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ĐÀO THỊ THU AN

LAW ON ADMINISTRATIVE MEASURE APPLYING TO MINORS IN CONFLICT WITH THE LAW

Major: Constitution and Administrative law

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SUMMARY OF DOCTORAL DISSERTATION

The dissertation is completed at

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- 1. Dr. Trần Thi Hiền
- 2. Dr. Nguyễn Thị Kim Thoa

Reviewer 1:		
Reviewer 2:		

Reviewer 3:

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INTRODUCTION

1. The rationale of the dissertation

Many countries in the world must address the problems of minors who conflict with the law (MICWL) in different ways, depending on the social-economic conditions, customs and legal system of each country. However, each country may have different s approach is different to solve this problem, event they share the same goal of effective education, rehabilitation and reintegration for better generations of law-abiding citizens in the future. It is in common as such the approach must be in line with ratified international treaties and relevant child justice international standards.

As a state party to the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Viet Nam has obligations to implement the substantive provisions of these treaties, as well as obligations to report on a regular basis on measures taken to implement the substantive provisions. Improving the legal framework on administrative measures applying with MICWL is an urgent need to demonstrate genuine efforts to show Viet Nam's commitments as a member state.

The Law on Handling of Administrative Violations 2012 includes a separate chapter on measures to handle cases of administrative violations committed against minors, protecting legitimate rights and interests of minors. The Law provides two alternative measures to deal with administrative offences with the aim at enhancing informal community-based treatment of juvenile offenders whilst at the same time improving the responsibility of families for the education of juveniles. The law also limits the scope for committing children to reformative schools. Specifically, application of reformative schooling measure is under jurisdiction of the District People's Court (It adapts to the requirement of rule of law state as the measure that limits freedom of a child must be under jurisdiction of justice system.

The Law on Handling of Administrative Violations (LHAV) regarding of administrative measures includes many significant changes. Remarkably, the decision of placement a minor in a reformatory is the jurisdiction of the Courts that demonstrates a substantial reform in reforming Vietnamese legal system in line with international standards. The law also includes a separated part dedicated to the handling of MICWL consisting of principles and regulations protecting legitimate rights and interests of minors. For the first time, the Law stipulates alternative measures, aimed at enhancing informal community-based treatment of MICWL as well as improving the responsibility of families for the education of MICWL.

Despite such improvements, however, in comparison with international standards, especially the Model law on Juvenile Justice, Vietnamese law on administrative measures applying to MICWL, still have some limitations such as: inconsistency with the new criminal policies for the minors in the 2015 Penal Code (PC), inadequate regulations on diversion measures; and scattered policies on the protection of the rights of the minors.

The enforcement of law on administrative measures applying to MICWL also shows many gaps in comparison with international standards, for example, it lacks regulations for the implementation. As a result, there is great hindrance in the execution, affecting effectiveness and the rights of the MICWL.

Based on the previous-mentioned facts, there is a crucial to do research and identify both theoretical and practical issues in relation to the law on administrative measures applying to minors in conflict with the law.

2. Research objectives and tasks

Based on theoretical research, international standards, practice of enforcement and reference of international models on handling of MICWL applicable to Vietnam, the research aims at proposing solutions to ensure law on administrative measures applying to MICWL for changing their behavior and attitude towards law binding.

The thesis's tasks are defined as follows:

- Literature review of previous studies related to the topic to determine which can be referred to and gaps for further research
- Theoretical aspect: identify the problems of MICWL, the characteristics that necessitate a separate legal system; the basic

requirements of the legal system according to international standards and the unique traits of the Vietnamese legal system; development of the new definitions, principles, and scope of law on administrative measure applying to MICWL as well as criteria for improvement of legal framework.

- *Practical* aspect: analyze the current situation of the implementation of the law on administrative measure applying to MICWL, focusing on the gaps of the law and its impacts on the law enforcement.
- Analyzing of international standards and model law on juvenile justice; assessment of pilot models that are being implemented to provide evidence for improvement of the legal system.
- Propose solutions to revise the law on administrative measures applying to MICWL in accordance with international standards on human rights and child friendly justice, moving towards a comprehensive juvenile justice system.

3. Scope and Subjects of the research

As a dissertation of the Constitution and Administrative Law major, the subjects of the research are theorical and practice issues of the law on administrative measure applying to MICWL, which include:

- Minors are special subject of legal system as they are not yet fully physical and mental developed as adult and the requirement of special protection.
- Definitions, characteristics, principles, scope and criteria for improvements of law on of administrative measures applying to MICWL.
- International standards, core components of a comprehensive justice system for minor in conflict with the laws.
- The current legal regulations and enforcement of the law on administrative measures applying to MICWL.
- Orientation s and solutions for reforming law on administrative measures applying to MICWL.

Scope of research: The dissertation focuses on law on administrative measures applying to MICWL since 2012, after the Law on handling administrative violations was enacted. However, to effectively analyze the changes in law on administrative measures applying to MICWL, this dissertation also refers to laws on this matter prior to 2012 as well. It also looks into the United Nations' studies, international experiences, and trends

on development of specialized child justice system before and after 2012 to propose solutions for a comprehensive specialized legal system on handling of MICWL.

4. Fundamental theories

This dissertation based on different research theoretical basics and ideologies including the scientific methodology of Marxist - Leninism for law and governance, directions and perspectives of the Communist Party of Vietnam on legal revision, the protection of human rights and rights of the child. The content of core international conventions on human rights, including rights of the child provides the basis for the theoretical reasoning, approach, analysis, assessment and proposed solutions of the dissertation.

5. Research Approach and Methodology

5.1. Research Approach

- Human rights-based approach

Human right-based approach is used as the key research methodology of this dissertation. Minor in conflict with the law is one of the most vulnerable groups in society and in need of special care, attention and protection always. Unlike adults, they are not yet fully capable of understanding the law and protecting their own interests and require special protection and intervention to be assured the rights to development. Taking a human rights-based approach to tackle problems relating to MICWL is suitable and in accordance with international standards.

- Systems-building approach

Many countries nowadays have applied the systems-building approach, moving from categories of problems towards preventing and responding to minor issues systematically. This approach includes three core systems including social behavior changes system, legal and regulatory system, and social welfare system at the same time. The analysis and assessment of law on administrative measures applying to MICWL include regulations aiming at changing the attitude of people directly involved in the prevention, handling and reintegration for MICWL; building a comprehensive legal framework with specific regulations on subjects, authorization, handling and diversion measures and precondition for the effective law implementation.

- Interdisciplinary approach

This is an approach that combines the knowledge of multiple social science subjects such as philosophy, psychology, medicine, social studies to support the study under the perspective of law to analyze the terms and structures of law on administrative measures applying to MICWL.

- Comparative law study approach

This approach is used mainly in the analysis and evaluation of the law on administrative measure applying to MICWL based on comparisons with the international requirements and standards on human rights and rights of the child

- History-based approach

The dissertation uses this approach to ensure the consistency of the historical point of views related to research topic and assessment of the changes of the law on administrative measures applying to MICWL in Vietnam, especially the changes in the revised LHAV in 2012 compared to 2002 Ordinance on handling of administrative violations to show the improvement of the LHAV.

5.2. Research methodology

To conduct the research, this dissertation uses the different research methods including desk review of previous researches and documents related to this topic. Methods of analysis, compiling, comparison, and reasoning are used to compare Vietnam's regulations with international standards as well as to show the drawbacks of Vietnam's laws compared to international standards. In addition, the dissertation also focuses on analyzing the current regulations, practical observation and professional opinions to clarify and improve the assessment of law on administrative measures applying to MICWL.

6. Findings and practical contribution of the dissertation

6.1. Key findings

- On the basis of the protection of human rights, rights of the child, scientific findings on development of MICWL, the dissertation systemizes and analyzes the legal theories of handling MICWL. It also proposes principles, basic requirements and scope of law on handling MICWL to ensure the legal regulations meets the metal, biological and physical characteristic of the minors

- On the basis of analyzing international standards, the dissertation concludes that the administrative measure of placing a minor to the reformative schools needs to be considered a judicial measure and should be revised in accordance with the CRC's provisions on deprivation of liberty of MICWL. Provisions on community-based education measure applying to MILWL also need to be revised to be fully in line with international standards.
- Regulations on diversion and alternative measures are an important part of law on handling MICWL. However, there are still some gaps and not fully in line with international standards, thus, it remains a floor for improvement
- Vietnam should establish a specialized friendly justice system for minors without any distinction between administrative and criminal responsibility as stipulated in the current legal system. This system should include core components required by the international standards.
- The dissertation recommends applying the Model Law on Juvenile Justice to develop a new law on handling minors in conflict with the law as the strategy solution and revising related provisions of the Law on handling administrative violations and Law on legal aid as short-term solutions.

6.2. Practical contribution of the dissertation

- The key findings of the dissertation can be used as reference material in further research, education and training on child friendly justice for students, law enforcement officials.
- The proposals on improving the law in the dissertation can be used as reference material for policy makers when revising law on handling MICWL and law on administrative measures applying to MICWL.

7. Structure of the dissertation

Apart from the introduction, conclusion, appendix and list of reference, the dissertation consists of 5 chapters:

- Chapter 1: The research's overview in relation to dissertation theme
- Chapter 2: The theorical studies of the law on administrative measures applying to minors in conflict with the law
- Chapter 3: International standards on the protection of the rights of minors in conflict with the law

Chapter 4: Vietnamese law on administrative measures applying to minors in conflict with the law and its practical implementation

Chapter 5: Orientation, requirements and solutions for improving the law on administrative measures applying to minors in conflict with the law

CHAPTER 1 THE RESEARCH'S OVERVIEW IN RELATION TO DISSERTATION THEME

The law on administrative handling of the minors is not a new issue and it has drawn attention from different researchers and scholars in all local, regional and international contexts. However, these studies in general did not apply human right-based approach, principles and international standards on handling of MICWL for identifying the gap of Vietnamese law in comparison with international standards, thus it is also not reflect the new direction in using evidence on new scientific findings of the human brain.

International researches on this topic primarily focused on juvenile justice resulting from the different legal systems, most countries do not have a legal system on administrative handling like Vietnam. There are also some researchers conducted by foreign authors on administrative measures of Vietnam which analyze on the basis of standards of criminal justice, especially the placement a minor to reformatory is deprivation of liberty. However, these researches only assess the situation and recommend Vietnamese laws need to be revised in accordance with international standards but those lack specific and feasible solutions for the case of Vietnam.

Based on literature review, this dissertation proposes the following research hypotheses:

Law on administrative measures applying to MICWL needs to be improved systematically as a component of a comprehensive specialized juvenile justice system in accordance with international standards on human rights, including rights of the child and child friendly justice in order to ensure a child will follow the laws and contribute to development of society.

Specifically, the dissertation needs to prove the research hypotheses as follows:

- Law on administrative measures applying to MICWL is not yet fully consistent with international standards on human rights and rights of the child.
- The regulations on measures of administrative handling of MICWL are stricter than regulations on the Penal Code
- The placement of minors in reformative schools isolating children from family and society for a period, therefore, it should be defined as a judicial measure in consistent with international standards.
- Law on administrative measures applying to MICWL needs to be improved systematically as a component of a comprehensive specialized juvenile justice system

The following research's questions are put forward and addressed in the dissertation:

- 1. In what way the laws on administrative handling of MICWL should be changed to ensures the protection of the rights of children?
- 2. What requirements of the international standards on ensuring the rights of MICWL, the mechanisms and measures for implementing these standards which require state party to develop and reform law on handling MICWL and law on administrative handling of MICWL?

To fulfil obligations of a state party to implement the substantive provisions of core human rights convention, including CRC, what requirements on improving legal framework on administrative measures applying with MICWL should be considered?

- 3. What are the gaps of Vietnamese law administrative measures applying to MICWL in comparison with international standards on ensuring the rights of MICWL and how can we implement those international standards?
- 4. What solutions can be implemented to ensure the Law on the consistency of administrative measures applying to MICWL to comply with international standards on human rights and rights of the child?

CHAPTER 2 THE THEORICAL STUDIES OF THE LAW ON ADMINISTRATIVE MEASURES APPLYING TO MINIORS IN CONFLICT WITH THE LAW

2.1. Definition and characteristics of MICWL

2.1.1 Concept of the minor

The criteria for someone to be considered "minors" is based on a specific age stated by law. In Vietnam, the law stipulates that people under 18 years old are considered minors. According to the CRC, people under 18 years old have all the rights stated in the Convention. Minors are people whose brains have not yet fully develop, thus resulting in a limitation in awareness and behavior control, high sensitivity from the environment, inability to protect their own rights. They are more in need of legal protection compared to an adult.

2.1.2 Development characteristic of minors

Studies have shown that the person's brain is not fully developed until approximately the age of 25. Adolescence is also a crucial period of brain development; it is also the age when a minor is most likely to come in conflict with the law. The prefrontal cortex of the brain is the part controlling the decision-making, including long-term planning, risk assessment, impulse control, and emotional control -is far less developed in teenagers than in adults. The development of the brain explains why minors reason differently to adults. They cannot be held to the same standards of behavior as adults because their brains are still learning to make good decisions, to use reasoned judgment, to assess the consequences of their actions, and to restrain impulses in the same way that an adult can.

Minors are also highly sensitive to impact from their surroundings. During adolescence or development phase, minors have greater rehabilitative potential. Therefore, education measures create much more positive effects on MICWL than adults. Approaches that focus on the underlying causes of anti-social behavior, education and rehabilitation, rather than simply punishment, are more likely to ensure that the minor does

not go on to lead a life of crime, but instead becomes a productive and law-abiding citizen.

2.1.3. Definition of a minor in conflict with the law

A minor in conflict with the law is a person under 18 years old and not yet fully developed physically and mentally who conducted a behavior that goes against the law intentionally or unintentionally in the case MMM, and he/she bears legal liability for his/her wrongful act in accordance with the laws.

2.2. The law on administrative measures applying to minors in conflict with the law

2.2.1. Handling administrative violations, administrative sanctioning, and applying administrative measures

Administrative handling is a process that includes many works/activities of the related administrative agencies and its officers to review and imposes administrative penalties or remedies to someone who commits administrative violation acts in accordance with Law on handling administrative violations. Handling administrative violations includes both administrative sanctioning and applying administrative measures.

Administrative sanctioning is the act of authorized people applying penalties and remedies for recovering the damages caused by administrative violations of individuals or organizations. Administrative sanctioning only applied when it is proven that there is administrative violation act.

Administrative measures are the measure of depriving or limiting the liberty of a person applying by administrative officers to an individual who violating the law but not serious enough to be prosecuted. This is a unique characteristic of the legal system in Vietnam and countries following the former Soviet Union model. Measures of administrative handling is based on the "historical personal record" and violation process of the individual rather than specific acts.

2.2.2 The differences between measures of administrative handling and administrative sanctioning

Administrative handling and administrative sanctioning are two different concepts. This is shown in the applying conditions, authorization and subject of application as well as in the legal procedure and consequences. This difference is also shown in the legal system. The idea

of separating these two concepts has been stated in independent legal documents. However, for many reasons, this has not yet been implemented.

2.2.3. Measures of administrative handling of minors in conflict with the law

Measures of administrative handling of MICWL aims at educating children which carry out at community or in designated facilities for MICWL. These measures are applied by government administrative offices on MICWL with procedure stated in the law to help educate MICWL understand his/her guilty, change his/her behavior and attitude towards law-abiding citizens in the future.

2.2.4. Comparing between administrative measures applying to minors in conflict with the law and measures of supervision, education, and judicial measures applying to a minor offender

Theoretically, administrative liability and criminal liability are separated terms. However, there are differences in seriousness of these two measures, for example, administrative measures are stricter than judicial measure, even though it is originally considered to be otherwise. Judicial measures of supervision and education and community-based education administrative measure are all conducted in and by the community. The administrative measure of placement a minor to reformatory and judicial measure of education a minor in reformatory are enforced by the Court on the same reformatory without any discrimination on educational policies.

Regarding to the age, measures of administrative handling are applied when minors in conflict with the law when they are not aged enough for criminal responsibility. At that age, minors can only be criminally charged for some acts, and measures of supervision, education or judicial measures can be applied. In this comparison, measures of administrative handling of minors are stricter than judicial measure because the minor must be responsible for his/her action at a lower age and wider range than other criminals.

Regarding to procedure, the procedure of placement a minor to reformatory under administrative procedure are not as coherent and clear as those in a criminal procedure.

Regarding legal liability, even though administrative measures are considered to be less serious than criminal measures, the legal

consequences for minors after complying with the legal decisions for applying administrative measures lasts for up to 2 years, while if a minor is to be criminal investigated and applied criminal justice measures, after he/she complied, there will be no criminal convictions left.

2.2.5. The core principles of the law on administrative measures applying to minors in conflict with the law

The law on administrative measures applying to MICWL must follow some principles to ensure development, education for the minors and that they are suitable to the characteristics of the minors for the main goal is to educate the minors to fix their mistakes and not to legally punish them like adults.

The law on administrative handling measures for minors should ensure the rights of the minors under the Convention on the Rights of the Child. Legal measure only is applied when it is necessary to help MICWL to correct guilty and develop law-abiding citizens in the future. The law should clearly stipulate the principle to ensure the best interests of minors, measures such as separating minors from families, communities or sending minors to reformative school should be used as the last resort and for the shortest appropriate period of time when there is no other more appropriate intervention. The law on administrative measures applying to minors should include friendly procedure, not only recognizing the rights of minors but also paying attention to procedures and methods to ensure the rights of minors. Regulations on specific handling measures should be based on age, cognitive ability, cause and circumstances of the violation. In comparison to criminal law, administrative handling measures must be less restrictive, educational and more preventive than criminal measures. In particular, in order to comply with international standards, the law on administrative handling measures for minors should work towards promoting the application of diversion measures to avoid negative consequences caused by formal proceedings, and to avoid leaving criminal convictions and legal consequences for MICWL.

2.2.6. Scope of the law on administrative measures applying to minors The scope of the law on administrative measures applying to MICWL include these following parts:

2.2.6.1. Regulations on subjects of application

Regulations about application of the law on administrative measures applying to minors include two parts: age and act of violation

Regulations on the minimum age of application of administrative handling measures should be placed in relation to the minimum age for criminal responsibility. The minimum age of a minor who is subject to administrative handling measures should be from the age of 14, not lower than the minimum age of criminal responsibility. For minors who are below the age of 14, who breaks the law, then, administrative handling measures should not be applied because this is a sanction for the violation. For these minors special protective measures can be taken if necessary, in their best interests.

Regarding act of violation, with measures less serious than those of criminal law, violations subject to administrative handling measures shall be based on the provisions of Article 12 of the Penal Code 2015 amended in 2017.

2.2.6.2 Principles of application

- The application of administrative handling measures to minors shall be implemented only in necessary cases in order to take timely measures to intervene, educate and help the minors to correct their faults, develop and become law-abiding citizens in the future.
- The application of administrative handling measures to minors must be based on the minors' awareness of the social dangers of the violations, the causes and circumstances of the violations, psychophysiological characteristics and circumstances of each individual minor.
- In the process of considering and applying administrative handling measures for minors, authorized persons must ensure the best interests of minors, respect and protect their privacy.
- The application of the measure of deprivation of liberty must be decided based on assessing the circumstances, personal characteristics of the minors, the causes and the nature of the violation and in the best interests of the minors. A deprivation of liberty shall only be used only as a measure of last resort and for the shortest appropriate period.
- The application of administrative handling measures does not cause any legal consequences and will not be considered for recidivism and the

application of more severe measures when minors come into subsequent violations.

- Diversion and alternative measures must be considered for the application instead of administrative handling measures. Administrative handling measures may only be applied when it is not eligible to apply diversion measures.

2.2.6.3. Specific measures

The administrative handling measures for minors are divided into two groups, community based education and deprivation of a minor from the family and community, in which community based education measures are encouraged to be applied because this is a measure suitable to the development characteristics of minors and the negation of the causes of the conflicts. Diversion, which diverts the minors from formal procedures, should also be given priority.

In some very serious cases, the application of juvenile isolation from the community may be necessary to ensure the safety of minors and the community. However, this measure has a great impact on the development and maturity of minors, so it may only be applied after taking into consideration all the factors of violations, circumstances, interests, and benefits of the minors. it should always be used only as a measure of last resort.

2.2.6.4. Competence and friendly procedures

With the name of administrative handling measures, in theory, the authority to decide on the application is the head of the general authority at the communal administrative unit, which is the Chairman of the People's Committee at commune level. However, for the measure of deprivation of liberty, the isolation of minors from the environment of families and communities, according to international standards, must belong to the judiciary. The decision and procedures must be strictly regulated, ensuring friendliness and suitability for minors.

2.2.6.5. Regulations and conditions for law enforcement

For the administrative handling measures for minors to be effectively implemented, the law on administrative handling measures for minors needs regulations on implementation and conditions to ensure implementation, especially regulations on human resources trained to work with minors.

2.3. Criteria for improving the law on administrative handling measures for minors

- Complying with the spirit of the 2013 Constitution on human rights and civil rights, including the rights of minors.
 - Ensuring the comprehensiveness of the law on handling MICWL.
- Ensuring the consistency with the legal system regarding child protection, and compliance with the criminal policies on handling of offender below 18 years in the 2015 Penal Code, amended 2017.
- Ensuring consistency with international treaties to which Vietnam is a state party.
- Ensuring efficiency, meeting practical requirements, based on practical evidence

CHAPTER 3

INTERNATIONAL STANDARDS ON THE PROTECTION OF THE RIGHTS OF MINORS IN CONFLICT WITH THE LAW

3.1. International conventions and guidelines on ensuring the rights of MICWL.

The United Nations Convention on the Rights of the Child, the International Convention on Civil and Political Rights and the Convention against Torture, together with international guidelines and rules, constitute international standards on juvenile justice are used as fundamental documents for this research to identify the gaps and solutions mentioned in Chapter 5. Although Article 40 of the Convention on the Rights of the Child states that the scope of application is a child suspected of, allegedly or confirmed to be in violation of criminal law, this provision must be applied to minors in conflict with the law in general, including minors who are subject to administrative handling measures. In accordance with Paragraph 15 of General Comment No. 32 of the Convention on Civil and Political Rights, to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law. Following this approach, the measures that apply to acts set forth in the Penal Code must comply with international standards on child justice.

To the scope of application, international standards are applicable to all children who, according to Article 1 of the CRC, "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"

3.2. Obligations of member state to report on the implementation of conventions relating to juvenile justice/child justice

These conventions all include provisions that require member states to regularly review their legal system, policies, and monitor, ensure implementation, and report on a regular basis on measures taken to implement the substantive provisions. The objective of the report is for the member state to reflect and report on the status of the implementation of the Convention and to receive recommendations for better implementation. Vietnam has submitted the 3rd report on the International Covenant on Civil and Political Rights in 2017, combined CRC 5th and 6th report in 2018, and the first report on the Convention against Torture in 2017.

3.3. The rights of minors in conflict with the law

The human rights-based approach consists of two fundamental aspects, recognizing human rights and measures to empower rights holders in exercising their rights.

In terms of recognizing rights, every minor conflicts with the law shall have the same rights as other children, and as a group of children requiring special care, certain rights should be protected more, including the best interests of the child, non-discrimination, children's right to life and maximum survival and development, the right not to be separated from parents, the right to be heard and express their views, the child's views must be considered in every decision affecting them, the right to privacy, the right to protection from all forms of violence, the right not to be separated from the family environment and the right to education. Children in conflict with the law have special rights including the right not to be prosecuted before reaching the minimum age of criminal responsibility; the right to a fair trial, to be presumed innocent until proven guilty according to law, the right to have representatives and legal support, the right to have the matter determined without delay by a competent authority or judicial body in a fair hearing according to law, the right not to be compelled to give testimony of to confess guilt; to examine or have examined adverse witnesses, the right

to appeal, the right to participate and understand the proceeding process and the right to have his or her privacy fully respected all stages of the proceedings and no criminal records.

3.4. Mechanisms to ensure the rights of minors in conflict with the law

To ensure the rights of minors in conflict with the law, international standards recommend that member state needs to take a holistic approach to judicial reform for children. The judicial system needs to be designed (or redesigned) to deal positively and effectively with minors in conflict with the law by focusing on prevention, diversion handling of minors outside the formal legal system, invest in rehabilitation and reintegration services, and promote alternatives to deprivation of liberty measures. Recommended measures to ensure the rights of minors in conflict with the law include:

- Focus on preventing legal violations through various ways such as education and propaganda to raise the legal awareness for children, build an intervention system to support minors in conflict with the law, develop community-based programs and services to meet children's unique needs, issues, concerns, and interests, especially for minors in conflict with the law, and provide counseling and guidance to their families.
- Promote intervention measures that avoid resorting to judicial proceedings (diversion measures and other alternative measures)

International standards recommend two groups of measures that can be taken to handle minors in conflict with the law. These include measures that do not use the formal system, moving minors out of the judicial system, implemented at any time before or during the proceedings, often referred to as diversion measures and alternative measures in the proceeding. These measures should not be limited to minor conflicts such as petty theft, minor damage, and first-time conflict, but should be applied to all.

- The age of criminal liability and the comprehensive specialized justice system for minors

To ensure the right of a child who commit an offence when he/she is not reaching the age for prosecution as criminal offender, the country should increase the minimum age for criminal liability as well as do not lower the minimum age for criminal responsibility under any circumstances; do not create any exceptions to the applicable minimum age of criminal

responsibility; carry out the necessary reforms to specify a minimum age for criminal responsibility, do not set two minimum ages of criminal responsibility.

The child justice is recommended to apply to everyone above the minimum age of criminal responsibility but below the age of 18 years at the time committed crime. This system should also extend protection to minors who were below the age of 18 at the time committed crime but who reaches 18 during the trial or sentencing process and allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This system should ensure the core elements of the child justice system, addressed in General Comment No. 24 of the Children's Rights Committee.

3.5. The model law on juvenile justice and its reference value for Vietnam

The laws for handling minors in conflict with the law vary from country to country, and it is always recommended to use a human rights-based approach and ensure compliance with international standards on dealing with minors in conflict with the law. The model law on juvenile justice/child justice organized by the United Nations Organization on Crime and Drugs (UNODC) is a valuable reference document for Vietnam in the process of improving the law on administrative handling measures for minors.

CHAPTER 4

VIETNAMESE LAW ON ADMINISTRATIVE MEASURES APPLYING TO MINORS IN CONFLICT WITH THE LAW AND ITS IMPLEMENTATION

4.1. Overview of establishment and amendment of the law on administrative measures applying to minors

4.1.1. Law on administrative measures applying to minors before 2012

On July 6, 1995, the Standing Committee of the National Assembly enacted the Ordinance on Handling of Administrative Violations, which stipulated two administrative handling measures applying to minors are community-based education and placing a minor to reformative school. The Ordinance on Handling of Administrative Violations 1995 was amended in 2002 and 2008, in which the regulations on the application of administrative

handling measures were also gradually amended and supplemented to meet the requirements of preventing law violations in each period. The law on administrative handling measures for minors in the period prior to 2012 was assessed as having many contents that did not comply with international standards, not ensuring the rights of children in the Convention on the Rights of the Child to which Vietnam is a state party.

4.1.2. Law on administrative measures applying to minors since 2012

After 2012, the law on administrative handling measures for minors in conflict with the law has been amended in accordance with international standards. The Law on Handling Administrative Violations has its own regulations on handling minors in conflict with the law, transferring the jurisdiction to apply administrative handling measures of deprivation of liberty from the administrative organs to the Court. The revision on the provision of the Law is considered as a significant change, demonstrating strong reforms, narrowing the gaps of Vietnam's legal system in comparison with international standards. However, the law on administrative handling measures for minors remains certain limitations, both from the perspective of theory and practical implementation, hence it is essential to revise.

4.2. Assessment of current law on administrative measures applying to minors

4.2.1. Community based education

Community-based education, though having many advantages compared to international standards, still has some limitations that need to be further improved. The law does not have regulations on community-based education measures, which are protective interventions suitable for minors in conflict with the law. Compared with international standards, Vietnamese law lacks regulations on ensuring the right to ask for a review of community-based education in a comprehensive way; The law also has no specific regulations on ensuring the rights of minors in conflict with the law applied with the measure of community-based education, and there is no provision on preventing minors to be in conflict with the law and on recidivism. There is also a lack of separate regulations on education, assisting minors in conflict with the law reliant on the community, and services for preventing conflicts and recidivism.

4.2.2. Placing a minor to reformative school

Although there is much progress, the reformatory measure still needs to be improved to be more consistent with international standards, especially the provisions about the application. The minimum age of minors subject to the reformatory measure is 12 years old which is lower than the age of criminal responsibility. It is considered as inconsistence with international standards. The current Vietnamese law only stipulates the "necessary conditions" without the "sufficient conditions", which are the conditions for deciding whether or not to place a minor to reformative school: regulations on social investigation reports, personal assessments, including family background and environment, characteristics of minors, and specific assessment of the causes of conflict. The law has not stipulated alternative measures so that the authorized person can choose alternatives to the reformatory measure.

4.2.3. Diversion measures

Only the management of minors in conflict with the law at home is recognized as a diversion measure in the Vietnamese legal system. The law needs to provide for alternative measures, which are the group of measures applied in the formal handling process, to replace the formal handling measure. In addition, in order to deal with the problem of minors in conflict with the law, the law needs to stipulate a variety of diversion and replacement measures as well as revise the regulations on the appropriate conditions of application to be in accordance with international standards.

4.3. Implementation of law on administrative measures applying to minors

4.3.1. Situation of applying administrative measures to minors

In 2006 – 2018 period, the number of administrative violations by juveniles dropped substantially by 66%. As a result, the application of administrative measures also decreased.

4.3.2. Implementation of law on community-based education

The number of minors in conflict with the laws who are subject to community-based education in the period of 2014-2017 is much higher than the statistics in the previous period. The reality of implementing the law on community-based education still reveals some limitations due to the provisions of the law, such as ineffective management and education due to

the lack of full-time staff, support services in the community, and difficulties in determining grounds for applying educational measures.

4.3.3. Implementation of law on placement in reformatories

The number of minors subjected to the reformatory measure is much lower than before 2012. Since the beginning of 2015, the number of minors entering reformative school s has decreased sharply. The reformative school in Long An was closed and now there are only three reform schools in Ninh Binh, Da Nang and Dong Nai. Practical implementation of the law on the reformatory measure still reveals difficulties and limitations such as being unclear in the regulations on the grounds of application decisions or failing to ensure a friendly educational environment and best interests for children, and the difficulties in reintegration after leaving reformatories due to ineffective education and management.

4.3.4. Implementation of law on management a minor at home

In the period of 2014-2017, an average of 1,560 minors in conflict with the law was subjected to home-based management instead of community-based education every year. This is a new measure so the application of this measure in practice is still confusing except for the areas where there are pilot projects and staff are well trained.

4.4. The pilot model of "community-based support for minors in conflict with the law" in Dong Thap and Ho Chi Minh city - practical evidence for improving legal on administrative measures applying to minors

Since 2013, the United Nations Children's Fund (UNICEF) has provided technical assistance to Ho Chi Minh City and Dong Thap province to develop a pilot model of "community-based support for minors in conflict with the laws". The development and implementation of this pilot model is to facilitate the law revision as mentioned above and strengthen the shift of delinquent juvenile out of mainstream justice system to community-based education and rehabilitation and restriction of detention measures on juvenile in conflict with the laws, strengthen the support to delinquent juveniles in their correction, community re-integration and becoming a good citizen in the society. This model is considered as a successful model which has reduced the number of new minors' violations, up to nearly 90% of interventions turned positive. This model provides a practical evidence

for improving the law on administrative handling measures for minors in the direction of promoting community-based measures, limiting the deprivation of liberty, while still ensuring effective education and prevention. This model is also a practical evidence for the law to stipulate cases to apply diversion measures, alternatives and regulations on conditions for enforcement, from regulations on supervising mechanism and education to ensuring resources and manpower.

CHAPTER 5

ORIENTATION, REQUIREMENTS AND SOLUTIONS FOR IMPROVING THE LAW ON ADMINISTRATIVE MEASURES APPLYING TO MINORS IN CONFLICT WITH THE LAW

5.1 Perspectives and orientation for improving the law on measures of administrative handling of minors

Reforming the law on handling minors in conflict the laws and the Law on administrative handling measures for minors is one of the important aspects of the legal reform process and judicial reform for ensuring constitutionality, legitimacy, unity, cohesion, efficiency, and feasibility. The law on administrative handling measures for minors must meet the requirements of protection of human rights, children's rights, and friendly procedures, in accordance with international standards on juvenile justice in conventions that Vietnam has ratified. The law should clearly state the principle of ensuring the best interests of minors, measures such as separating minors from families, communities or reformatory should be only applied as a measure of last resort when there is no other more appropriate treatment. The law on administrative handling measures for minors needs to revise towards promoting the application of diversion measures and alternatives to administrative handling measures to avoid negative consequences due to formal proceedings, and avoid leaving criminal records, legal consequences for minors in conflict with the law.

5.2. International recommendations regarding the law on administrative measures applying to minors and Vietnamese response

After reporting cycles, Concluding Observations of ICCPR, CRC, CAT committees included recommendations regarding child/juvenile justice issues, such as recommendations on administrative measures. State reports

on Vietnam's implementation of these conventions always consider administrative measures as a part of juvenile/child justice and demonstrate genuine efforts to implement these conventions.

5.3. Solutions for reforming law on handling minors in conflict with the laws.

As Vietnam has two separate systems handling acts of violation, namely criminal and administrative liability, the establishment of a specialized comprehensive system applying to minors in conflict with the laws would take time. The dissertation proposes long-term and short-term solutions as follows:

5.3.1. Long-term solution: Promulgation of the Law on handling minors in conflict with the laws.

It is necessary to develop a new Law on handling minors in conflict with the laws as a legal ground for establishing a specialized friendly justice system for minors without any distinction between administrative and criminal responsibility as stipulated in the current legal system. The new law should include main contents as recommended in the Model Law on Juvenile Justice, such as minimum age, scope, child justice principles, rights of minors, diversion and alternative measures to judicial proceedings, retrial proceedings, trial, competencies, aftercare and reintegration.

5.3.2. Short-term solutions

In coming year, to address the limitations and ensure that the provisions of Vietnamese law are in accordance with international standards, ensure the rights of minors in conflict with of the law, and ensure the effectiveness of the handling, it is necessary to revise the provisions of the Law on Handling Administrative Violations and the Law on Legal Aid.

For community-based measures, the Law on Handling Administrative Violations needs to supplement regulations on protective measures applying to minors who commit acts showing criminal signs, stated in the provisions of the Penal Code for underage for criminal liability. These measures may include psychological treatment, counseling, legal knowledge support, legal support for parents, caregivers, family members and minors, and reintegration support for minors, helping minors and their families access social assistance services, employment, social policies, and other resources to address the cause of the violation. The law also needs to supplement

regulations to ensure the right to be represented by lawyers, legal assistants, and the right to present evidence to protect themselves when being applied to measures of community-based education. In order to ensure the effectiveness of the application of this measure, it is required that regulations require consideration and evaluation of the circumstances and characteristics of each specific case in order to make appropriate educational measures. Preventive measures, as well as the regulations for services and management of support services for minors in the community, enforcement mechanisms should be in place to ensure the effectiveness of law enforcement.

For the measure of placement a minor to reformative school, the Law on Handling of Administrative Violations needs to include regulations on assessing the personal, familial, social and environmental conditions of the minor in order to understand his or her personality and the extent of his or responsibility before making a proposal for the application of reformatory measures and consider this process as compulsory. The measure of placing to reformative school shall be applied only if reports show violence, harm to the community and signs of continued conflict; the environment of family, friends, and community adversely affects the behavior change education or is dangerous to minors themselves; or community-based educational measures have been implemented but are ineffective. This report should be given to commune-level child protection workers who are responsible for supporting minors and their families during proceedings, handling administrative violations, reintegration into the community stipulated in Article 72 of the Child Law. Alternatives to the reformatory measure should also be supplemented to implement the principles laid down in the Law on Handling Administrative Violations, which will only be applied as s a measure of last resort when there are no other appropriate measures.

Law on Legal Aid needs to revise Article 7 to include people from the age of 16 to under 18 years old who are subject to placement to reformatory measures as one of legal aid beneficiaries.

In addition, to ensure the effectiveness of handling minors in conflict with the law, there should be regulations on the establishment of specialized units and trained staff to effectively deal with minors in conflict with the laws.

CONCLUSION

- 1. Handling violations by administrative sanctions is a unique feature of the Vietnamese legal system. There are very few countries in the world following this model. The law on administrative handling measures, including administrative handling measures for minors, is a historical institution, which has been revised to gradually approach international standards on human rights. Although the authority to decide 3 of the 4 administrative handling measures is transferred to the judicial body, their names are still maintained as administrative handling measures.
- 2. Minors have not fully mental development, resulting in limitations in awareness and behavior control, and the inability to protect their rights and interests. Therefore, they need special legal protection compared to adults. A separate legal system is needed to deal with minors in conflict with the laws which is suitable to their characteristics. The law on administrative handling measures is a part of the law on handling minors in violation of the law in general and should be designed to be suitable to their specific characteristics.
- 3. The law on administrative handling measures for minors must ensure the principles of suitable to the unique characteristics of the minors, with a view to educating and supporting the correction of their mistakes. The law on administrative handling measures for minors should ensure the rights of minors prescribed under the International Convention on the Rights of the Child. Legislation should clearly show the principles of ensuring the best interests of minors, measures such as separating minors from families, communities or reformatory should only be used when there is no other more appropriate treatment. The law on administrative handling measures for minors should have a friendly process, not only reforming towards the end goal of ensuring the rights of minors but also paying attention to procedures and methods to ensure the rights of minors. Regulations on specific handling measures should be based on age, cognitive ability, causes and circumstances of the violation. In comparison to criminal law, administrative handling measures must be less restrictive, educational and

more preventive than criminal measures. In particular, in order to comply with international standards, the law on administrative handling measures for minors should revise towards promoting the application of diversion measures to avoid negative consequences caused by formal proceedings and to avoid leaving criminal convictions and legal consequences for minors in conflict with the law.

- 4. The United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention against Torture, together with international guidelines and rules, constitute international standards on juvenile justice/child justice, which are applicable to all people under the age of 18 who are minors under Vietnamese law. The international standards on juvenile justice/child justice are applied to all minors committing acts with criminal signs prescribed in the Penal Code, who are to be subject to measures of administrative handling.
- 5. Children in conflict with the laws have special rights, including the right not to be prosecuted before reaching the minimum age for criminal responsibility; the right to a fair trial, and the rights prescribed under Article 14 of the Convention on Civil and Political Rights.

To ensure the rights of minors in conflict with the laws, international standards require a country to take a holistic approach to judicial reform for children. The judicial system needs to be designed (or redesigned) to deal positively and effectively with minors in conflict with the law by focusing on prevention, diversion handling of minors outside the formal legal system, investing in rehabilitation and reintegration services, and promoting alternatives to deprivation of liberty measures; determining the minimum age for criminal liability in accordance with international recommendations; establishing juvenile justice/child justice system organization.

- 6. The model Law on juvenile justice/child justice organized by the United Nations Organization on Crime and Drugs (UNODC) is a valuable reference document for Vietnam in the process of reforming the law on administrative handling measures for minors.
- 7. The regulations on administrative handling measures for minors in conflict with the laws has been changed and supplemented in accordance

with international standards, however those remain limitations that need to be addressed

- 8. Improving the law on handling minors in conflict with the law and the law on administrative handling measures for minors is one of the important aspects of the legal reform process and judicial reform to ensure constitutionality, legality, unity, cohesion, efficiency, and feasibility.
- 9. To establish a juvenile justice system, the study and issuance of a general law on the handling of minors in conflict with the law are the appropriate solutions. The content of this Law should include regulations on age; the scope of application; rules of application; rights of minors; formal measures;, diversion and alternatives measures; friendly procedures; jurisdiction; requirements for people directly working with minors in conflict with the laws; and regulations on implementation institutions.

In the near future, it is necessary to revise the provisions of the Law on Handling Administrative Violations 2012 and the Law on Legal Aid 2017 to overcome limitations and to ensure that the provisions of the Vietnamese law comply with international standards as well as to ensure the rights of minors in conflict with the laws; and ensure the effectiveness of handling minors in conflict with the law.