

2. Judicial System

The Vietnamese judicial system comprise: organizations for mediation and conciliation; people's courts, organized in three levels; military courts where the judges often are officers with a background in the armed forces (these are not discussed in this report); and organizations for economic arbitration¹.

While the framework of substantive laws has been greatly improved during the last few years, it is commonly recognized that the mechanisms for dispute resolution and enforcement are neither comprehensive nor sufficiently strong. In spite of better defined principles regulating the relationship between central and local agencies, it seems that local ambitions sometimes prevail over centrally formulated policies. Corruption must also be listed as a core problem.

2.1. Conciliation

The tradition of informal dispute resolution, for example in the form of conciliation with the assistance of village elders or other virtuous men, is very long in Vietnam. Various forms of conciliation have also been an integrated part of many socialist-oriented legal systems, of which the Vietnamese is one. Informal conciliatory arrangements therefore continue to hold a prominent position in society.

There are conciliation groups consisting of three to ten persons who deal mainly with family and civil matters and minor crimes. Conciliation is mandatory before a legal proceeding is commenced in matters relating to

¹ The 1992 Constitution, Art. 127, and the Law on Organisation of the People's Courts, Arts. 1 and 2, lay down the judicial bodies of Vietnam. Special tribunals are allowed under special circumstances.

family law and can be undertaken voluntarily in other civil matters. The conciliation is claimed to result in amicable settlements in about thirty percent of the disputes². The decision is not binding and the parties still have the right to bring the matter before court.

The Department of Justice of the People's Committee organizes and supervises the organization for conciliation within the locality. The persons responsible for the conciliation procedure are also usually appointed by the People's Committee. The organization consists i.e. of the Deputy Chairman of the People's Committee, and representatives of the Fatherland Front, the Women's Union and the youth organizations.

Although conciliation appears to be popular, it can be a source of distress. Strong social pressure can be executed to make a party give up lawful rights. Like all forms of informal adjudication, it ought to be combined with proper legal safeguards and information regarding the possibility of appeal to court.

2.2. People's Courts

The system of people's courts consists of district courts, provincial courts, and the Supreme People's Courts. The Ministry of Justice is administratively responsible for the district and provincial courts³, but certain functions regarding the district courts are delegated to the People's Committee's Departments of Justice. The Supreme Court is under the administrative

² Art. 127 of the 1992 Constitution states that 'Appropriate popular organizations shall be formed at the grassroots level to deal with minor breaches of law and disputes among the people in accordance with the law'. The Law on the Organisation of the People's Courts, Art. 2, stipulates that appropriate people's organizations shall be formed to deal with minor breaches of law and disputes among the people.

³ Law on the Organisation of the People's Courts, Art. 16.

responsibility of the National Assembly. No agency may give court instructions in a specific case, but people's councils may, for example, force a court to speed up the procedures in case of delay. The presidents of district and provincial courts shall also report to the people's councils⁴.

2.2.1. District People's Courts

Each administrative district of the country has a District People's Court, which is court of first instance in most domestic civil and criminal cases⁵. Most civil cases are claimed to be settled within four months from the application for a summons, although complicated cases can take longer time than six months, but this requirement cannot always be met.

Most cases are settled by one professional judge and two lay assessors. Economic cases are settled by two professional judges and one lay assessors⁶. A notable change since the enactment of the new constitution is that persons appointed as professional judges are supposed to have the equivalent to a LL.B. degree, but the scarcity of trained lawyers, especially outside the major urban areas, makes it difficult to uphold this requirement⁷. Judges who do not have an LL.B. are now

⁴ The report shall contain the number of cases tried by the court; the motives for the decisions (if the President of the District Court is asked by the People's Council to explain the reasons); and recommendations to the People's Councils based on the cases.

⁵ Rules for the establishment and administration of the district courts are provided for in the Law on Organisation of the People's Courts, Art. 2, 32 and 33.

⁶ Unlike the provincial people's courts and the Supreme People's Court, the district courts do not have special economic chambers. Instead economic cases are settled by judges (normally one per court) with special knowledge of economic matters.

⁷ Professional judges must also be Vietnamese citizens and have at least five years of work experience. Law on the Organisation of the People's Courts, Art. 37. Five out of seven judges at a district court in Ho Chi Minh City in November

given an opportunity to study and take the exam. Lay assessors are not required to have knowledge of law, but receive basic training within the courts. All the decisions taken at the people's courts need the vote of the majority, and each member of the court has one vote. The lay assessors may also, just like the legally trained judges, cross-examine witnesses.

The professional judges are appointed by the President of the State for a period of five years⁸. Judges who have "performed well" are usually appointed for another period. Lay assessors are elected by the District People's Council on recommendation by a committee of umbrella organization of mass organizations, the Fatherland Front. All judges can be discharged by the President of the State⁹.

2.2.2. People's Courts of Provinces

There is a Provincial Court in each province of the country. These are mainly courts of appeal for cases decided by the district courts, but also adjudicate some cases as court of first instance¹⁰.

The provincial courts are organized in a judicial committee, a criminal court, a civil court, an economic court, a labour court, an administrative court, a review department and a chancellery. The vast majority of cases in the provincial courts are criminal and civil cases¹¹. The economic court, the labour court and the

1993 had a law degree. Two judges had a technical law degree, i.e. They had been trained for three years.

⁸ Judges used to be elected by the People's Committee without tenure.

⁹ Law on the Organisation of the People's Court, Art. 38.

¹⁰ Art. 28.

¹¹ The Bac Thai Provincial Court tried about 1,000 cases in 1995. About 200 were criminal cases tried in first instance and 250 criminal cases as appeal court. The court acted as first instance in about 400 civil cases and as appeal court in 100 civil cases.

administrative court are new conceptions and have often not yet found their final form. The number of settled cases is also low, sometimes none at all¹². Representatives of the courts argue that people are not reluctant to litigate in economic and labour matters; they simply do not know yet that the courts deal with this kind of cases.

As court of first instance, the Provincial Court is competent with one judge and two lay assessors. In economic cases, it is competent with two judges and one lay assessor. If the court acts as appellate court, or tries a special case (concerning for example corruption or narcotics), or if foreigners are involved, it is competent with three judges. If the court is trying a criminal case as first instance, and capital punishment is within the range of possible punishments, it is competent with two judges and three lay assessors. Professional judges are people's councils. Judges are appointed by the President of the State. Lay assessors are elected by the provincial people's councils. Judges are appointed for a term of five years¹³. A majority of the judges in the provincial people's courts are men, but the number of women is claimed to be increasing.

A decision of a provincial court may be appealed to the Supreme Court as long as the decision has not become effective.

2.2.3. Supreme People's Court

¹² The Bac Thai Provincial People's Court has tried four economic cases since its economic court was established in 1994, but no administrative or labour cases had been settled in October 1996.

¹³ Law on the Organisation of the People's Courts, Art. 38 and 39.

The Supreme People's Court of appeal and review¹⁴. The Chief Justice is elected by and responsible to the National Assembly¹⁵. Other judges are appointed by the President of the State at the suggestion of the Central Selection Council. Even the Supreme contains lay assessors. These are appointed and discharged by the Standing Committee of the National Assembly. Candidates for positions as lay assessors need approval from the Fatherland Front¹⁶.

The court is organized in a judicial council, a judicial committee, a civil department, a criminal department, an economic department, and three departments of appeal¹⁷.

Cases which are appealed to the appeal departments may be either re-adjudicated or sent back to the provincial courts followed by the guidelines containing the Supreme Court's opinion on the matter. The decisions of the appeal departments take legal effect immediately unless they are overruled by a decision by the Judicial Council of the Supreme People's Court.

The Supreme People's Court publishes summaries of certain judgements in the yearly Bulletin of the Supreme People's Court¹⁸. It is not considered a source of law. It is sometimes argued that lower courts have difficulties

¹⁴ The organization and function of the Supreme People's Court is regulated in the Law on the Organisation of the People's Court, Art. 15, 38 and in the 1992 Constitution, Arts. 84 and 103. The court has offices in Hanoi, Da Nang and Ho Chi Minh City.

¹⁵ The Chief Justice is elected on recommendation of the President. Law on the Organisation of the People's Courts, Art. 15 and 38; Constitution 1992, Arts. 84 and 103.

¹⁶ Law on the Organisation of the People's Courts, Art.39.

¹⁷ Art. 17.

¹⁸ There is also a plenary assembly among the judges every third month to discuss the judgements taken during the period. Information from these meeting may be possible to abstain through the Ministry of Justice.

in obtaining information of the decision of the Supreme People's Court.

2.2.4. Economic Courts

The adoption of the Law on Amendments and Supplements to the law on the Organisation of the People's Courts on December 28, 1993, meant that economic courts were established within the provincial people's courts and within the Supreme People's Court. The economic courts formally became operative on July 1, 1994. At the same time the State Economic Arbitration ceased to exist.

Under the amended law, the Economic of the Supreme People's Court consists of a Chief Justice, a Deputy Chief Justice, judges and clerks. The economic courts at provincial level consist of two judges and one lay assessor. There are no specialised economic courts within the district courts. Instead they have specially trained judges, normally one, who settle economic cases.

Problems remain in the area of economic dispute resolution. The absence of reliable and efficient means for enforcement is especially troublesome. Unless these means are strengthened, the business community is likely to prefer to continue to look to other, mainly informal, forms of adjudication and enforcement¹⁹. Another problem for the courts is the scarcity of skilled personnel. It may also be doubted whether those arbitrators of the former Economic Arbitration Organisation who have transferred to the economic courts possess the necessary skills and enjoy sufficient confidence to adequately perform their function.

2.2.5. Labour Courts

¹⁹ The court fee can be another reason for turning to another forum.

Individual and collective labour disputes between employers and employees in all economic sectors and in enterprises with foreign investment shall be settled in accordance with Chapter XIV of the Labour Code and the 1996 Ordinance on the Procedures for Settling Labour Disputes.

Mediation is the first step in all-labour disputes. If this fails, the parties may turn to the court for a settlement. Cases which are purely domestic (only Vietnamese parties are involved) should be settled by a district people's court. Cases involving foreign elements may be settled by provincial people's court.

Labour disputes between public officials and employees are settled in accordance with the Ordinance on the Settlement of Administrative Cases.

2.2.6. Administrative Courts

After having studied different models for solving administrative disputes, the National Assembly passed the Law on Amendments and Supplements to some Articles in the Law on the Organisation of the People's Courts in October 1995. The new law established special administrative courts within the Supreme People's Court and in each provincial people's court. The district courts have judges specialised in administrative matters, but no administrative court, procedural matters, matters of jurisdiction, court fees, etc, are regulated in the 1996 Ordinance on the Procedures for the Settlement of Administrative Cases.

The administrative courts shall try the legality of administrative decisions and acts and matters of negligence and delay. Citizens, economic bodies and social organisations may appeal to the courts, but all

other means of administrative review must be spent first in order to allow the authority which issued the decision "second chance" to review its decision²⁰. The Procuracy may also attend the hearings, ask questions and appeal judgements and decisions²¹.

The complainant must file the case with the court within thirty days from the date he received the result of the final administrative review. Part of the court fee must be paid in advance. The court must decide whether to adjudicate the case within sixty days. Decisions by the provincial administrative courts may be appealed by the parties or protested by the Supreme People's Procuracy²².

There are also two extraordinary possibilities of review. First, judgements and decisions at all levels which have acquired legal force can be subject to cassation on the ground that the conclusions in the judgement or decision "do not conform with subjective details of the case", or that serious violations of the procedural acts have occurred, or that serious errors in the application of the law have been made²³. The initiative to undertake a procedure of cassation may be taken by the President of the Central Administrative Court or the Head of the Supreme People's Procuracy²⁴. The new hearing is done by the Council of Judges of the

²⁰ The Ordinance on the Procedures for the Settlement of Administrative Cases, Art. 2.

²¹ Chapters III and IV of the Ordinance on the Procedures for the Settlement of Administrative Cases list the persons who participate in the proceedings.

²² The Prime Minister may also ask the Chief Justice of the Supreme People's Court or the Chairman of the Supreme People's Procuracy to reconsider administrative judgements, which, according to the Prime Minister, are incorrect. The Chief Justice or the Chairman must respond to the Prime Minister within 30 days.

²³ Ordinance on the Procedures for the Settlement of Administrative Cases, Art. 67.

²⁴ Art. 68.

Supreme Administrative Court²⁵. Secondly, cases may also be reopened for "final re-adjudication" if important new details have emerged, evidence or other material is not true, e.g. because of mistakes in translation or forgery, intentional mistakes or illegal conclusions have been made in the case, or if the verdict or decision upon which the case rest has been cancelled²⁶.

The decisions and judgements of the Supreme Administrative Court are not intended to be precedents, but it may issue "bench guides" to local administrative courts to help them uniformly to apply the law and summarise the adjudication experience.

It is argued that "the present socio-economic conditions and changing legal system" only allows the administrative courts to settle a limited number of the administrative complaints.

2.3. Non-Governmental Economic Arbitration

Non-governmental economic arbitration can fulfill an important function in Vietnam with its long tradition of avoiding settling disputes in public²⁷. On a lower level, this "arbitration" may take the form of informal conciliation with the assistance of some trustworthy person, and when the sums and complexity increase, in a more formalized manner with the assistance of skilled jurists. It is also notable that almost all foreign

²⁵ Arts. 70 and 71.

²⁶ Art. 67. This is also possible with decisions made in the procedure of cassation.

²⁷ The Economic Arbitration Organisation, a product of the centrally planned economy and a combination of a state administrative agency and a dispute resolution authority, was dissolved on July 1, 1994. Part of the functions of the Economic Arbitration Organisation has been taken over by the newly established economic courts. Another part has been taken over by non-governmental economic arbitration centers and by the Vietnam International Arbitration Center (VIAC).

investors and their Vietnamese partners currently prefer non-governmental arbitration to litigation.

The Government Decree 116/CP of September 5, 1994, is the birth certificate of economic arbitration centers in Vietnam. It specifies their status, organization and activities. A center is established by a permit granted by the Provincial People's Committee. Person aspiring to work as arbitrators must have permit granted by the Ministry of Justice in the form of an arbitrator's card. They must also have a legal exam equivalent to an LL.B. degree.

The jurisdiction of the economic arbitration centers is quite extensive. A center can settle disputes arising from economic contracts, disputes between a company and its members, disputes among the members of a company regarding the establishment, operation and dissolution of the company, and disputes regarding the trading of shares.

Arbitration is not as formalized as litigation in court. The parties may choose an arbitrator, and if they fail to reach an agreement, the center can appoint one. The awards are supposed to be implemented voluntarily. If a party refuses to comply, the other party is entitled to request the competent People's Court to settle the case in accordance with the procedure for economic cases.

The economic arbitration centers are products of the economic reform policy and are important to Vietnamese business life. Just like many other recent phenomena, however, they have weaknesses. A difficult matter is enforceability. Awards, which cannot be implemented voluntarily, have to be heard from the beginning in a court. On the other hand, since the accession to the 1958

New York Convention, Vietnam enforces foreign arbitration awards once they have been recognized by a Vietnamese court²⁸. The Ordinance on Non-governmental Arbitration, which currently is drafted, will hopefully make it possible also to have domestic awards enforced.

Disputes involving foreign trade or international elements can be settled by the Vietnam International Arbitration Centre (VIAC) if the parties involved have agreed to refer their case to VIAC²⁹. The Arbitrators are appointed by the Vietnam Chamber of Commerce and Industry. Foreign arbitrators may also be invited to VIAC to parties' tribunals. Awards rendered by VIAC are final and cannot be appealed Vietnamese court or organization. There are currently no means for coercive enforcement, but an ordinance providing such a mechanism is under drafting and subsequent changes in the Law on the Organisation of the People's Courts will follow.

2.4. Public Notary

The Public Notary organization is a governmental body on provincial level subject to state management through the Ministry of Justice. Notaries are appointed by the Ministry of Justice³⁰.

The main activity of the Public Notary is to handle various kinds of compulsory registrations, for example to certify transfer of use-rights and leases of land and buildings. Legal capital in enterprises and several

²⁸ See Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, September 27, 1995.

²⁹ The jurisdiction of the VIAC is specified in the Rules on the Organisation of the Vietnam International Arbitration Centre, issued in conjunction with Decision 204-TTg by the Prime Minister, dated April 28, 1993.

³⁰ The organization and activities of the notary are provided for in Decree No. 31/CP of the Government dated May 18, 1996, in a circular issued by the Ministry of Justice dated October 3, 1996, and in various other laws and regulations. The activities of the notary offices are supervised by the Department of Justice of the People's Committee.

activities in connection with family law (separate property of spouses, wills etc), are also subject to compulsory registration. Negligence to register in accordance with the law often makes the legal act or document void.

Voluntary registration of economic contracts is also offered in which the notary registers the contracts, checks the legal status of the parties and authorized representatives, and the legality of the contracts. Registration renders a better position in a case of dispute over the correct content of the contract. Relatively few seem to register economic contracts.

2.5 Civil Procedure

Meanwhile a comprehensive Civil Procedure Code is drafted; the civil procedure continues to be regulated in several other laws and sub-laws³¹. The Ordinance on the Procedures for Handling Civil Cases stipulates that the district people's courts have jurisdiction to handle cases as first instance in matters regarding property, extra-contractual liability, disputes related to the rights and obligations of citizens, family and labour disputes, and matters regarding civil registration³². Cases in which foreign elements are involved are handled by the provincial people's courts as first instance³³.

³¹ Before 1982 the civil procedure was mainly regulated in instruments enacted by the Supreme People's Court. Since 1989 several legal instruments of higher dignity have been enacted, i.e.... the Ordinance on the Enforcement of Civil Judgements (1989); the Ordinance on the Procedure of Handling Civil Cases (1989); the Ordinance on the Recognition and Enforcement of Foreign Civil Judgements and Decision in Vietnam (1993); the Ordinance on the Procedures for Handling Labour Cases (1996). The Government and the Supreme People's Court have issued various regulations, which provide detailed rules for the implementation of the ordinances.

³² Ordinance on the Procedures for Handling Civil Cases, Art. 10 and 11.

³³ Recent surveys have revealed that Vietnamese courts often have difficulties in dealing with family and marriage cases in which foreign elements are involved. Also countries with which Vietnam has signed an agreement on mutual legal assistance have sometimes not responded to judicial requests on time, etc.

Cases which regard intellectual property rights fall under the jurisdiction of the district courts, but the provincial courts may take over the case. In special cases, the Supreme People's Court may take over cases from lower courts and settle them as first and final instance. Decisions by the district courts can be appealed to the provincial people's courts. The appellate body for decisions taken by the provincial courts is the Supreme People's Court. The Supreme People's Court is situated in Hanoi, but has offices in Ho Chi Minh City and Da Nang.

The proceedings in the people's courts are open to the public, unless something else is stipulated by law³⁴. The Constitution grants the defendant the right to present his point of view, by himself or represented by a counsel. The Constitution also permits the organization of associations of lawyers³⁵.

Article 126 of the Constitution lays down the courts explicit duty to protect socialist legality, the socialist regime and property of the State, but also "...to protect the life, property, freedom, honour and dignity of the citizen". Article 136 stresses that effective verdicts and decisions of the courts must be respected by State organs, social and economic organizations, the armed forces and "serious implemented by the individuals and organs concerned".

The enforcement of civil judgements is regulated in the Ordinance on the Enforcement of Civil Judgements. The responsibility for enforcement has recently been transferred from the courts to the newly established

³⁴ 1992 Constitution, Art. 131.

³⁵ Art. 132.

Enforcement Units organized under the Department of Justice on provincial level and the Enforcement Group of the Department of Justice on district level³⁶. The Enforcement Units of the Department of Justice is also said to check that all judgements from the courts within its jurisdiction actually are enforced³⁷. The Enforcement Office of the district, if necessary with assistance from the police, undertakes to carry out the enforcement. Forcible measures may be used if the judgement cannot be enforced voluntarily. Such measures must be appropriate to the nature and importance of the case.

Efforts are continuously made to improve the mechanisms for enforcement, but it is commonly known that they are still weak. It is difficult to assess and seize assets since reliable records are missing, and the enforcement is often delayed due to lack of officers, cars, storage rooms, etc. The overall low respect toward the judicial authorities also sometimes makes people reluctant to comply. It may be necessary to ask a person who are respected in the locality, for example the Chairman of the People's Committee, for instance. It has also happened that persons subject to enforcement try to use contracts within the People's Committee to delay or prevent enforcement³⁸.

2.6. Criminal Procedure

The criminal procedure (investigation, prosecution, adjudication and execution) is related in the Criminal

³⁶ Ordinance on the Enforcement of Civil Judgements, June 1, 1993; Decree 30/CP and 38/CP. The Department of Justice is organized under the People's Committee. All civil enforcement agencies are supervised by the Department for Enforcement of the Ministry of Justice.

³⁷ This is said to be done in connection with the collection of the compulsory court fee.

³⁸ Department of Justice, Da Nang, December 1, 1993.

Procedure Code³⁹. The Code also defines the functions and relationship between the agencies involved.

A person is considered innocent and cannot be punished until a judgement of guilt has come into legal force. The burden of proof lays on the investigation and prosecution agencies. The accused is entitled, but not bound, to prove his innocence⁴⁰. Coercion and torture are prohibited.

The accused has the right to defend him or appoint some else to do so. A defense counsel may participate from the formal initiation of the criminal investigation and throughout the trial. The counsel has the right to meet the accused, to read the case files, and to participate in hearing, etc⁴¹. The court shall ensure that defense is provided for, but the scarcity of lawyers, especially outside the major urban areas, and the low remuneration, makes this requirement difficult to meet⁴²

It is notable that it is possible to submit the task to defend the accused to the court itself. Many of the accused also seem to lack both knowledge of and confidence in the advantages of legal counsel. Some members of the judiciary claim that this lack is compensated by an "understanding" court and a trial with certain "inquisitorial" elements.

Judges, procurators, experts, etc. are not permitted to participate in the investigation or the process if there are good grounds to believe that they are partial

³⁹ Before the adoption of the Criminal Procedure Code in 1998, the criminal procedure was regulated by several legal instrument issued by different state authorities. The code, which is said to work well, is now being amended to correspond better to the new situation in a market-oriented economy.

⁴⁰ Criminal Procedure Code, Arts. 10 and 11.

⁴¹ Arts. 12 and 36.

⁴² Bac Thai is a province with about 1.5 million inhabitants. The Bar Association in the province has seven members.

or otherwise disqualified. Judges must also announce that they are lawfully disqualified. The parties may request that a challengeable judge is replaced⁴³.

The Criminal Procedure Code stipulates that judges are independent and accountable to law only⁴⁴, but they are appointed for a limited term, without firm right of reappointment, and the President of the Court is responsible to the People's Council. Judges can only be discharged during their term of tenure if they have been convicted for a crime or subject to disciplinary actions. The terms and work conditions of judges appear to have improved considerably over the last few years. Judges are together with teachers among the best-paid State employees, but their salaries are nevertheless very modest in comparison with those of privately employed lawyers⁴⁵.

Cases are heard in public and anyone may attend the hearings. Closed hearings are only permitted to meet the requirements of state security and good morality. The sentence must always be openly announced⁴⁶. These principles appear to be respected.

The higher courts and the Procuracy supervise the lower courts in order to ensure a proper application of the law. Courts and agencies that have "committed injustices, unlawful actions, or reached a wrongful judgement" shall apply measures for restitution of honour, among them the somewhat peculiar "formal excuse" if an innocent person has been punished, and pay damages. It is commonly recognized that the conventional means for

⁴³ Criminal Procedure Code, Art. 14, 28-30

⁴⁴ Art.17

⁴⁵ A judge at district level may earn between USD 50 and 70 per month, and a judge at provincial level can earn as much as USD 100 per month.

⁴⁶ Criminal Procedure Code, Art. 19

restitution and compensation are insufficient and that any significant damages are hardly ever paid.

2.6.1. Investigation and Prosecution

The Criminal Procedure Code regulated the work of the police during the process of investigation. An investigation is considered as "opened" when there is formal decision to investigate a suspected crime. This is also the earliest time a legal counsel may represent a suspect. About thirty per cent of the suspects are claimed to be represented by counsels. The counsel may talk in private with his client when this is "practically possible".

The police can keep a person for a maximum of 24 hours. The investigating authorities must then issue an arrest warrant or release him. A person who has been arrested in an "urgent case" or has been caught in the act can be kept in provisional custody for 72 hours after a decision by the police. The decisions on provisional custody must be sent to the Procuracy within this period. A person can be kept in custody for three days. This time can be extended up to nine days in urgent cases after approval by the Procuracy⁴⁷.

The court or the Procuracy can decide that a person should be detained if the accused is charged with having committed a serious crime (a crime on which imprisonment for more than five years may follow) and there are reasons to believe that he may escape, cause obstacle to the investigation, or commit further crimes. The total period of detention must not exceed two months for less grave offences. And four months for serious offences. This time can be doubled after permission from the

⁴⁷ Arts. 65, 68 and 69.

Procurator-General if longer time is required for the investigation⁴⁸. A decision on detention cannot be tried before a court.

The regime during the time in custody and under detention is determined by the Criminal Procedure Code⁴⁹. The accused is generally allowed to receive visitors, letters and gifts, except when this can be harmful to the investigation. There is also a possibility of bail in some cases.

The evidence, which has been collected during the investigation, is handle over to the Procuracy⁵⁰, which decides whether to prosecute, remand the case for additional investigation, or close the investigation.

2.6.2. Trial

It is the chairman of the criminal department or the court who distributes the cases among the judges. The judges of the Supreme People's Court are speacialised in adjudicating special kinds of crimes, while judges within lower courts generally adjudicate all kinds of crimes.

The judge must decide within 45 days from the indictment whether to proceed to trial, remand the case for further investigation, or suspend the case. This time limit can be extended to 75 days in complicated cases⁵¹.

The district people's courts are courts of first instance in most criminal cases, but if the court finds that the sentence risks to exceed seven years, it must refer the case back to the Procuracy, which may refer the

⁴⁸ Arts. 70 and 71.

⁴⁹ Art. 72.

⁵⁰ The responsibilities and functions of the Procuracy are provided for in the 1992 Law on the Orgnisation of the Procuracy.

⁵¹ Criminal Procedure Code, Art. 151.

case to a provincial people's court ⁵². District courts are competent with one judge and two lay assessors in criminal cases. The number of judges can be increased to two or three in serious or complicated cases⁵³.

Certain social organizations, i.e. the Fatherland Front and the Women's Union, have the right and duty to participate in some criminal proceedings. The courts and other agencies are responsible for creating favourable conditions for their participation.

Judgements shall be rendered on the basis of evidence, which have been presented at the sessions only⁵⁴. The members of the court decide the case by voting on each matter separately on the basis of majority. The presiding judge gives his vote last. Members holding a minority opinion have the right to state their opinion in the case file⁵⁵. The sentence must contain a description of the offence, the relevant articles in the Penal Code, aggravating and extenuating circumstances, the sentence imposed, the ground on which the accused was held guilty, and finally, how to appeal⁵⁶.

Criminal cases are claimed to be settled within ten days from the indictment. Appeal can be made by the accused, the injured person, or by their legal representatives. Appeals must be lodged within 15 days from the date the judgement was pronounced⁵⁷. The Provincial Court can reject the appeal and affirm the original judgement, reject the original judgement and

⁵² Art. 145.

⁵³ Arts. 160 and 160a.

⁵⁴ Art. 159.

⁵⁵ Art. 196.

⁵⁶ Art. 198.

⁵⁷ Arts. 205 and 208.

transfer the case for reinvestigation or retrial, and reject the original judgement and suspend the case⁵⁸.

If the reason for appeal is a disagreement over the evaluation of evidence, the Provincial Court may choose to reject the original judgement and transfer the case to the Procuracy at either district or provincial level for further investigation. It is notable that the Procuracy is allowed to add further evidence to the investigation and improve the arguments before having the case tried once again before the court. This is probably one of the reasons why the accused are acquitted in less than one per cent of the cases.

The new economic policy has resulted in a large number of new "economic" crimes, but it is commonly argued that the legislation has not kept pace with the changes. The authorities sometimes see themselves as more or less forced to improvise in order to keep the situation reasonably under control. One possibility is to rely on administrative law and sanctions where the criminal law is silent. A person may for example be order to pay an amount of money as compensation for "damages" suffered by the State or state property⁵⁹.

Decisions which have acquired legal force may be enforced. The President of the court shall issue an enforcement order within 15 days from the day the judgement was announced. The Department of Enforcement of Criminal Judgements of the Ministry of Interior is the highest authority with responsibility for enforcement

⁵⁸ Arts. 216 and 220.

⁵⁹ Various Vietnamese laws allow state agencies to take administrative measures to ensure that laws and policies are implemented. For example, the State Bank has the right to impose sanctions for non-compliance on credit institutions under the Ordinance on Commercial Banking, Art. 47.

issue. The actual enforcement is carried out by the police⁶⁰.

2.7 Judicial Review

Besides traditional appeal, court decisions may also be changed through a procedure of judicial review by superior courts. This is possible also after the judgement has acquired legal force. The purpose with the review is to ensure that the law is uniformly applied.

Criminal judgements which have acquired legal force may be reviewed if the examination or interrogation was partial or insufficient, if the conclusions in the judgement are not consistent with objective facts, if a serious violation of the criminal procedure was revealed in the process of investigation, prosecution or adjudication, or if serious errors were made in the application of the law⁶¹. The time frame for review in criminal cases is one year if the review may result in a harder punishment. There is no time limit if the convicted benefits from the review⁶². All enforcement measures shall be suspended if a protest is lodged against a judgement.

The maximum time for review in civil cases is three years. Civil cases are only subject to review under exceptional circumstances, for example where someone has been bribed.

District courts shall send their judgements to the provincial courts for review within 15 days of the judgement. The Provincial Court's Committee of Judges may then, in case of incorrect application of law or improper

⁶⁰ Criminal Procedure Code, Arts. 226 and 227.

⁶¹ Art. 242.

⁶² Art. 247.

evaluation of evidence, act in the same manner as if the case had been appealed⁶³. Decisions by provincial courts are reviewed by the Supreme Court's Civil, Economic, and Criminal Departments⁶⁴. Reviews are relative frequent regarding decisions of the district courts, while only a few percent of the decisions of the provincial courts are subject to review⁶⁵.

Decisions of civil, criminal and appeal departments of the Supreme Court may be reviewed by its Committee of Judges and Judicial Council⁶⁶, but this is very uncommon. The Committee of Judges has nine members, among them the Chief Justice and the deputy chief justices. The Judicial Council consists of 25-30 persons, among them the Chief Justice and the deputy chief justices. It is the highest judicial body under the procedure of appeal and review, and the only body with competence to review decisions by the committee⁶⁷.

2.8. Sources and Interpretation of Law

The Law on the Promulgation of Legal Documents has put the Vietnamese sources of law in an authoritatively defined hierarchy. The primary and supreme sources of law are the Constitution. It is followed by all other valid Vietnamese codes and laws, of which the laws enacted since the renovations sometimes are considered most

⁶³ The Judicial Committee also holds review meeting with members of lower courts. These meetings give a chance to discuss shortcomings and compare the experiences of previous cases.

⁶⁴ Criminal Procedure Code, Art. 248; Law on the Organisation of the People's Court, Arts. 22 and 29.

⁶⁵ Of about 1,000 cases settled in the BacThai Provincial People's Court, between 10 and 15 were changed in the process of review.

⁶⁶ Criminal Procedure Code, Art. 248. Law on the Organisation of the People's Courts, Arts. 20-22. Reviews of judgements of the Supreme Court are carried out on the initiative of the President of the Supreme Court or the Head of the Supreme People's Procuracy.

⁶⁷ Law on the Organisation of the People's Courts, Art. 18. The council and the committee issue guidelines, which are distributed to all courts to "unify the application of the law and summarise the courts adjudicating experience".

important. Codes and laws are supplemented by various sub-laws issued by the Standing Committee of the National Assembly, the Government, and other State agencies. International conventions and treaties to which Vietnam is a party are also considered as sources of law and are claimed to have direct application.

Resolutions enacted by the Judicial Council of the Supreme People's Court are also considered normative, but directives and guidelines, although detailed and up to date, are not. Directives and circulars issued by the Supreme People's Procuracy are also normative. Legal literature and works of legal scholars are considered as scientific products only. It is said, however, that, judges frequently turn to legal scholars for expert opinions before and during trials⁶⁸.

Interpretation of the law is not seen as a matter for the courts, at least not when an interpretation risks intruding on the power of the legislator. It is instead stated "the Standing Committee (of the National Assembly) interprets the law..."⁶⁹. The official reason for these arrangements that it eliminates disputes over the correct interpretation of legal instruments between courts or agencies. The Standing Committee seldom, or never, attempts to interpret the law in a particular case. It is instead said to be a matter of supplementing or amending existing provisions when there is a problem of implementation. Interpretations by the Standing Committee must be formalized and in written form. The Standing

⁶⁸ A well-known example is a recent murder trial against a policeman who shot a person who refused to pay him a bribe. Legal scholars assisted on each side and in all instances here.

⁶⁹ 1992 Constitution, Art. 91.

Committee has no authority to annul a decision of the Supreme Court or any other court.

How the courts render laws and regulations is not bound by precedents. However, previous cases, especially those settled by the Supreme Court, are influential as guidelines. Important cases are published in the Bulletin of the Supreme People's Court. Cases decided by the Supreme Court may also be used as a ground for guidelines, directives and multisectoral circulars, which provide guidance in the application of unclear laws⁷⁰. The relative weight attributed to these circulars is high since both the Ministry of Justice and the Chief Procurator take part in the edition. A limitation to the use of directives follows from the principle of sovereignty of courts. No agency may interfere in, or provide guidelines for, a specific case, which is under consideration by a court. The Supreme Court may also try a case specifically to provide appropriate guidelines for similar cases, or when the present legislation is found inadequate or obsolete.

The "purpose of the law" or the "guiding principle" used to be the most influential principle for interpretation of unclear provisions, partly because of the influence of Soviet-inspired jurisprudence. Another favoured method for interpretation was "principle of similarity", where the courts sought to find a solution which was in conformity with the registration in general. It is now claimed that these principles are given a meaning which is more in accordance with the new situation and that the "guiding principle" now merely

⁷⁰ The Judicial Council of the Supreme Court (see section 3.6.) issues guidelines, instructions and directives.

helps to put the law in a correct context, i.e. understand the meaning of the law more deeply and understand the intention of the law-maker.

2.9. Due Process of Law

General conclusions whether the principles of a due process are respected or not are difficult to make. The norms for legal decision-making may be the same, but the practices vary between different branches of the judiciary and between different parts of the country. Efforts are currently made to streamline both administrative and judicial decision-making.

The number of civil disputes brought before the people's courts is rising but most civil matters still appear to be solved through various forms of informal conciliatory arrangements. These may provide fast and flexible solutions, but there is a risk that strong social pressure can make people give up lawful rights.

It seems that the standard of the court proceedings has improved and that the basic requirements of a due process generally are respected in civil cases. The parties are for example allowed to explain their points of view and argue in favour of a certain judgement, they may be represented by counsel, the judgements are openly announced and may be subject to appeal, etc. Nevertheless, a number of problems remain. The court system is not equipped for the rapidly increasing number of cases and large parts of the population live where there are no courts at all. These are also problems inherent in the dissemination of and the access to legal information. Another concern is the scarcity of trained jurists, especially in "new" areas such as economic and labour law. Corruption must also be mentioned as a

problem, but the authorities have repeatedly stressed that firm and determined actions will be taken to combat it.

The standard of the criminal procedure appears to be improving. A remaining problem is the scarcity of qualified defense counsels, especially in remote areas, and that many accused do not understand how a counsel could help. Representatives of the courts sometimes claim that they try to make up for the absence of counsel by being "understanding" or by asking questions to find facts, which speak to the advantages of the accused. Another problem is that some provisions in the Penal Code still provide for broad and diffuse descriptions of crimes and open up for a rather discretionary application of the law. It is understandable that the courts sometimes must make broad interpretations of the existing rules in order to meet the needs of a rapidly changing social and economic environment, but it is a source of distress that this appears to be frequently done, also at the lowest levels.