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Development of Children's Rights from the Second Part of the 20th Century in Vietnamese Private Law Compared to Chinese Private Law

Since the Communist Party won the revolution in Vietnam on August 19, 1945¹ and, in China on October 1, 1949, the Socialist Republic of Vietnam and the People's Republic of China were established². After that, the Governments of these two countries issued many documents to adjust the social relations in the new situation and realize the goal of bringing the society to develop towards the socialist orientation. Besides politics, economy, social security, the protection of children's rights was also a concern by the authorities. The article examines the development of child protection regulations from the founding of the Socialist Republic of Vietnam and the People's Republic of China. Considering analysis, evaluation and comparison of child protection regulations of these two countries, the article has highlighted the progress of each country's legislation in each period.

Keywords: *children's rights protection, Vietnamese law, Chinese law*

1. Introduction

In Vietnam, child protection has not become the legislator's concern since the 20th century, instead, such regulations were formed in the Vietnamese traditional law, notably expressed in the *Hong Duc Code* of the *Le Dynasty* (1470) and the *Gia Long Code* of the *Nguyen Dynasty* (1815). Even during the colonial law, protecting children's rights was not the legislator's primary purpose, but these regulations have somewhat taken Vietnamese children at that stage out of some mental and physical abuse.³

Along with a shift from a property view in parents and children relationship towards a concept of parents as a representative to protect their children's best interest and Vietnam's

¹ On September 2, 1945, President *Ho Chi Minh* read the Declaration of Independence at Ba Dinh Square, Hanoi, establishing the Democratic Republic of Vietnam. NGUYEN BINH, Declaration of Independence 1946 – historical values and times.

² Chairman *Mao Zedong* proclaimed the founding of the People's Republic of China on September 21, 1949, to the entire nation in Beijing Square. See: HUNT, *The World Transformed 1945 to the present* 118.

³ HUỖNH, *Beginning of Protection of Children's Rights in the Vietnamese Legal Development* 105

proactive and active participation in international documents on children's rights, Vietnamese child protection regulations in the second part of the 20th century have many outstanding and positive changes.

However, Vietnam still lacks many experience in both legal thinking and law enforcement, hence it is necessary to learn more experiences from other countries. China can consider as a well-developed legal science country in Asia. Additionally, it is a neighbour of Vietnam with quite numerous similarities from culture to law. Therefore, comparing child protection regulations in Vietnam with China to draw out legal lessons for Vietnam is a necessary step so that our legal system can be more compatible with international law.

Moreover, the clarification of the content and scope of child protection in the legal systems of these two countries has practical implications. Because understanding these regulations will help assess their effectiveness in implementing child protection issues in practice. Therefore, this study will review the provisions of protecting children's rights in the development of Vietnam and China since the Socialist Republic of Vietnam and the People's Republic of China were found until now.

The article's objective is to address the following research questions: how do Vietnamese and Chinese laws recognize children's rights? What are the advantages and disadvantages of these regulations? How are the similarities and differences in the protection of children's rights in Vietnam and China shown? What are the reference experiences for each country in the matter of child protection?

To carry out this article, the authors have used the following methods: systematic and structural methods to research policies and laws in the field of child protection in Vietnam and China; statistical methods to generalize the development of these regulations, methods to analyse information from relevant studies of the two countries; comparative legal method aims to analyse Vietnamese law concerning similar legal norms of Chinese law.

2. The development of legal provisions in Vietnam and China on children's rights

2.1. Children's rights in the Constitution

This part attempts to explore the interconnections between children's constitutional rights and the implementation and enforcement of children's rights by studying the two countries: Vietnam and China. The primary aim is to bring new insight on children's constitutional rights and their impact on children's legal rights in practice.

2.1.1. Vietnam

Although protection of children's rights in an international convention is essential, the question arises whether and how enshrining these rights in national Constitutions enhances the level of protection and opportunities to vindication of the rights.

Constitutional protection could render visibility to children as rights-holders and could avail stronger arguments in favour of treating children as 'fully-fledged human beings'.⁴

⁴ REYNAERT – ROOSE, Children's rights from a social work perspective 3.

Whether or not children are explicitly mentioned in the Constitution is probably an insufficient indicator of the extent to which children's rights are rendered efficient.

A specific provision on children's rights in the national Constitution could have mere symbolic value. Conversely, a Constitution that remains silent on the issue does not necessarily entail weak protection of children's rights in practice.

The provisions on child protection in the Constitution of Vietnam over time are detailed as follows: Constitution of 1946 is the highest legal document of Vietnam after independence. *'This is the constitution that has the closest approach to human rights.'* This Constitution stipulates the principle of child protection in Article 14: *'Children are cared for and educated.'* *'The outstanding core values of the 1946 Constitution were inherited and promoted in the next 4 Constitutions, namely the 1959 Constitution, 1980 Constitution, 1992 Constitution and 2013 Constitution.'*⁵

The 1959 Constitution affirms in Article 24: *'The State protects the rights of mothers and children and ensures the development of health care homes and kindergartens.'*

The 1980 Constitution recognized the right to protect children in Article 65: *'The State and society attach special importance to the protection, care and education of minors and children, gradually expanding the responsibility for raising them and ensuring children's living, learning and maturation.'*

The 1992 Constitution stipulates: *'children are protected, cared for and educated by their families, the State and society'* in Article 65.

The 2013 Constitution states in Clause 1, Article 37: *'Children are protected, cared for and educated by the State, family and society; are allowed to participate in child-related issues. Torture is strictly prohibited such as mistreatment, ill-treatment, neglect, labour exploitation and other acts that violate children's rights.'* *'The 2013 Constitution of Vietnam is the premise and legal foundation for substantive improvements, the breakthrough in childcare and protection'*⁶.

Thus, the Constitutions of Vietnam, over the period, have provisions that explicitly mention the protection of children's rights. At the same time, the content of the provisions on child protection in the Vietnamese Constitution also shows the latter's progress compared to the previous one. Specifically, if in the 1946 Constitution, the Vietnamese legislator stipulates that children are cared for and educated, in the 1959 Constitution, the issue of child protection is no longer limited to care and education. Instead, the legislator prescribed *'protection of children's interests'* in general. The 1980 Constitution added the principle of expanding the responsibility of raising children, the 2013 Constitution added the principle of prohibiting acts of abuse and maltreatment against children – something all Constitutions have previously unspecified in law.

However, compared with the children's rights enshrined in the United Nations Convention on the Rights of the Child, the rights listed in the Vietnamese Constitution may not be comprehensive. Therefore, the analysis of children's rights in Vietnamese law should not be limited by the Constitution, but also include rights enshrined in other documents such as the Civil Law, the Law on Marriage and Family. Subsequent sections of the study will attempt to clarify this.

However, does enshrining children's rights in constitutional regulations improve implementation and enforcement of those rights?

⁵ VÂN, Hiến pháp năm 1946: Bản Hiến pháp dân chủ, tiến bộ.

⁶ NGUYỄN, Quyền trẻ em trong pháp luật Việt Nam hiện nay.

2.1.2. China

After the Revolution of 1949, China established the Communist Party of China and began to enact laws to regulate social relations in the new situation. The 1950 Constitution was one of the first documents and was adopted on May 1, 1950. It was followed by the 1975 Constitution, the 1978 Constitution, and the current 1982 Constitution which was revised in 1988, 1993, 1994, 2004 and 2018. The issue of child protection in China has been recognized in all these Constitutions with the following specific contents:

The 1954 Constitution was the first Constitution of the PRC which was adopted after being discussed by the whole people⁷. It prescribed the nature of a people's democratic state, the political system, and the functions of the state organs. The Constitution also stipulated, in a special chapter titled *The Fundamental Rights and Duties of Citizens*, the political, economic, social, cultural and personal rights of citizens, laying the foundation for the development of people's democratic constitutionalism.

This document clearly expresses the position of the Communist Party and the State of China on the protection of children through the provisions of Article 46: the state protects the comprehensive moral, intellectual and physical development of adults and children⁸. Author *Cynthia Bell* has observed that: *'for the first time in her history, the "maltreatment" of children is explicitly prohibited by the national Constitution, by specific provisions of the Constitution.'*⁹

The Article 27 of the 1975 Constitution stipulates: the state protects marriage, the family, and the mother and child¹⁰.

The 1978 Constitution. In the research of authors *Sheng Yu*, *Wang Deyi* and *Wu Changzen*, they argued that the 1978 Constitution was committed to giving every child born the best possible upbringing and that the Government attaches great importance to child health care¹¹.

The 1982 Constitution. It was adopted on December 4, 1982, after being amended based on summarizing historical experience.

It was passed on December 4, 1982, after being amended on the basis of summing up historical experiences. It made improvements in two aspects: democracy and the legal system. The stipulation on citizen's fundamental rights became more extensive, practical and specific. It also

⁷ DONG, Inclusion of Human Rights in the Constitution an Important Milestone in China's Human Rights Development 24.

⁸ The Constitution of the People's Republic of China was adopted on January, 1975 by the Fourth National People's Congress of the People's Republic of China at its First Session, Article 46. See <https://web.archive.org/web/20170725061003/http://www.e-chaupak.net/database/chicon/1975/1975e.htm>.

⁹ CYNTHIA, A Look behind the Great Wall: Children's rights in China 13.

¹⁰ The Constitution of the People's Republic of China was adopted on January, 1975 by the Fourth National People's Congress of the People's Republic of China at its First Session, Article 27. See <https://web.archive.org/web/20170725061003/http://www.e-chaupak.net/database/chicon/1975/1975e.htm>.

¹¹ The Constitution of the People's Republic of China was adopted on 5 March, 1978 by the Fifth National People's Congress of the People's Republic of China at its First Session, Article 51. See <https://journals.sagepub.com/doi/10.1177/000944557801400209> and SHENG – WANG – WU, Chinese Law and Status of Children 71.

prescribed the policies and measures the state should take to guarantee the realization and gradual extension of citizens' rights.¹²

In the provisions of Article 49 of the 1982 Constitution as amended in 2003 stipulates: *Marriage, family, mother and child are protected by the state (...). Parents are responsible for raising and educating their minor children.*¹³

To put the Constitution's children rights principle into practice, it is also necessary to crystallize respecting and safeguarding children rights in all aspects of social life, as well as in people's daily life.

Although legislative techniques have varied over time, the idea of child protection has been guaranteed by the Party and State of the People's Republic of China from its founding to the present day.

Besides, similar to Vietnam, children's rights in China are also well-secured through human rights laws and other legal provisions; However, the inclusion of the Constitution would nevertheless help to clarify and secure fundamental basic core values in Chinese society. In addition, children's rights would be better protected against short-sighted political changes, as the Constitution is not as easily amended as ordinary law.

Thus, a comparative study of the Vietnamese Constitutions and the China Constitution provisions in the development process has shown the similarities in such countries' children's rights. It is also considered a progressive point of the law of Vietnam and China in Communist Party leadership compared to the law of the feudal period in which the law was heavily influenced by Confucian ideology where children's rights were not respected.

2.2. Children's rights in the Civil Code

2.2.1. Vietnam

From 1945 to now, Vietnam has promulgated three civil laws. These are the Civil Code of 1995, the Civil Code of 2005 and the Civil Code of 2015. The provisions on the protection of children's rights are recognized in all three documents. Specifically, they include: (1) the right to be adopted, (2) the right to have a birth, (3) guardianship, (4) regulations on the participation of the legal representative in the law. Civil transactions established by minors and the provisions on civil transactions are invalid.

2.2.1.1. The right to be adopted

Although the right to be cared for and brought up in their family is a fundamental right that affects the children's physical, intellectual and emotional development, in particular cases when some children do not have such fortune; it is reasonable and humane to recognize the right to adoption. Children need to grow up in the love of a family; although it may not be the family of their

¹² DONG, Inclusion of Human Rights in the Constitution an Important Milestone in China's Human Rights Development 22.

¹³ XIA, Legal system of guardianship over Minors in People's Republic of China.

biological parents, there is genuine love for the child. There have been many adopted cases where children have developed well and achieved many successes in their careers.¹⁴

The right to be adopted is prescribed in Article 40 of the 1995 Civil Code, Article 40 of the 2005 Civil Code, and Article 39 of the 2015 Civil Code, which does not mention directly children. However, based on clause 1 Article 8 of Law on Adoption¹⁵, it is possible to determine that the age to be adopted in Vietnam is under 16 years old. Therefore, it can be concluded that the right to be adopted under the Vietnamese Civil Codes is a right dedicated to children.

When it comes to formality, the right to adoption in the 2015 Civil Code is different from those of the previous two documents. Specifically, the 1995 Civil Code and the 2005 Civil Code have separate articles on this right. Meanwhile, the 2015 Civil Code stipulates the right to adoption and other rights related to marriage and family aspects in one article. The author thinks that the provisions of the 2015 Civil Code are adequate and reasonable because another specialized law, the Law on Adoption, has already regulated the detailed contents.

It is also important to emphasize that it was not only after 1945 that Vietnamese law had provisions on the right to adoption but also since the French colonial period; this right has also been enshrined in Civil Codes¹⁶. However, the purpose of adopting children is slightly different.

Previously, a researcher *Vu Van Mau* said that the purpose of adopting in this period came from humanity, personal interests and spirituality. *‘An example of adopting children as a kindness is when a well-off family adopts the young children of a destitute family. When the aim of adopting children is a personal interest means adopting a child to take them working without a salary. For example, the creditors adopt the debtor’s children for adoption. Then, they will make deductions to the loan amount. Adopting for spiritual reasons means that a well-off but disaster-prone family will adopt a child from a low-income family with many children, so that child would take off part of the disaster and bring to the recipient’s family a little happiness’.*¹⁷ In the current period, the purpose of adoption is defined as follows: adoption aims to establish permanent parent and child relationships in the best interests of adopted persons, ensuring that adopted persons are nurtured, cared for and educated in the family environment.¹⁸ This comparison shows that Vietnamese law is now more concerned with children’s rights than before.

2.2.1.2. The right to have a birth

Article 7 in the UN Convention on the Rights of the Child regards birth registration immediately after birth as one of the fundamental human rights of children. Registering children at birth is the first step in securing their recognition before the law, safeguarding their rights, and ensuring that any violation of these rights does not go unnoticed.¹⁹

¹⁴ CHI, Đứa trẻ Sóc Trăng mồ côi 9 tháng tuổi được nhận nuôi, 38 năm sau là phó thủ tướng Đức.

¹⁵ Law on Adoption number 52/2010/QH12 was issued by the 12 Vietnamese national Assembly on 17 June 2010, <https://thuvienphapluat.vn/van-ban/Quyen-dan-su/Luat-nuoi-con-nuoi-2010-108082.aspx>.

¹⁶ Under Article 185 of the Northern Civil Code and Article 183 of the Central Civil Code, the adoptive person must be a minor, regardless of whether one is a girl or a boy. In Gia Long Law, adoption is also provided for in Article 76.

¹⁷ VU VAN, Việt Nam Dân Luật Lược Khảo 294.

¹⁸ Law on Adoption number 52/2010/QH12 was issued by the 12 Vietnamese National Assembly on 17 June 2010, <https://thuvienphapluat.vn/van-ban/Quyen-dan-su/Luat-nuoi-con-nuoi-2010-108082.aspx>.

¹⁹ CAPP – GREGSON – WARDLAW – BISSELL, Birth registration: a child’s passport to protection 67.

The child's right to have a birth is enshrined in all Civil Codes in Vietnam from 1945 to date.²⁰ The content of the right to have a birth was recorded in detail in the first Vietnamese Civil Code. Accordingly, it affirms that everyone has the right to a birth certificate regardless of whether they were born in wedlock or out of wedlock. This right is provided more simply in the following two documents issued in 2005 and 2015. Accordingly, it only affirms that individuals have the right to have birth registration. Non-discrimination and how to give a name to children no longer appears. The author believes that this change is necessary and appropriate because the specific relevant contents have been recorded in the documents of state administrative agencies. Additionally, the issuance of birth certificates to children right after completing the birth registration procedure has created favourable conditions for children to enjoy the remaining rights as citizens of Vietnam.²¹

2.2.1.3. Guardianship

Guardianship is one of the institutions recorded quite fully and in detail in the Civil Code of Vietnam. Similar to the laws of other countries, the recognition of guardians in Vietnamese civil law is also aimed at protecting the interests of children. Although, throughout time, the form of appointing a guardian is regulated differently in the Civil Codes, the purpose of a guardian is still to take care of and protect the legitimate rights and interests of the guardian. The 1995 Civil Code and the 2005 Civil Code have similar provisions in the guardian's formality selection. Accordingly, a guardian is a person who is required by law or appointed. Although the 2015 Civil Code also stipulates that a guardian is a person who is required by law or appointed, the subject of appointment of a guardian is more expanded, namely the ward, the People's Committee and the Court, instead of only the Court as the previous two Civil Codes.

There is almost no difference in the provision of guardians for minors under the Vietnamese Civil Codes. Accordingly, relatives of minors will be designated as their guardians. Specifically: the eldest brother or sister shall be the guardian of the ward; if they fail to satisfy all requirements for acting as a guardian, the paternal grandfather, grandmother or maternal grandfather, grandmother shall be the guardian; if they fail to satisfy all requirements for acting as a guardian, a biological uncle or aunt of the ward shall be the guardian.

To ensure that guardians protect children's best interests, Vietnam's Civil Codes have forced them to perform several obligations that have remained unchanged over the past twenty years. It shows the correctness and stability of these regulations. Specifically, guardians have the following obligations: to take care of and educate the ward; to represent the ward in civil transactions, except where it is provided for by law that wards aged under fifteen years can establish

²⁰ Civil Code number 44-L6CTN was issued by the 8 Vietnamese National Assembly on 28 October 1995, Clause 1 Article 55 <https://thuvienphapluat.com/van-ban/bo-luat-dan-su-1995-44-l-ctn-39391.html>; Civil Code number 33/2005/QH11 was issued by the 11 Vietnamese National Assembly on 14 June 2005, Article 29, <https://thuvienphapluat.com/van-ban/bo-luat-dan-su-2005-33-2005-qh11-2463.html>; Civil Code number 91/2015/QH13 was issued by the 13 Vietnamese National Assembly on 24 November 2015, Clause 1 Article 30, <https://thuvienphapluat.com/van-ban/bo-luat-dan-su-2015-296215.html>.

²¹ HUYNH THI TRUC, Beginning of Protection of Children's Rights in the Vietnamese Legal Development 111.

and perform civil transactions by themselves; to manage the property of the ward; to protect legitimate rights and interests of the ward.

2.2.1.4. The right to be protected in civil transactions

This right includes two sets of provisions: Firstly, regulations on representatives in civil transactions of minors. When participating in civil transactions, in order to achieve specific goals to satisfy their own needs and to achieve that purpose the expression of such will must comply with a particular form, as provided for by the following laws. However, due to immature cognitive development, children cannot accurately express their will or recognize the risks that may arise when entering a trade.

Therefore, to ensure children's rights, Vietnam's Civil Codes has required the participation of a representative to assist children in establishing and performing civil transactions. These regulations are recorded in Articles 22 and 23 of the 1995 Civil Code, Article 20 of the 2005 Civil Code, Article 21 of the 2015 Civil Code. Accordingly, *'people from full six years of age to under the age of eighteen must obtain the representative's consent, except for transactions serving daily needs appropriate to the age or otherwise provided for by law without the representative's consent as prescribed by law, unless otherwise provided for by law.'*

Both of these regulations show that depending on the minor's age when participating in civil transactions, the role of their legal representative will be different. Specifically, for minors under 6, all their civil transactions are performed by their legal representatives. For a minor who is six years old, his/her legal representative only needs to express his or her will to agree or disagree with the minor to participate in civil transactions. In addition, during this age, if a minor has enough assets to secure his/her obligations in a civil transaction, he/she may enter into a civil transaction by himself/herself without consulting his/her legal representative on the law.

Regarding the change in content over time, it can be seen that the 2005 Civil Code is the successor to the entire content of the 1995 Civil Code on this issue. However, the 2015 Civil Code has changed when it stipulates: *'persons from full six years old to under fifteen years old when establishing and performing civil transactions must obtain the consent of their representative. According to the law, except for civil transactions serving daily-life needs as prescribed by law, persons under eighteen years of age shall establish and perform civil transactions by themselves, except for civil transactions related to immovable property. Property and movable property subject to registration and other civil transactions as prescribed by law, which the legal representative must agree to follow the law.'* This provision shows that the person's consultation is required. Legal representation for minors older than 15 has changed compared to previous documents. Specifically, as analysed above, minors aged 15 have enough assets to fulfil their obligations. The civil service contract can participate in civil transactions by itself without the representative's consent. However, the 2015 Civil Code has ruled out the possibility of minors for the transaction group. Acts related to real estate, movable property with registered ownership. Previously, due to underdeveloped economic conditions, the transaction needs of minors related to high-value assets had not yet been formed. Gradually, along with socio-economic changes, transactions related to real estate, registered movable property of minors arose. This issue puts minors at risk of taking advantage of these transactions. Therefore, the 2015 Civil Code helps to ensure a part of the

economic benefits for minors when it does not allow minors to perform these transactions on their own.

Second, the provisions on invalid civil transactions: While the regulations on the participation of representatives in civil transactions established by minors are preventive provisions, the regulations on invalid transactions established by minors have legal consequences. The 1995 Civil Code and the 2015 Civil Code recorded that these civil transactions would be declared invalid by the Court. However, the way the provisions of the legislator of the 2015 Civil Code are more open-minded when offering many choices. Specifically, when minors perform by themselves a civil transaction that must be established, performed or agreed upon by their representative at the law request, those transactions will be invalid except for the following cases:

Firstly, civil transactions of people under six years old, people who have lost their civil law capacity in order to meet essential daily needs. Secondly, civil transactions only give rise to rights or immunity from obligations to minors, people who have lost their civil act capacity, people who have difficulty perceiving and controlling their acts, or people with limited act capacity. Civil transactions with other persons to establish and perform civil transactions.

Thus, the new point of Article 125 of the Civil Code 2015 compared to previous documents is civil transactions that minors can perform. However, without a legal representative's participation, such a civil transaction shall not be declared invalid if the establishment of such a civil transaction only creates rights and interests for minors or minors. It is a service transaction serving the essential daily needs of minors.

2.2.2. China

The Communist Party of China, after assuming political control over the country in October 1949, completely repealed this civil code and switched the country to a model based on Soviet Russian law. Since then, the Chinese central authorities have attempted several times to draft a complete civil code. The first time occurred at the beginning of the 1950s and the second time at the beginning of the 1960s; both failed to produce a civil code because of many reasons. After 1978, China entered the era of reform. The liberalization of the economy rendered it necessary to have a civil code, so the third draft of the Chinese Civil Code was developed in 1982. However, this draft is still not approved because the country was in transition from a centralized planned economy to a free market economy, the instability of the socio-economic structure made the legislator change its working strategy, namely, the legislator decided to temporarily abandon the program of total civil codification and devote itself instead to enacting a series of special regulations). Legislators expected to be able to consolidate these pieces of legislation into a comprehensive civil code at some opportune moment in the future. As the first step of the new policy, the General Principles of Civil Law was promulgated in 1986 and came into effect on January 1 of the next year.

China's new civil code, adopted by the 13th National People's Congress on May 28, 2020, was announced as the beginning of a new era and the next step in the China's social and technological development. The Code consists of seven books and an additional provision. The first book of the Code, also known as the General Regulations, was adopted by the National

People's Congress on March 15, 2017, and entered into force on October 1, 2017, implementing and replaced a large part of the general principles of the Civil Law (1986). On August 27, 2018, the draft of other books of the Code was submitted to the fifth session of the Standing Committee of the 13th National People's Congress for the first reading. On May 28, 2020, the third session of the 13th National People's Congress voted to approve the Civil Code.

Children's rights protected in these civil legal documents include the right to be protected in civil transactions and guardianship.

2.2.2.1. The right to be protected in civil transactions

Article 12 of General principles of the 1986 Civil Code stipulated: a minor aged ten or over shall be a person with limited capacity for civil conduct and may engage in civil activities appropriate to his age and intellect; in other civil activities, he shall be represented by his agent ad litem or participate with the consent of his agent ad litem.

The Vietnamese Civil Code and the General Principles of the 1986 Chinese Civil Code have similar provisions when determining the different levels of support of the legal representative for civil transactions established by minors, depending on the minor's age.

However, the difference is that the Civil Code of Vietnam stipulates the age for adults to perform civil transactions with minors or express their opinions on transactions conducted by children. Meanwhile, the general principles of the 1986 Chinese Civil Code do not specify the role of the legal representative for minors who have reached the age of ten. This provision of Chinese law creates flexibility and initiative for the legal representative in assisting children in participating in civil transactions, but disputes are likely to arise. Therefore, in this case, the interests of minors are still not best guaranteed.

Regulations on civil transactions established by minors without the participation of a legal representative are not provided for in these 1986 general principles. Thus, because there is no civil code, the regulations related to the protection of minors in the civil field in China at this stage have not been completed.

The 2020 Chinese Civil Code defines: a minor aged 8 or above has limited capacity for performing civil juristic acts, and may perform a civil juristic act through or upon consent or ratification of his legal representative, provided that such a minor may independently perform a civil juristic act that is purely beneficial to him or that is appropriate to his age and intelligence.²² A minor under the age of 8 has no capacity for performing civil juristic acts, and may perform a civil juristic act only through his legal representative.²³ Thus, compared with the General Principles of the 1986 Civil Code, the age at which minors are limited in their capacity in civil transactions has been determined to be eight years old instead of ten years old. Besides, the role of the legal representative in the minors' civil transactions aged eight years is still not specified. Accordingly,

²² Chinese Civil Code was adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020, Article 19, See

https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html.

²³ Chinese Civil Code was adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020, Article 20, See

https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html.

if the minor is eight years old, he/she can choose to act as a representative in two forms: performing civil transactions on behalf of the minor or simply expressing his/her opinions on the minor's transactions.

Regarding the invalidity of civil transactions established by minors, the 2020 Chinese Civil Code 2020 affirms in Article 144 that civil transactions performed by persons without civil act capacity are invalid. However, there has also been an exception in this matter specified in Article 145 of the Civil Code 2020 as follows: a civil juristic act, performed by a person with limited capacity for performing civil juristic acts that is purely beneficial to the person or is appropriate to the age, intelligence, or mental status of the person is valid; any other civil juristic act performed by such a person is valid if a consent or ratification is obtained from his legal representative.

2.2.2.2. Guardianship

This right is provided for in Article 18 of the General Principles of the 1986 Civil Code as follows: a guardian shall fulfil his duty of guardianship and protect the person, property and other lawful rights and interests of his wards. A guardian shall not handle the property of his ward unless it is in the ward's interests.

In addition, Article 16 of the principle also provides guardians for minors: the parents of a minor shall be his guardians. If the parents of a minor are dead or lack the competence to be his guardian, a person from the following categories who has the competence to be a guardian shall act as his guardian: (1) paternal or maternal grandparent; (2) elder brother or sister; or (3) any other closely connected relative or friend willing to bear the responsibility of guardianship and having approval from the units of the minor's parents or from the neighbourhood or village committee in the place of the minor's residence.

Similar to guardianship in the general principles of the 1986 Civil Code, the 2020 Civil Code also provides for minors' guardians in Article 27 and provisions on the settlement of disputes related to the selection of guardians for minors in Article 31. In addition, Article 34 of the 2020 Civil Code also stipulates the responsibilities of guardians as follows: *'the duties of a guardian are to represent the ward to perform civil juristic acts and protect the personal, proprietary, and other lawful rights and interests of the ward.'*

Thus, both Vietnamese and Chinese Civil Codes have provisions for the protection of minors. The similarities between the two countries in protecting children's rights in the civil aspect are enshrined in the representative to participate in minors' civil transactions, the invalidation of civil transactions, and guardianship regulations. The difference is that the provisions on the right to register children's birth are not recognized in the Chinese Civil Code as in the Vietnamese one.

2.3. Children's rights in the Law on Marriage and Family

2.3.1. Vietnam

The provisions on children's rights in the Law on Marriage and Family of Vietnam over time have the following highlights: Firstly, the goals of the Vietnamese Law on Marriage and Family have varied over time, but they are all aimed at the State's protection of children's rights. Second, the

rights of children recorded in this group of documents mainly focus on the right to be cared for and nurtured, the right to education, the right to have a private property with other institutions' different performance guarantees. Children's rights are protected in Vietnam's Law on Marriage and Family through specific periods as described in the following.

2.3.1.1. Right to be cared for and nurtured

This is a fundamental right of children, which should be recognized in the Law on Marriage and Family in Vietnam from 1945 to the present. However, in terms of content, the recently issued documents will have more progress than the previous ones. For example, the 1959 Marriage and Family Law stipulates that parents must love, raise, and educate their children, but the 2020 Marriage and Family Law and the 2014 Marriage and Family Law have more than its predecessor: parents must care for and raise their minor children jointly. Compared to the provisions of the 1959 Marriage and Family Law, this new regulation has emphasized the equality of parents in the exercise of children's right to care and upbringing and clarifying that the beneficiaries of these rights are minor children. In order to ensure the right to be cared for and nurtured for children is best implemented, the Law on Marriage and Family from time to time also stipulates the right to be adopted.

2.3.1.2. Children's right to education

Like the right to be cared for and nurtured, this right is recognized in all laws on marriage and family in Vietnam. If the 1959 Marriage and Family Law and the 1986 Marriage and Family Law stipulate the right to care, nurture, and legal education in one law, the 2000 Marriage and Family Law and the 2014 Marriage and Family Law separated each right in a separate law. Specifically, Article 17 of the 1959 Law on Marriage and Family stipulates: *'parents must love, raise and educate their children'*, Article 19 of the 1986 Law on Marriage and Family stipulates: *'parents must love, raise and educate their children.'* *take care of their children's learning and healthy development in terms of physical, intellectual and moral values.'* Article 37 of the 2000 Marriage and Family Law stipulates as follows: *'parents create conditions for their children to live in a warm and harmonious family environment; set a good example for their children in all aspects; closely coordinate with schools and social organizations in the education of children'*. Article 72 of the Law on Marriage and Family 2014 stipulates: *'parents create conditions for their children to live in a warm and harmonious family environment; set a good example for their children in all aspects; closely coordinate with the school agencies and organizations in the education of children.'* Thus, the content of children's right to education in the Law on Marriage and Family 2000 and the Law on Marriage and Family 2014 is more detailed than in previous documents. At the same time, the two later documents also added that parents must set an example for their children and coordinate with schools, other agencies and organizations in educating their children. It is necessary because children will passively learn their parents' behaviour in social activities.

Furthermore, home-schooling is an educational activity that happens every day and goes on for a long time. Therefore, stipulating the responsibility of parents in setting an example for their children in all aspects is a practical regulation and helps parents guide on how to educate their

children at home. In addition, regulations on the cooperation of parents with schools, agencies and organizations are also necessary. For example, at present, when Vietnam in particular and countries around the world, in general, are affected by the Covid-19 epidemic, the cooperation between parents and schools in educating their children is more evident. Specifically, schools are closed to prevent the spread of the virus, so online learning measures are implemented. However, in order for this learning method to be effective, as well as to ensure children's right to learning, parents must show their cooperation in educating children by activities such as guide children to use electronic devices for learning, especially those who are still in primary school, creating favourable conditions in terms of time and space for them to participate in learning.

2.3.1.3. Children's right to their own property

This right has been stipulated in the Law on Marriage and Family of Vietnam over time, with the following contents respectively: article 23 of the 1959 Marriage and Family Law stipulates: '*Children can own their property*'. Article 20 of the 1986 Marriage and Family Law has more detailed provisions when it is noted: '*adult children still living with their parents are free to choose occupations, political and social activities and have their possessions*'. This provision shows that, from the point of view of the 1986 legislator, only adult children can have their property, even though they still live with their parents. Although the content of the law is more detailed than that of the Marriage and Family Law of 1959, it is not a progressive law because it limits the right of children to have their own property.

Overcoming this shortcoming, Clause 1, Article 44 of the Law on Marriage and Family 2000 stipulates: '*children have the right to own their property. A child's property includes property inherited separately, given as a gift, income from the child's labour, yields, income arising from the child's property and other lawful incomes*'. Thus, children's right to have their property in the 2000 Marriage and Family Law contains provisions on subjects having the right to own property similar to the 1959 Marriage and Family Law. That is, no age limit of having in owning private property. At the same time, the 2000 Law on Marriage and Family Law also stipulates the grounds for establishing the separate property of children. This is the content that the Law has inherited from the 2014 Marriage and Family Law. Accordingly, Article 74 of the 2014 on Marriage and Family Law is stipulated as follows: '*children have the right to have their property. Children's property includes property separately inherited, donated to rowing, income from children's labour, yields, and profits from their property and other lawful incomes. Property formed from their property is also their property.*'

These provisions show the details of the Law on Marriage and Family 2000 and the Law on Marriage and Family 2014 in regulating the right to own property of minors. Since then, it has helped solve the question posed by the Marriage and Family Law of 1959. That is: what is the private property of minors. Similar to the 2000 Marriage and Family Law, the 2014 Marriage and Family Law stipulates the grounds for forming separate property of minors. In addition, this Law also adds a basis that '*the child's private property is the property formed from the child's property*'. This basis helps to diversify the sources of children's property, thereby ensuring children's legitimate rights in property ownership.

Regulations on children's right to own property will be a premise for children to exercise their other rights better—for example, the right to participate in civil transactions. Specifically, if

children have property sufficient to meet their obligations, children can participate in civil transactions by themselves without the legal representative's consent²⁴.

2.3.2. China

The provisions on children's rights in the Marriage Law from 1949 to the present are reflected in the following documents: the 1950 Marriage Law, the 1980 Marriage Law, and the 2001 Marriage Law. Accordingly, these regulations have the following characteristics: Firstly, the provisions on the protection of children's rights in the Marriage Law of 1950 are rather sketchy than the Marriage Law of 1980 and the Marriage Law of 2001. Second, fundamental children's rights, namely the right to be cared for and nurtured and the right to life and health protection, are enshrined in all three of these documents. Third, according to the development of society, several new regulations related to children's rights have been added to new documents issued later. This shows the growing interest in children's rights in China.

2.3.2.1. Children's right to foster care

This right is enshrined in all three documents of the Chinese Marriage Law. Specifically in Article 13 of the 1950 Marriage Law, Article 15 of the 1980 Marriage Law and Article 21 of the 2001 Marriage Law. However, in terms of content, the 1950 Marriage Law stipulations were still rather sketchy than the two remaining texts. Specifically, Article 13 of the 1950 Marriage Law stipulates that: *'parents have the duty to rear and to educate their children; neither the parents nor the children shall mistreat or desert one another.* Children's lives and health are also protected when this Law stipulates: *'infanticide by suffocation and similar criminal acts are strictly prohibited.'*²⁵ Meanwhile, the Marriage Law of 1980 and the Marriage Law of 2001 provide this right in more detail in Articles 15 and 36. For example, this right is guaranteed to be exercised regardless of the parents' marital relationship. Therefore, if the parent's divorce, Article 29 of the Marriage Law 1980 and Article 36 of the Law on Marriage 2001 provide: *'after divorce, both parents continue to have the right and duty to rear and educate their children'.*

In addition, Article 30 of the Marriage Law 1980, Article 37 of the Law on Marriage 2001 also stipulate: *'if after divorce, one party is assigned custody of children, the other party must bear part or all of the necessary expenses for raising children care and education. The two parties should agree on the amount and duration of payment for such maintenance and education.'* In addition to emphasizing the need for child support, Article 30 adds that: *'if such an agreement is lacking, the party's court must make a judgment. The agreement between the parents or the judgment of the people's court concerning the costs of the child's upbringing and education does not prevent the child from making a reasonable request when necessary against either party to increase the amount already paid. decided by agreement or by decision of the judicial authority'.*

²⁴ Except for civil transactions related to real estate and movables, which must be registered in accordance with the provisions of the Civil Code 2015 above.

²⁵ Chinese Marriage Law was adopted by the Chinese Communist Party in May 1950, Article 123, See <https://alphahistory.com/chineserevolution/marriage-law-1950/>.

In order to ensure the right of custody of the child to be fostered, Article 15 of the Marriage Law 1980 also stipulates that: *‘when parents fail to perform this duty, their children who are minors or who are not capable of living on their own have the right to demand that their parents pay for their care.’*

2.3.2.2. Equal rights of children born in wedlock and out of wedlock

This right was first recognized in the Marriage Act of 1950 and then entirely inherited in the two successive Marriage Laws. This provision appeared in the Marriage Law of 1950 in China, which showed significant progress in the thinking of Chinese legislators at that time. Because the Communist Party won the revolution in 1949; that is, the feudal system in China only ended in 1949. By 1950, the legislator had modified the idea of equality: *‘children born out of wedlock enjoy the same rights as children born in lawful wedlock. No person is allowed to harm them or discriminate against them’*. The next two laws, both inherit and develop this provision by adding that: *‘children born out of wedlock enjoy the same rights as children born in lawful wedlock. No person shall harm them or discriminate against them. The father of a child born out of wedlock must bear part or the whole of the cost of maintenance and education of the child until he or she can live on his or her own’*.²⁶

2.3.2.3. Right to inherit the parental estate

This is the right to regulate children’s property, under international documents on children’s rights, but has only appeared in China in the 2001 Marriage Law.

3. Conclusion

Vietnamese history has recorded that our country was dominated by the Chinese dynasties (179 BC – 907) for thousands of years, which has led to a profound influence on Chinese culture and society in Vietnam. Besides, Vietnam and China are two neighbouring countries, so there are many similarities between Vietnam and China in legal culture even after Vietnam has gained independence.

This is one of the critical reasons for the author to conduct comparative legal research between Vietnam and China in protecting children’s rights. This peculiarity will make it more convenient for Vietnam to apply China’s experience and review carefully and systematically similar provisions in our legal system. From there, figure out the weak points in Vietnamese legal system in this regard. Moreover, understanding the laws of neighbouring countries is also a practical step to moving closer to international cooperation in legal issues related to children.

Research results have shown that, in general, there are many similarities in documents such as the Constitution, Civil Code, Marriage and Family Law of Vietnam and China. Specifically, to

²⁶ Marriage Law was adopted at the Third Session of the Fifth National People’s Congress on September 10, 1980, Article 19, See <https://www.cecc.gov/resources/legal-provisions/marriage-law-of-the-peoples-republic-of-china-amended>; and Marriage Law was amended in accordance with the Decision on Amending the Marriage Law of the People’s Republic of China, adopted at the 21st Meeting of the Standing Committee of the Ninth National People’s Congress on April 28, 2001, Article 25, http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21897930.htm.

protect children, both Vietnam and China have recognised the general principles in the Constitution and defined guardianship, representatives, and minor civil transactions in the Civil Code. Many children's rights are recognised and protected in the marriage and family aspect, namely, non-discrimination between children born and out of wedlock and the right to foster care. In detail, there are differences between the two countries regarding regulating children's issues, such as the right to have a child's birth is not stipulated in the Chinese Civil Code but exists in the Vietnamese ones or parents must have guardianship over their children, while in Vietnam, parents are not guardians of children but only representatives. With some initial results obtained from a legal perspective, the article hopes to motivate the author to expand other research on implementing and enforcing these regulations in some localities in Vietnam and China.

Bibliography

- DONG, YuNhu: Inclusion of Human Rights in the Constitution – An Important Milestone in China's Human Rights Development. *Human Right Journal* 3/2004, 24-27
- CAPPA, Claudia – GREGSON, Kendra – WARDLAW, Tessa – BISSEL, Susan: Birth registration: a child's passport to protection. *The Lancet Global Health* 2/2014
[https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(13\)70180-3/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(13)70180-3/fulltext) (22. 03. 2022)
- CHI, Chi: Đứa trẻ Sóc Trăng mồ côi 9 tháng tuổi được nhận nuôi, 38 năm sau là phó thủ tướng Đức [The 9-month-old Soc Trang orphan child was adopted, 38 years later he was the deputy chancellor of Germany].
<https://vanvn.vn/dua-tre-soc-trang-mo-coi-9-thang-tuoi-duoc-nhan-nuoi-38-nam-sau-la-pho-thu-tuong-duc/> (22. 03. 2022)
- CYNTHIA, Bell: A Look behind the Great Wall: Children's Rights in China. *Child Legal Rights Journal* 3/1982, 13-21
- HUNT, Michael: *The World Transformed 1945 to the present* (version 2). New York 2014
- HUYNH THI TRUC, Giang, Beginning of Protection of Children's Rights in the Vietnamese Legal Development. *Díké* 5/2021, 105–108
- NGUYỄN, Bình: Declaration of Independence 1946 - historical values and times.
<http://dautieng.binhduong.gov.vn/portal/Tin-tuc/Chi-tiet/Thong-tin-tuyen-truyen-1157-6> (01. 07. 2021)
- NGUYỄN, Thị Yến, Quyền trẻ em trong pháp luật Việt Nam hiện nay [Children's rights in current Vietnamese law].
<https://phaply.net.vn/quyen-tre-em-trong-phap-luat-viet-nam-hien-nay-a210359.html>. (20. 03. 2022)
- REYNAERT, Didier – ROOSE, Rudi: *Children's rights from a social work perspective*. Routledge International Handbook of Children's Rights Studies. London 2015
- VÂN, Hồng: Hiến pháp năm 1946: Bản Hiến pháp dân chủ, tiến bộ [Constitution of 1946: The Democratic and Progressive Constitution] <https://vov.vn/chinh-tri/hien-phap-nam-1946-ban-hien-phap-dan-chu-tien-bo-828802.vov> (22. 03. 2022)
- SHENG, Yu – WANG, Deyi – WU, Changzen: Chinese Law and Status of Children. *Columbia Human Rights Law Review Journal* 1/1981, 71-100
- VU VAN, Mẫu, *Việt Nam Dân Luật Lược Khảo-Quyển 1: Gia đình* [Civil Law Review-Volume 1: Family]. Saigon 1961
- XIA, Yinlan: Legal system of guardianship over Minors in People's Republic of China,
https://www.jstor.org/stable/25740501?seq=1#metadata_info_tab_contents (22. 03. 2022)