



Joint UN Recommendations to the Draft Amended Law on Marriage and Family (as of February 7th 2014)

Basic principles

The Law on Marriage and Family governs issues of recognition and protection of the people living in family and partnership relations. In the light of the newly revised Constitution of Viet Nam, CEDAW and other human rights instruments¹, the Law should contain provisions guaranteeing the rights to marriage, the rights of families and should avoid discrimination of individuals on the basis of their sexual orientation or gender identity. The obligations of the State to integrate its human rights commitments into the revised Law on Marriage and Family can be grouped under the **three** fundamental principles below:

- **Gender equality and equal rights for all;**
- **The right to live free of discrimination on the grounds of partnership, gender identity and sexual orientation; and**
- **The best interest of the child as a primary consideration.**

Key recommendations

1. Gender equality and equal rights for all:

- **Avoid statement that reinforces gender stereotypes:**
 - In Article 2 (6), we recommend to rephrase the end of the sentence to read, "*to help parents to properly perform their parental functions by helping both parents as equal partners in raising children*", to avoid reinforcing stereotypes of women in their reproductive role as mothers above all other roles and to promote sharing of parental responsibilities.

¹ Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC) and other international conventions and agreements that Viet Nam has acceded to, as well as the jurisprudence and commentary of international treaty bodies. The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (adopted 26 March 2007) should also be taken into consideration.

- **Avoid statement that formulate gender inequality and discrimination:**
 - Article 2 (1), we recommend to revise the sentence to read, “Voluntary, progressive and monogamous marriage in which *two people* are equal.”
 - In Article 2a (3), we recommend to rephrase the sentence to read, “Getting married” should be defined as an act whereby “*two people* establish a *spousal* relationship in accordance with ...”. In the same principle, the entire draft Law should be carefully reviewed to ensure all gender-specific terms be replaced with the gender-neutral formulations; and binary gender construct should be removed.

- **Guarantee the equal rights to marriage, upon separation and divorce:**
 - In Article 8, we recommend to set equal minimum age to marriage to all.
 - In Article 23a, we recommend to keep the formulation on separation to ensure women’s rights in separation.
 - In Chapter III, provisions on divorce, we recommend to provide further guidance on the appropriate level of child support payments. In addition, the draft Law should provide protection measures to be applied in case a spouse suffers from violence or abusive behaviors caused by the other spouse and his/her kinship.
 - In Article 56, we recommend to rephrase the sentence to read, “*When one party, wife or husband, files for divorce, the Court shall decide to recognize the divorce*”, to avoid imposing conciliation a compulsory precondition to filling a divorce, particularly if domestic violence is the reason for requesting the divorce.
 - Article 63 is revised to guarantee the right to stay in the matrimonial house by one partner and children upon divorce (i) before an agreement on property is reached; and (ii) in situations of domestic violence.

- **Guarantee the equal property rights for both spouses during marriage, cohabitation, divorce and separation:**
 - In Chapter III on relations between spouses, we recommend to ensure that (i) elected property regime, e.g. common property and personal property, is obtained in a joint-decision making process; (ii) just and equitable division of property upon divorce, and the agreement has not been obtained through fraud coercion, undue influence or domestic violence.

- In Article 15, 59 (2b) and 61, we recommend to provide guidance on how to determine the value of household and family work to strengthen references to the assertion that household and family work are considered as income. Furthermore, the entire draft Law should be carefully reviewed to introduce a broader definition of common property in line with CEDAW principles and General Recommendations 21².
- Article 63 is revised to guarantee the right to stay in the matrimonial house by one partner and children upon divorce (i) before an agreement on property is reached; and (ii) in situations of domestic violence.

2. The right to live free of discrimination on the grounds of partnership, gender identity and sexual orientation:

- **Ensure equality and non-discrimination to people living in de-facto union:**

- In light of the principle of non-discrimination enshrined in the newly revised Constitution of Viet Nam³, we recommend that the State recognizes the substantive rights of people living in de facto unions to the same extent as married people are treated and entitled to the legitimate rights and interests which are specified in the draft Law.
- In Article 2a (5), we recommend to replace the term “*living together as wife and husband*” with an internationally recognized term “*de facto union*”. In addition, we recommend to rephrase the definition to read, “*A de facto union means two persons mutually agree to organize a life of living together in a stable and continuous manner and consider each other as de facto spouse.*”, so as to ensure it does not exclude same-sex couples.
- From Article 13 to 16, we recommend to revise the current provisions towards greater recognition of the rights of people living in de-facto unions. It is the State’s obligation to provide legal protection and to address the **legal consequences** which may arise in de-facto unions, including but not limited to:
 - parenting consequences;
 - material consequences (in relation to property, social welfare or other material benefit);

² It provides that “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration”.

³ Article 16(2), the Constitution of Viet Nam.

- other legal consequences (for example: protection against domestic violence, civil registration, etc.).
- **Guarantee non-discrimination on the grounds of gender identity and sexual orientation:**
 - The principle of non-discrimination is enshrined in the newly revised Constitution of Viet Nam as well as international law. However, the current draft of the Law on Marriage and Family expressly discriminates against people on the basis of their sexual orientation or gender identity. We strongly recommend that the Law on Marriage and Family be revised to conform to the Constitution.
 - Article 8(2): we strongly recommend to delete this Article and any other text in the draft Law that expressly forbids same-sex unions.
 - From Article 13 to 16, in accordance with the above-mentioned recommendations, these provisions should be revised towards recognition of the legal safeguard and protection to de-facto union partners regardless of their sexual orientation and gender identity.

3. The best interest of the child as a primary consideration:

- **Protect the rights of the child:**
 - The Convention on the Rights of the Child (CRC) and CEDAW, both of which Viet Nam has ratified, include the right of a child to have her or his best interests assessed and taken into account as a *primary consideration* in all actions or decisions that concern her or him, both in the public and private spheres.
 - In Article 2, we recommend to add a provision along the following lines, *"In all matters concerning children in this Law, the best interests of the child will be the primary consideration."*
 - Article 89, sets a time limit of between 1-5 years for the application of restriction of parental rights. In many cases of abuse or neglect, parental rights may need to be restricted permanently in the child's best interests, and the Court should be empowered to make such a decision. We recommend the following changes to Article 89.

... depending on a case-by-case basis, the Court may make decisions by itself or at the request of the individuals, agencies or organizations

prescribed in Article 90 of this Law, to disallow such parents to look after, care for and educate their children or manage the personal property of their children or act as their children's representatives at law for any amount of time as is necessary to ensure the child's best interests.

- In Article 89, we recommend changes as below.
 1. *Parents, guardians of minor children shall have the right, in accordance with the Civil Litigation Law, to request the Court to restrict some rights of parents toward their minor children.*
 2. *The following individuals, agencies, organizations shall have the right, in accordance with the Civil Litigation Law, to request the Court to restrict some rights of parents toward their minor children:*
 - a) *Relatives;*
 - b) *State management agency on family;*
 - c) *State management agency on children;*
 - d) *The Women's Union;*
 - e) *The People's Committee.*

- **Enforce parenting obligations and the principle of non-discrimination:**

- In Chapter VII, we recommend provisions on child support to be strengthened by adding further guidance on the appropriate level of child support payments and measures for more effective enforcement of child support provisions.
- In addition, we recommend to strengthen the requirement for provision of support in both circumstances (i) to children born to single mothers; or (ii) fathers are obligated to contribute to the pregnancy and childbirth costs for mothers of children regardless of cohabitation or marriage
- The CRC prohibits (Article 2) any form of discrimination against a child based on the status of the child, the child's parents or the child's guardian. We recommend that this fundamental CRC and Vietnamese constitutional principle is included, most suitably under Article 3. Such a provision must include children born to single mothers and children of same-sex parents.