. 14, 2018).

130) VLA and UNICEF Vietnam, *supra* note 89, at 22.

strengthens Vietnam's humane legislation and policies towards juvenile offenders. The MACR remains unchanged. Death penalty and life imprisonment against juvenile offenders are strictly prohibited. Further, the introduction of new leading principles and children's rights plays an important role in handling juvenile offenders at pre- and post-judgment stages. Alternatives to child detention, rehabilitation and reintegration programmes have been designed under the auspices of international organizations and State authorities. The Government of Vietnam has managed to allocate adequate human, technical, and financial resources for the protection and fulfillment of children's rights within juvenile justice to ensure diversion and alternative measures to deprivation of children's liberty, and provision of rehabilitation and reintegration programmes to help juvenile better reintegrate into the society upon their release. These are very commendable and welcoming efforts.

However, as having shown above, a number of challenges still remain; thus, the justice system is in need of further improvement. Among many things, limitations and shortcomings are showed in either the regulations or the implementation of such in practice. On the basis of the comparison and assessment in this article, several suggestions can be made with view to better ensure the rights of juvenile offenders in Vietnam's juvenile justice:

First and foremost, there is a need to review a number of regulations with the purpose to bring Vietnam's legislations into conformity with international standards, as recommended by the CRC Committee. Thereby, the definition of a 'child' should cover all persons aged below 18. As a result, the wording of Article 1 of the 2016 Law on Children should be amended as follows: "*A child means a human being below the age of eighteen years.*" The People's Supreme Court should be responsible for instructing lower courts to apply relevant regulations in desired ways and to preclude unnecessary interpretation of provisions that hurts the interest of juvenile offenders'; as well as clarify the content and scope of new rights, such as the right to remain silent and to be heard, in order to ensure such rights fully respected and implemented in practice.

Secondly, in respect of the prevention of torture and ill treatment, Vietnam should incorporate CAT provisions and general recommendations into its domestic law for a better administration of justice and the protection of human rights. The Government should take all necessary steps, including dissemination of knowledge, professional training, and judicial oversight, to ensure that police officers shall not carry out torture on suspects and offenders.

If there is clear evidence, such officers shall be subject to appropriate internal discipline or prosecution, dependent on the degree of such violation. All interrogations must be videotaped and recorded as provided under the New PC and CPC. This issue is highly critical at the grassroots level at which police officers are poorly trained to deal with juvenile offenders and due to limited resources for equipment.

Thirdly, legal and appropriate assistance should be improved and enhanced in both quality and quantity. Besides, it is important to constantly emphasize the duty of police officers and public procurators in informing not only suspects and offenders but also their representatives and parents about their substantive and procedural rights. The procedure-conducting bodies should engage juvenile offenders' parents and legal guardians more in the criminal procedural process. It should be a means for external oversight of judicial power.

Further, public education campaign on legal rights of citizens should be conducted regularly, to disseminate basic legal knowledge to people for self-protection against the abuse of power by different stakeholders.

Fourthly, regarding the protection of children's privacy, the State shall ensure that no harm will be caused by undue publicity or by the process of labeling which may lead to the stigmatization and identification of a child offender, thus impacting on the exercise of his or her rights. The People's Supreme Court should encourage lower courts to conduct trials behind closed doors for juvenile offenders, victims, or witnesses. Besides, there is a need to tighten rules and standards regarding press activities in Vietnam. It is recommended that the law should strictly prohibit any acts of publishing photographs or pictures of juvenile offenders; only certain graphic depictions should be allowed in order to prevent stigmatization and identification of the child offender.

Fifthly, ensure the deprivation of children's liberty shall be carried out lawfully, non-arbitrarily, as the last resort, and for the shortest period of time through different means of judicial oversight. If the procuracies cannot produce any appropriate justifications for arrest or detention warrant, the court shall strike it down to protect suspects and offenders from illegal arrest and detention. There is a need to continue and further research, and accelerate pilot running on interventions and diversions alternative to deprivation of liberty. The State of Vietnam must ensure all available resources for such purpose.

When handing down their judgments, courts should take into account the age and maturity of the suspect with the purpose for him or her to repair the harm done and rehabilitate and reintegrate into the society. Thereby, alternatives to

children's deprivation of liberty should be prioritized. Besides, termed imprisonment shall be reviewed periodically based on the improvement and positive attitude of juvenile inmates to provide them a chance of early release.

Sixthly, there is a need to accelerate the running of pilot investigation and court models in order to apply them on a larger scale. Proper and regular trainings should be designed for all stakeholders handling children in conflict with the law. If possible, it is recommended to establish an ombudsman who reports directly to the National Assembly to monitor the implementation of children's rights within the juvenile justice system.

Seventhly, in respect of foreign juvenile offenders, the State should negotiate legal assistance treaties with other countries to cover this subject. Besides, diplomatic means and international cooperation in criminal matters on the basis of reciprocity can be a resort to solve the problem.

Finally, the Vietnamese authorities should prepare a specific plan to establish regulations on adequate data collection on children (which respect their privacy) with a view to monitoring the implementation of the rights of children in conflict with the penal law. This information would be relatively useful to conduct further research on the effective protection of the rights of juvenile offenders.

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