The Mechanism to Settle Administrative Complaints in Vietnam

Challenges and Solutions

SUMMARY REPORT

August 2009

The Asia Foundation

PLD VIỆT NAM

This document provides a summary of key findings of a research project aimed at a better understanding of the nature of administrative complaints in Vietnam, the existing structure resolving those complaints, and how such a mechanism can be improved. The research was carried out by the Policy, Law and Development Institute under the guidance of Dr. Hoang Ngoc Giao with funding support from The Asia Foundation.

The research was carried out by a team of researchers which include:

Hoang Ngoc Giao, Ph. D. (Lead author and editor)
Tran Van Son, Ph D.
Nguyen Thi Thu Van, Ph.D.
Dinh Van Minh, M.A
Nguyen Van Kim, M.A
Nguyen Thi Hanh, M.A.

The summary report includes the following sections:

1. Background of the mechanism for settlement of the administrative complaints: Objectives and scope of the research;
2. Vietnamese laws on administrative complaints settlement;
3. Citizens' right to complaint;
4. Present institutions for settlement of the administrative complaints in Vietnam;
5. Conclusions and recommendations

Finally, it should be noted that the report is the result of the research team's independent research and does not reflect the view of The Asia Foundation, the Policy, Law and Development Institute, or any other related organizations. The research team welcomes all feedbacks and comments.

1. Background of the mechanism for settlement of the administrative complaints: Objectives and scope of the researh

After more than 20 years of implementation of the *đổi mới* (renovation) policy, Vietnam has gained important socio-economic achievements. The country has carried out quite successfully a number of reforms in the economic sector; and other social reforms have contributed to substantial hunger and poverty alleviation.

Since the beginning of the current decade, in addition to socio-economic reform, the State of Vietnam has also initiated institutional reform in the administrative, legal and judicial arenas. The comprehensive Public Administration Reform Master Progamme 2000 – 2010 was appoved covering four fundamental areas and 7 action plans. One of the key areas of the public administration reform programme is to improve institutions related to the organization and operation of the public administrative system, including those which "regulate the relationship between the State and its citizens." The mechanism for the settlement of citizens' complaints is one of the essential institutions in the relationship between the state and society. The improvement of this mechanism will contribute to enhancing the effectiveness and efficiency of public administrative practices, and simultaneously promoting the implementation of citizens' civil and political rights.

Citizen's right to complain about the state's administrative practices is recognized and protected by law. The 1992 Constitution of Vietnam (amended and supplemented in 2001) reads: "Citizens have the right to lodge with any competent State authority a complaint or denunciation regarding transgressions of the law by any State body, economic or social organization, people's armed forces unit or any individual." (Paragraph 1, Article 74)

Although the legal framework on resolving complaints has been amended many times, the actual settlement of complaints by state administrative organs has exposed more and more difficulties and shortcomings. At the same time, there has been an increasing number of citizens' complaint letters on decisions and actions of state organs at all levels and in all fields of life (land, environment, health, transportation, construction, business, import-export transactions, etc.). The nature of the complaints is getting more and more complicated and diversified, calling for an urgent need to effectively and quickly settle citizens' complaints.

> According to the figures provided by responsible agencies, in 1999 government authorities at all levels have received 280,000 visits from citizens to lodge their complaints or denunciations; 230,000 such visits in 2000; 280,000 such visits in 2001, with the actual number of petitions lodged around 180,000 to 190,000 cases each year.[1]
> The number of complaints and denunciations going directly to the central level without going through the lower levels is a growing trend, with 41,750 cases of citizens and 939 cases of groups doing so. In 2006 alone, there were 554 groups of citizens, an increase of 31% over

[1] *The mechanism for supervision, audit and inspection in Vietnam*, Hanoi: Judicial Publishing House, 2004, p. 128.

> 2005; in the nine months of 2007, there were 385 groups of citizens from 52 provinces/ centrally-managed cities.
> Nature of complaints: mainly relates to land management (accounted for approximately 80% of all administrative complaints) focusing on issues like: asking for compensation at market prices when the State appropriates land from citizens; asking for land previously given over to production collective, state's agroforestry enterprises, or donated to the State's use for social welfare purposes; complaints of the settlement of land disputes by religious or social organizations, etc. Apart from those, there were complaints about getting back houses/ properties from which the owners were absent, or houses/properties belonging to the re-educated groups previously under the State's management; complaints about the implementation of the social policies (applied to war invalids, dead soldiers, people who have contributed to the revolution, retired people…); complaints about the environment, about officials' disciplines happening in many localities.[2]

The Vietnam Communist Party and the State of Vietnam are greatly concerned about the increasing number of citizens' complaints about the administrative activities of the state's organs. In 2002, The Central Secretariat of the Communist Party of Vietnam (Session IX) issued Directive 09-CT/TW on some urgent matters that need carrying out in resolving complaints. In 2007, the Government started to draft the new Law on Complaints. In 2008, The XIIth National Assembly conducted an assessment of the settlement of citizens' complaints. In October 2008, The Standing Committee of the National Assembly discussed and rendered their ideas on the National Assembly's assessment report of the complaint settlement.

Most scholars and officials have offered two main reasons to account for the increase in citizens' complaints about the administrative activities of the state's organs. First, the legal system of Vietnam is still inadequate in many regards, overlapping, and contradictory in content. Some laws were issued by the organ without power over the matter; and there is a lack of compatibility and consistency between sub laws, administrative documents, laws, and the Constitution. As such, the implementation of laws produces many contradictions, damaging the rights and interests of citizens, and therefore, generating complaints. Secondly, the current mechanism to resolve complaints is still inadequate. Not only is it not an effective tool in assisting state administrative organs to settle citizens' complaints, but the mechanism itself has become a factor stimulating the increase of complaints and making those complaints even more complicated and long lasting.

Citizens are hard pressed to find administrative justice, while state organs are overloaded with the demanding task of settling the growing number of complaints from citizens. Institutionally, what need be done to improve the situation?

In such a context, with support from The Asia Foundation and in line with the objectives of the Research Institute for Policy, Law and Development (PLD), the

[2] "Summary report on the result of settlement of complaints and denunciations from the year 2006 up to now, and the solutions in the new circumstance," presented at the Summary Conference of Inspection Work in 2007 and the Deployment of the Task in 2008, Hanoi, 11 January 2008.

research on current mechanism for resolving administrative complaints in Vietnam was carried out between 1 December 2006 and 30 September 2008. The objective of the research is to assess the actual situation and the effectiveness of the mechanism for settling citizens' complaints about decisions and actions of state administrative bodies that may have directly affected and/or damaged the rights and interests of citizens and enterprises. Based on the research findings, practical and informed recommendations can be made to help renovate and enhance the effectiveness of the present mechanism and methods for resolving complaints, as well as to improve the law on administrative complaints. This will support Vietnam's ongoing international integration and reform process leading to the achievement of the goal "prosperous people, strong nation, and just, democratic and civilized society."

To carry out the research, PLD formed a specialized research group consisting of legal researchers, experts in state administrative bodies, individuals having practical experiences in resolving administrative complaints, and policy makers from competent government agencies.

The research was conducted by different means such as questionnaires, in-depth interviews with target groups related to different stages of the complaint settlement procedure, and seminars with the participation of researchers and practitioners directly dealing with complaints. The research project attracted strong interest of and feedback from legal experts from various line-ministries, as well as from local state agencies.

The research group studied and assessed the present legal framework on complaint settlement and also researched specific topics related to each stage of the complaint settlement procedure. Together with the desk research, various seminars and workshops were organized, namely the seminar "Discussion on the Mechanisms for the Settlement of Administrative Complaints" on 29 December 2006; the workshop on "Issues Related to the Mechanism for the Settlement of Administrative Complaints" on 8 September 2007; and the workshop on "The Mechanism to Settle Administrative Complaints with the Improvement of the Law on Complaints" on 30 September 2008.

One of the important activities within the framework of this project was fact finding. Each expert in charge of a topic in the research group was responsible for identifying the assessment need, developing the questionnaire, and establishing the in-depth interview structure. The PLD research group defined the following target groups to be surveyed: a) those who are empowered to meet with citizens and settle administrative complaints; b) those who are empowered to supervise the settlement of administrative complaints; c) the complainants (citizens, entrepreneurs).

Members of the PLD research group conducted surveys in 6 cities and provinces in all three regions of the country, namely Hanoi, Thai Binh, Khanh Hoa, Da Nang, Ho Chi Minh City, and Dong Thap. The PLD research group surveyed and met with: 24 organs empowered to meet with citizens and deal with complaints; 12 bodies empowered to supervise the settlement of administrative complaints; 9 economic organizations (the Vietnam's Chamber of Commerce and Industry (VCCI), representatives of VCCI in Danang, and 7 enterprises); and met with a number of complainants. Specifically, in each surveyed locality, the research group met with

bodies and organizations such as: Office to Receive Citizens of the Provincial People's Committee; Inspectorate of the province; Department of Planning and Investment, Department of Civil Construction; Department of Natural Resources and Environment, the Fatherland Front, etc.

During direct surveys at the localities, members of the PLD research group focused on issues such as: the situation of administrative complaints; cases of complaints with groups of complainants involved; complicated complaints; long-lasting complaints; reasons for administrative complaints; ways in which citizens are being received by state agencies; the task of receiving and dealing with administrative complaints; the task of reviewing and verifying complaint content; the execution of enforceable decisions in settling administrative complaints; shortcomings in the present Law on Complaints and Denunciations and the settlement of complaints; recommendations by surveyed bodies and organizations on what and how to renovate the mechanism for the settlement of administrative complaints, etc.

2. Vietnamese law on the settlement of administrative complaints

First, it is notable that up to now, citizen complaints are placed in the same legal framework as citizen denunciation in Vietnam. The 1992 Constitution of Vietnam (amended in 2001), as well as other related laws, often provide regulations over the right to complain and the right to denounce in the same normative legal documents. The combination of the two actions of complaining and denouncing in the same legal framework has created confusion and difficulties in providing relevant legal procedures to deal with each action.

Article 2, Law on Complaints and Denunciations dated 2 December 2008 regulates the actions of "complaint" and "denunciation" as follows:

> "To complain" means that citizens, agencies, organizations or public employees, according to the procedures prescribed by this law, propose competent agencies, organizations and/or individuals to review administrative decisions, administrative acts or disciplinary decisions against public employees when having grounds to believe that such decisions or acts contravene laws and infringe upon their legitimate rights and interests.
>
> "To denounce" means that citizens, according to the procedures prescribed by this law, report to competent agencies, organizations and/or individuals on illegal acts of any agencies, organizations and/or individuals, which cause damage or threaten to cause damage to the interests of the State and/or the legitimate rights and interests of citizens, agencies and/or organizations.

Although there are some points of intersection between complaints and denunciations, the motives and nature of the two actions are different. Recently, the National Assembly has begun to develop two separate laws: the Law on Complaints and the Settlement of Complaints and the Law on Denunciations and the Settlement of Denunciations.

The mechanism to settle administrative complaints currently operates under the provisions of the following legal documents: the 1998 Law on Complaints and Denunciations; the 2004 and 2005 Laws on Amending and Supplementing Some Articles of the Law on Complaints and Denunciations; and Resolution No.136/2006/ND-CP dated November 14th 2006 of the Government providing guidance on the implementation of those laws on complaints and denunciations.

The laws provide procedures to settle a complaint as follows: 1) Arising administrative dispute - first-time complaint; 2) First-time settlement of the administrative dispute; 3) Second-time settlement of the administrative dispute; 4) Initiate law suit in the Administrative Tribunal/Court.

In the present structure to settle administrative complaints, the Law on Complaints and Denunciations is considered to be the "general law," the common legal framework which serves as the foundation for the complaint settlement mechanism. Meanwhile, in every part of life which the State exerts its power of public administration, there are issues and disputes arising daily between citizens and public agencies and officials as the latter carry out their duties. As such, laws in specific sectors also have the function to deal with administrative disputes or complaints in their relevant areas. For instance, the 2003 Land Law, the 2005 Intellectual Property Law, the 2008 Law on the Enforcement of Civil Judgments, the 2005 Environment Protection Law, the 2004 Bankruptcy Law, and the 2006 Securities Law all have provisions on the settlement of specific complaints arising in their respective sectors. Formally, the overall legal framework that shapes the mechanism to deal with administrative complaints seems to be scientific and unified. In practice, however, the present legal system on complaint settlement still has many contradictions, overlaps, and redundancies.

The lack of consistency and compatibility between the provisions on administrative complaint settlement in the general law and the sectoral laws is one of many difficulties constraining the resolution of administrative disputes. For example, some provisions of the Law on Complaints and Denunciations, the Land Law, and the Ordinance on the Procedure for the Settlement of Administrative Cases are inconsistent with one another, making it difficult to guide and explain to citizens or leading to the situation of avoidance, or passing the responsibility of resolving complaints to others.

Based on the Law on Complaints and Denunciations as well as other sectoral laws mentioned above, the jurisdiction to resolve administrative complaints is defined in accordance with the organizing and operating principles of Vietnam's administrative system, namely administrative management based on both line ministries and territorial division. This principle of dual subordination is referred to in Vietnamese as *song trùng trực thuộc*. In accordance with the territoriality principle, an administrative complaint has to first be addressed at the point where the government (communal, district, provincial levels) issued the administrative decision or committed the administrative action being questioned. In the cases where the jurisdiction has not been assigned to local governments, citizens may submit administrative complaints to relevant agencies in specific sectors such as finance, tax, land, construction, or planning and investment. Ministers or heads of sectors have the

final decisions in those cases[3]. The question to be considered: whether the administrative structure based on dual subordination, together with unclear division of responsibility between local and central administrative authorities, and between local authorities and ministries, is an institutional reason for the shortcomings in the current mechanism for the settlement of administrative complaints in our country?

3. Citizens' right to complaint

In the 1959 Constitution, the 1980 Constitution, as well as the 1992 Constitution, citizens' right to complaint is prescribed as a constitutional right. However, for many years, it has not been easy for citizens to exercise this right.

People have no right to complain about normative documents issued by the state's organs.

There are many documents issued by the state's bodies at different levels, from central to local, that directly impact people's rights and interests. Many normative documents issued by local governments are against the law and the Constitution,[4] but they became the basis for specific administrative decisions which set off complaints from citizens whose rights and interests are negatively affected. However, according to the Law on Complaints and Denunciations, the complainant may only complain about an administrative decision or action but not a normative document of the state's body.[5] This can be considered as the biggest limitation to the right to complain of citizens.

In fact, in the Vietnamese legal system there is no mechanisms to evaluate the legitimacy of normative legal documents, aside from a very general principle provided in the Law on the Promulgation of Legal Normative Documents released in 1996 (amended, supplemented in 2002) which states: "normative legal documents issued by the lower authority shall be compliant with those issued by the higher authority." (Article 2)

The current mechanism to check, supervise, and evaluate the legitimate and constitutional nature of legal normative documents mainly relies on this principle: the issuing authority shall be responsible for checking and reviewing the legitimacy of its own documents. According to the Law on Promulgation of Legal Normative Documents in 2008,

---

[3] See Nguyen Van Liem, "Practical matters in settlement of administrative complaints in Vietnam," in Conference Proceedings: Vietnam - United States of America Bilateral Trade Agreement and the Mechanism for the Settlement of Administrative Complaints in Vietnam, Hanoi: Judicial Publishing House, 2004, page. 30.

[4] According to Mr. Le Hong Son, the Director General of the Department of Normative Legal Documents Review of Ministry of Justice, "Any time that a provincial-level organ, no matter whether it is the people's council or the people's committee, issued a document regulating actions and levels of fine, it is against the law. The majority of documents (against laws) are issued by people's committees of city or province, some issued by the people's councils, few by departments." (13/01/2006, http:www.hanoi.com.vn/vn/10/72779/)

[5] Even the court is not empowered to review normative administrative documents! The Administrative Court has jurisdiction to review "individualized administrative decision which directly affected the rights and interests of citizens, creating disputes between citizen and state, and that must be the first decision." (Articles 2, 4 and 12 of the 1996 Ordinance on the Procedure for the Settlement of Administrative Cases (amended, supplemented in 1998, 2006)

- The Standing Committee of the National Assembly has the power to interpret laws and ordinances (Article 85);
- The National Assembly, the Standing Committee of the National Assembly, the Council for Ethnic Affairs, and National Assembly Committees shall, in accordance with the provisions in the Law on Supervision Function of the National Assembly, supervise and take action against normative legal documents that may be against the law (Article 89);
- The Government shall have the power to review and take action normative legal documents that are against the law issued by ministries and ministerial-level agencies;
- The Prime Minister shall review and decide to abrogate or suspend the implementation of a part or whole legal normative document issued by Ministers or Heads of ministerial-level agencies that are against the Constitution, laws and normative legal documents promulgated by higher authorities;
- The Ministry of Justice executes its state management function in reviewing normative legal documents, assisting the Prime Minister in reviewing and taking action against normative legal documents that are against the law (Article 90);
- Ministers and heads of ministerial-level agencies have the power to examine and take action against their own normative legal documents that are against the law and those issued by other ministries and ministerial-level agencies on issues under their management. (Article 91).[6]

It should be noted, however, that the present structure outlined above for reviewing legal documents has not brought about expected results. In the mechanism for assessing the legitimate and constitutional nature of legal normative documents, there is no provision allowing for citizen the right to ask for a review or an assessment of the legality of normative legal documents. Simultaneously, in this structure, the Court, as a professional adjudication body with deep expertise, is not assigned the power to interpret, review, and evaluate the legitimate and constitutional nature of normative legal documents. It is highly recommended for us to study the practices and experiences of many countries in empowering the courts to construe, review, and provide decisions on the legitimate and constitutional natures of legal normative documents.

It is difficult for citizens to exercise their right to complain about actions of administrative officials.

The current reality is that for executive agencies tasked with resolving administrative complaints, addressing such administrative actions as inaction, passing on or avoiding responsibility is still a very foreign matter. This issue has not been sufficiently and clearly addressed in the Law on Complaints and Denunciations as well as other legal documents guiding the implementation of this Law. This is one of the main reasons why it is virtually impossible for citizens to complain about state officials' administrative actions, rendering moot their right to complain.

Complainant must complain to "the right agency with the power to settle the case".

[6] See the 2008 Law on the Issuance of Normative Legal Documents, Article 85, 89, 90.

The first obligation of complainants as legally determined is to submit complaints to the right authority with the power to settle the case. Formally speaking, this provision seems reasonable, so that citizens can submit complaints to the right body with settlement authorization, making the process less time consuming.

It is, however, not easy at all to fulfill this obligation given the reality of state management practice in Vietnam. The constant changes of functions, mandates, and power of state management organs (typically merging and splitting administrative bodies based on territory and management organs based on sectors and fields) have led to extreme difficulty in determining the authority of state agencies in receiving and resolving complaints.

Vietnam's state administrative organs, whether defined by sector or by territory, often have overlapping functions and mandates. Institutions related to inspection management in state administrative organs and local governments are not clearly defined and separated, making it very confusing for citizens to be able to identify the appropriate agency with the power to resolve their complaints.

Can citizens find justice at the agency which issued the administrative decision against their interest in the first place?

The law provides that complainants should first raise their complaint to the body which issued the problematic administrative decision or committed the complained administrative actions since this is considered to be the "first-level complaint settlement."

In reality, almost no dispute has been resolved at the "first-level complaint settlement." Officials and state organs that have committed the questionable actions or issued the problematic decisions seldom recognize and correct their mistakes. Complainants cannot count the sense of justice and objectivity of officials and agencies which have previously issued the unfavorable decisions toward them. Almost all decisions by the "first-level complaint settlement" are not accepted by complainants. Citizens then have to seek justice from higher administrative levels.

The provision that "the first-level complaint settlement is the level being complained against" can be explained as a way to create the opportunity for the parties in administrative disputes to review the ground for issuance of administrative decisions and the motivations of administrative actions. However, in all cases seeking justice, including administrative justice, the supreme operational principle of justice institutions is to be objective and independent. As such, in order to ensure administrative justice, the state organ assigned to resolve citizens' complaints should be an institution independent from those exercising administrative power. Legal experts have asserted that *adjudicative administration* must be independent from *management administration*.

Do citizens or the state bear the burden of proof in administrative complaint cases?

The law on complaints does not provide clearly who should take the burden of proof in complaints cases. Is it the responsibility of the complainants or officials or state organs?

The reality is that complainants always have to search, collect facts and figures and documents to establish grounds for their complaints. Meanwhile, the complaint settlement bodies generally do not seem to pay much attention to requesting the state organs which issued the problematic administrative decisions to explain and clarify their rationale and the basis for their decisions.

In the current context of Vietnam's administrative and legal institutional structure, complainants encounter many difficulties. More specifically, a) Vietnamese citizens' understanding of the law and the state administrative system in general is still limited; there is attention paid to legal aid for citizens but it is still too limited in comparison with demand; b) the closed nature of the administrative system makes it difficult for citizens to look for information and evidence as the basis for their requests; c) many policies and laws are not consistent and not unified; a significant number of sub laws were issued at different levels to implement laws, of which many are actually illegal in terms of content, procedure, or proper authorization. Given these shortcomings and challenges, the requirement that citizens must prove the legal basis for their complaints is very difficult for citizens.

The meaning of administrative complaint settlement (including administrative petitions in court) is to review and assess the legitimacy of the administrative decisions being questioned. It is hard for normal citizens when lodging complaints to know all the legal, policy, and administrative procedural basis of the administrative decisions which they considered unfavorable toward them. Citizens usually practice their right to complaint when facing losses of rights and interests that affected their lives. Therefore, it is necessary to clearly provide the obligation for officials or state organs to prove and explain the rationale and the legal basis for their administrative actions and decisions.[7] Such a provision would make Vietnam's public administrative system truly a state administrative system for the people.

What is the role of lawyers in administrative complaints settlement?

The provision on lawyers' participation is a breakthrough in the complaints settlement mechanism, and noted in the 2005 Law Amending and Supplementing Some Articles of the Law on Complaints Denunciations. Lawyers' participation, however, is limited to giving advice and support in the complaint settlement process. Lawyers are not authorized to speak on their clients' behalf and cannot interact directly with state authorities and agencies.[8] Citizens are on their own in putting together their cases and submitting the administrative petitions. In some cases, citizens can only authorize their relatives or representatives specifically provided by the law to complain on their behalf. The Law on Complaints and Denunciations does not state that: citizens may authorize the lawyer to make complaint.[9]

[7] For the Chinese experience, see Ming Gao, "The Judge of the People's Supreme Court of China," in *Administrative Procedure in China,* Etude et Document francaise numero 42, 1990.

[8] Meanwhile, paragraph 2 Article 6 of the 1996 Ordinance on the Procedure for the Settlement of Administrative Cases (amended and supplemented in 1998, 2006), provides that: "The party may authorize in written form the lawyer or another to represent him/her to participate in the procedure. The party may by himself/herself or asking lawyer or another to protect his/her legitimate rights and interests."

[9] 1998 Law on Complaints and Denunciations (amended, supplemented in 2004, 2005). Article 1, Resolution 136/2006/ND-CP.

Exercising such a modest role (as consultants or assistants) in the process of resolving complaints, lawyers are not facilitated with necessary favorable legal working conditions. The 1998 Law on Complaints and Denunciations (amended and supplemented in 2004, 2005), as well as the Decree 136/2006/ND-CP dated 14th November 2006 of the Government which provide more information and guide the implementation of some articles of the Law, are actually too detailed in prescribing what lawyers may do along with a broad warning of what they are not allowed to do.

Complying with Article 3 of Decree 136/2006/ND-CP means that lawyers are challenged by administrative procedures in supporting their clients to pursue administrative complaint cases.[10] At the same time, lawyers are also impacted politically and psychologically since they can easily find themselves in situations that would be considered in violation of the law, if they are deemed to "incite, force, bribe, and/or entice complainants to complain about untruthful incidents or abuse the right to complain to distort, slander, and/or violate public order, creating damages to the interests of organs, organizations and individuals." Such qualitative "warnings" can easily be interpreted arbitrarily and as such, may make lawyers feel reluctant to receive administrative complaint cases. This provision also discourages even legal aid organizations.

Since the Law on Complaints and Denunciations was amended and supplemented in 2005 up to now with lawyers being allowed to participate in the process of administrative complaint settlement, the number of cases with lawyers' participation as consultants remains very small in comparison with the total number of complaints.

> On August 22nd 2008, the Standing Committee of the National Assembly listened to the inspection report and discussed the implementation results of the Law on Complaints and Denunciations. According to statistics in the report, out of nearly 41000 complaints cases, lawyers participate in only 158 cases, mainly through providing consultation service or assisting complainants to write complaint letters.[11]

Can more than one person be complainants in a complaint (collective complaint)?

[10] Clause 2, Clause 3 of resolution 136/2006/NDD-CP provide that:

> 2. When assisting the complainant, lawyers bear the obligation to act precisely as the content of the request for help made by the complainant in accordance with law; lawyers must not incite, force, buy off, seduce the complainant to complaint against the truth or abuse the right to complain to distort, slander, violate the public order damaging the interest of organs, organizations, individuals.
> 3. When participating in the complaint settlement procedure to support the complainant on law, a lawyer must submit the following documents:
> a) Lawyer card;
> b) Paper asking for assistance on law of the complainant; and
> c) The introduction paper of the professional organization of lawyers for the lawyer who practices in that organization or the introduction paper of the bar association of which the lawyer is a member in the situation that he practices as an individual.

[11] Le Kien, in Ho Chi Minh City Law Newspaper, 22-8-2008 - http://www.phapluatttp.vn/news/chinh-tri/

As provided by the Law on Complaints and Denunciations, citizens can only exercise his/her right to complain directly. In cases where more than one person share the same ground for their complaints (for example, they all were moved from their home to make way for an industrial park, or suffered from environmental pollution from the same source, etc.), each complainant must write a separate complaint letter.[12] As such, the law does not recognize collective complaints while ensuring the individual right to complain.

In reality, however, complaints involved more than one person continue to occur, causing confusion among relevant state agencies when addressing complaints with the same content and demands. As such, specific provisions on procedures should be supplemented to guarantee the right to collective complaint, of communities negatively impacted by administration acts and decisions by government authorities. Only then can state organs have the basis to settle complaints involved multiple complainants, ensuring citizens' right to collective complaint and simultaneously reducing its negative effects.

4. The current institutions for administrative complaint settlement in Vietnam.

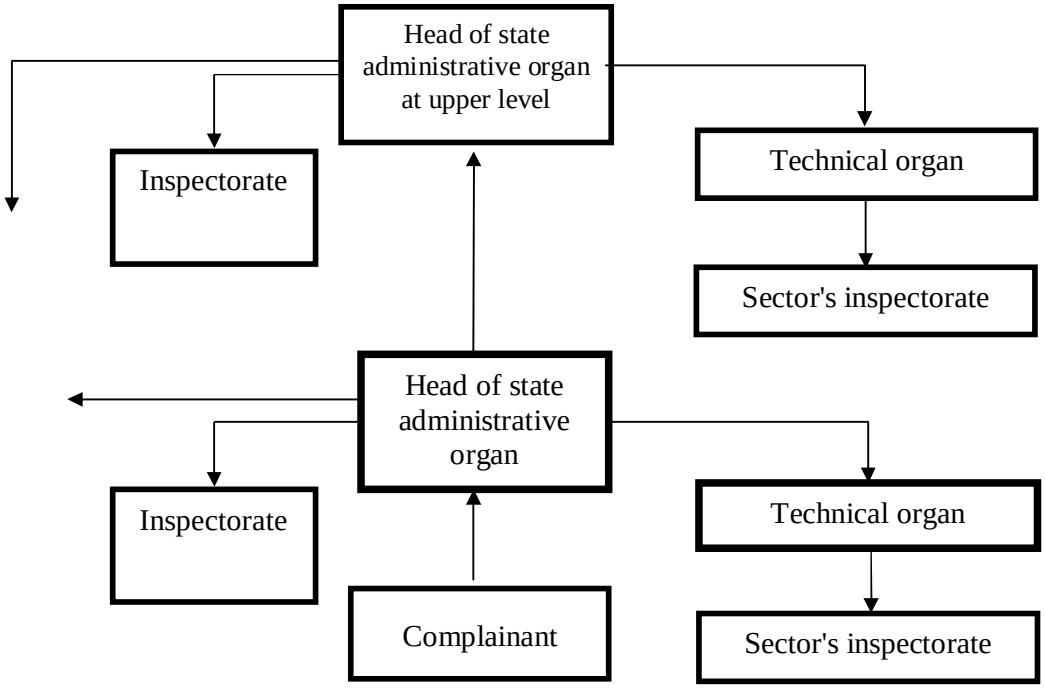
It is extremely difficult to assess all the participants in the process of administrative complaint settlement in Vietnam given the particular nature of the Vietnamese state apparatus, the unclear division of power and functions among state administrative agencies, limited transparency and public participation in the making and implementation of policies, and the disorderly influence of informal institutions upon the legal and administrative adjudication system.

This research only examines the administrative complaint settlement mechanism within the jurisdiction and responsibilities of the state administrative organs, meaning the executive agencies (including the role and responsibilities of state inspectorate organizations), but not those of the courts. In addition, the research does not account for the important roles of the Communist Party, the Fatherland Front, elective organs, etc.

In other words, the mechanism to resolve administrative complaints can be understood as a way to organize and operate the state apparatus (and more broadly, the whole political system) in receiving and resolving administrative complaints in order to ensure the right to complain of citizens and organizations.

A procedural map for administrative complaints

[12] Article 5, Resolution 136/2006/ND-CP provides that: " State organs when receiving complaint shall act as follows: 1.... in the case that the complaint letter is signed by many people, then the organ is responsible for guiding the complainants to write separate complaint letter in order to complain."



Whose responsibility to settle administrative complaints? Is it heads of state administrative organs, or heads of sector inspectorate at all levels?

Up to now, the shortcomings and difficulties related to the relationship between the heads of administrative organs and the heads of inspectorate in different sectors at different levels in settling administrative complaints have not been resolved. The inspectorate bodies are in charge of the issue, yet they only play the role as "assistants" to the heads of state administrative organs. Meanwhile, the heads of state administrative organs are empowered to render decisions to settle complaints but are not the direct agents in the process of reviewing, inspecting and concluding cases.

Institutionally, the difficulties and shortcomings in the relationship between the heads of administrative organs and the heads of inspectorate in different sectors at different levels can be viewed as a critical factor in the mechanism for settlement of administrative complaints. This matter could only be resolved when the mechanism for administrative complaints settlement is fundamentally reformed.

Shortcomings and challenges arise from the competence and responsibility of agents in the administrative complaints settlement procedure.

The responsibility to investigate and verify is an important but controversial issue; how it is practiced in reality is different from place to place. The law provides relatively clearly responsibility and power of inspectorate agencies, but increasingly this responsibility is no longer exclusive to inspectorate agencies. In reality, in many cases the heads of state administrative organs have assigned the responsibility to investigate and verify to other professional bodies.

In terms of effectiveness, there are still concerns about the division of responsibility in investigation and verification. If the responsibility is assigned to the inspectorate body, does this body possess necessary understanding of the matter that they need to investigate and verify? At the same time, if it is assigned to the technical agency, would the agency have enough investigation skills to carry out the task? Furthermore, such an ambiguous provision (the responsibility to investigate and verify can be assigned either to the inspectorate or to the technical agency) is one of the reasons causing delays and complexities in resolving complaints. The actual results are:

- The agencies try to avoid the advisory responsibility, passing responsibility to each other, or
- Advisory agencies have different views on the same case.

Meeting and discussing with complainants have legal and political meanings. In fact, direct dialogues are useful for the administrative complaint settlement process. However, not all heads of state administrative organs are willing to spend time and energy for dialogues to resolve complaints, which are always complicated and stressful. Therefore, it is the inspectorate and other related bodies that more often take charge of those dialogues, thus limiting their effectiveness. Meanwhile there is no legal provision requiring heads of state administrative organs to carry out this responsibility. Particularly for officials having power to settle complaint at the second level (appeal level) onward, the law only provides that they should meet and talk (with complainants) "when it is considered necessary."

The first constraint in the issuance of decision to settle complaint: the person who signs the decision (the head of the state administrative organ) and the investigator (from the inspectorate or professional agency) are two different individuals. Thus, before signing the decision to resolve the complaint, the head (who may sign the decision) always considers carefully the results of investigation and verification made by the consulting body. In other words, heads of the state administrative organs must be extremely prudent, because only when they are asked to signed do they know of the case. They must study carefully the files of the case and the results of the investigation and verification, which prolongs the time for complaint settlement.

Another constraint in the process is that heads of the state administrative organs (who must sign the decision on complaint settlement) for some reasons do not want to sign a decision specifying concrete solutions. The avoidance of responsibility is reflected in the fact that the head of the administrative organ will indicate that he agrees (or disagrees) with the recommendations of the advisory body (whether the inspectorate or the professional agency) but does not offer details of how such recommendations would be carried out. As such, the resulting notice issued by the state administrative organ to the complainant does not lead to full resolution of the complaint.

Given such constraints, there is a big issue for consideration: how to separate the state administrative management and the settlement of administrative complaints so they do not overlap and affect each other. There is a view arguing that it is necessary to distinguish *management administration* from *jurisdiction administration* function. There is a need to professionalize the dispute resolution process through a body with jurisdiction and responsibility specifically assigned to settle administrative complaints within the state administrative system.

Shortcomings and constraints arise from the relationship between heads of the state administrative organs and heads of directly higher level organs in resolving administrative complaints.

Although there have been many changes, in general the settlement of administrative complaints is executed on hierarchy basis, with the first and subsequent times of complaint settlement respectively falling under the jurisdiction of heads of administrative organs from lower to upper levels.

The simple logic that has been legalized is this: higher organs are responsible for resolving complaint cases under lower organs' jurisdiction but were not settled timely by the lower organs! With this logic, whenever lower organs for whatever reasons do not settle the complaints, then the higher-level state administrative organs (chairmen of the provincial people's committees/centrally-managed cities, ministers, and heads of ministerial-level agencies) should settle the complaints that would have been under the lower organs' jurisdiction. This explains the current spreading situation of "surpassing complaints" with many cases going over the level at which they should be resolved to administrative levels above in order to find resolution. In fact, the present settlement process via multiple state administrative levels is one of the big shortcomings of the present administrative complaints settlement mechanism in Vietnam.

Shortcomings and constraints arise from the relationship between inspectorate agencies and professional bodies in settlement of administrative complaints.

A relatively complicated issue in the relationship among inspectorate agencies comes from the fact that there is no absolute clear distinction in function and task between *administrative inspectorate* and *sector inspectorate*. This fact could be seen most clearly in one locality through the relationship between the provincial inspectorate body and inspectorate divisions of departments/sectors. Theoretically, if a complaint occurs in a province, then the jurisdiction to settle that complaint belongs to chairman of the people's committee of that province; the provincial inspectorate (administrative inspectorate) may assist the President in considering the case. There are also cases when the chairman of the provincial people's committee assigns the task to a specific department or sector to help him investigate the case (as mentioned above). In such cases, the actual responsibility is passed on to the inspectorate division of the assigned department or sector. How do provincial inspectorate agencies cooperate with inspectorate divisions of departments and sectors? How would the chairman of the provincial people's committee decide if there are different opinions between the provincial administrative inspectorate agency and the sector inspectorate agencies in complaint settlement? Those are big issues which remain unresolved.

The particularly important role of the Party in administrative complaints settlement.

The leading role of the Party's committees is manifested in enhancing awareness and responsibility of state organs in resolving administrative complaints, especially in mobilizing the power of the whole political system at the grassroots to increase the effectiveness of the complaint resolution process. This can be seen more clearly when complicated, critical, and prolonged cases occur, forming the "hot spots" that may strongly affect the socio-economic situation in the localities. The Party's committees

at different levels not only lead the government in complaints settlement, but more importantly through this work, they can assess the capacity and quality of officials as well as the implementation of policies and laws in the localities to develop solutions to strengthen local governments at different levels and their effectiveness, thereby limiting the occurrence of complaints and denunciations.

In practice, the direct leadership (or to be more precise, the direct instruction) of the Party's organizations has created negative effects upon the settlement of complaints by state's organs. The most easily recognizable effect is that it reduces the state organs' activeness and sense of responsibility. In some places, administrative organs rely on and even wait for instructions/opinions of the Party's committees. This can be seen clearly through reality on the ground at the grassroots level in different localities.

Opinions provided by Party's organizations are not official and are not binding from the legal point of view. Therefore, there can be no mechanism compelling responsibility toward these opinions. These informal opinions, however, often have the decisive effect on complaint settlement. Heads of state administrative organs are usually Party members, so politically they must follow the Party's opinion in line with the democratic centralism principle. Their professional career and promotion depend on the Party's organizations, thus they have to comply with the directives given by the Party's committee or by its representatives, even at times verbal opinions, in implementation of all tasks, including complaint settlement.[13]

Informal as they are, the Party's opinions are not disclosed in principle, which affects the effort to make transparent management activities as well as the complaint settlement process. When state organs are not truly allowed to exercise their power properly nor bear the responsibility for exercising that power, it is impossible to ensure their effectiveness. In its resolutions, the Party always warns of the Party's committees overwhelming the work of the state and push for a renovation in Party's leadership method in relation to the state apparatus, ensuring that the state organs can run their functions and tasks as prescribed by laws. However, practices in the localities show that there is still a gap between them and the spirit of the resolutions.

Given the current circumstance when it is not yet possible to clarify the degree and scope of the Party' direction over specific mandates of the government, such as the settlement of administrative complaints, the initiative to merge the Party's positions with the Government's positions is worth studying and discussing extensively among the academia and politicians. The merging of the two positions, one in the Party and one in the government, into one individual is expected to contribute to enhancing the responsibility of the individual official in execution of his/her public duties.

[13] Article 14 of the 1998 Ordinance on Officials and Public Servants (amended, supplemented in 2000, 2003) provides that the work of officials, public servants are under the leadership of the Communist party of Vietnam. Article 5 of the 2008 Law on Officials and Public Servants establishes the principles to manage officials and public servants as: to ensure the leadership of the Party and the management of the State.

5. Conclusions and recommendations

It can be said in general that, there are too many organs participating in settlement of the same complaints, but no organ takes the main responsibility.

In terms of functions, the task of receiving and resolving citizens' complaints is only a minor one for each and every related agency in comparison to all the administrative management duties assigned to them by the administrative system or as required in their technical fields. It is, therefore, unfair to demand professionalism from state administrative organs in the settlement of administrative complaints.

State inspectorates, which are considered to play an essential role in this task, do not have much power from the legal perspective. Inspectorate organizations are not complaint settlement organs, just complaint settlement consulting bodies. Directly reviewing the case, inspectorate bodies are only empowered to provide conclusions and propose solutions for settlement of the case. The power to decide on the resolution of cases of administrative complaint rests with heads of state administrative organs. This constructs a vague mechanism for settling complaints since it is unclear whether that decision-making power rests with the individual or with the agency he heads, but in either case does not fully understand the details of the cases being considered.

For inspectors in state inspectorate organs, advising heads of the state administrative bodies on meeting citizens and complaints settlement is just one among many other tasks that they have to do. Psychologically speaking, inspectors are not so enthusiastic about the task of resolving administrative complaints. In addition, not all officials working on complaint settlement are equipped with the necessary legal knowledge.

Given the limited capacity and qualifications of the People's Courts in resolving administrative complaints after ten years of exercising their jurisdiction in this area, the settlement of citizens' complaints right from the initial stage under the jurisdiction of the executive organs needs an improved resolution mechanism through administrative means.

The research group recognizes that there are two approaches to improve the mechanism of administrative complaint settlement.

The first approach, is to develop, amend, and supplement some fundamental institutions of the proposed Law on Complaint Settlement toward the following direction: for the right to complain of citizens, for the transparency and fairness of the administrative complaint settlement process; clearly determine the administrative jurisdiction, responsibility and discipline in complaint settlement.

With such an approach, it would seem unnecessary to impact too much the related institutions in the present mechanism for administrative complaint settlement. Changes would focus on adjusting and improving some institutions, procedures, and jurisdiction of the mechanism for administrative complaint settlement. This approach, therefore, would likely to be accepted and implemented more easily as it would not touch upon the way in which the state machinery is organized. However such changes would only be partial and lacks consistency, which may help to improve the

mechanism for complaint settlement one step further but will unlikely to achieve clear effectiveness overall.

Developing, amending, and supplementing the proposed Law on Complaint Settlement should start from determining the main guiding principles as the foundation for the construction of specific provisions of the Law. Such principles should include:

- Being objective and independent throughout the process of administrative complaint settlement;
- Ensuring the independence and professionalism of the agencies tasked with complaint settlement;
- Equality in relations between complainant and individuals/organs being complained;
- Making the process for administrative complaint settlement transparent by consulting procedure between the parties;
- The right of lawyers to participate in and to represent complainants in the settlement process;
- The obligation of administrative organs to prove and to counter the complaints;
- The obligation of complainants to cooperate with complaint settlement organs in providing necessary evidence and documents;
- Discipline of public services and responsibility of public servants in the settlement of administrative complaints; and
- Ensuring the strict implementation of decisions on settlement of administrative complaints.

The second approach is to reform the overall current mechanism for administrative complaint settlement.

The mechanism for complaint settlement needs to be reformed comprehensively, from the fundamental philosophy of the mechanism for complaint settlement, the main operational principles, related socio-administrative institutions and bodies, to the relevant procedures and related criteria. In this case, it is necessary to develop a comprehensive project on reforming the mechanism for administrative complaint settlement. It would be inconsistent to only develop the Law on Administrative Complaints.

Rather than considering more changes and amendments as a reactive response to the development of complaints in the recent period, which have shown to have little impact, it is time to fundamentally reform the work to resolve complaints by administrative agencies.

Having learned from the experiences of some countries, and originating from the reality of Vietnam, it is possible to propose two main methods to organize specialized state administrative agencies in administrative complaints settlement, each having its own challenges and advantages.

<u>The model of sector complaint settlement organ:</u>

The specialized organ for administrative complaint settlement is independently set up within sectors and fields of state management.

Presently, the Department of Intellectual Property already has an institution for complaint settlement following the sector-focus model, which is the *Complaint Settlement Council* at the *Department of Intellectual Property*. Complaints are sent to the Director General of the Department of Intellectual property, but in fact the jurisdiction to resolve administrative complaints belongs to the Council. The Council is led by a Deputy Director General of the Department of Intellectual Property and consists of some members. Should this model be set up in some ministries and sectors which are likely to receive a high number of complaints, such as the Ministry of Natural Resources and Environment, the Ministry of Industry and Commerce, etc.?

The model of central organ for complaint settlement:

Organizationally, the specialized body for administrative complaint settlement should be separated from the present system of management agencies (ministries, people's committees of all levels and other management agencies). The Prime Minister directs this system of agencies but does not directly interfere in the settlement of specific complaints.

This body should first be set up at two levels: at the central level and in appropriate localities with courts of various levels being reorganized as directed by the Party Resolution on Justice Reformation Strategy.

With regards to the title, in order to avoid unnecessary debates, the organs can be named "the central organ for administrative complaint settlement", "the organ for administrative complaint settlement in region X", etc., with clearly determined jurisdiction. It is also possible to use the new title "The Administrative tribunals" as being used in a current project being prepared by the Government Inspectorate.

The procedure to review administrative decisions and administrative acts at the complained agencies should still be maintained for a short duration, but that should not be considered a settlement level but only a compulsory procedure (with a sense of conciliation), before the case is submitted to the specialized organ for complaint settlement (the administrative tribunals).

In terms of functions and tasks, the specialized organ for complaint settlement has the mandate to receive and resolve citizens' complaints about the operations of administrative organs as well as of the officials and staff of these organs. Simultaneously, through the actual work to resolve administrative complaints, this organ is also tasked to summarize the emerging issues and the shortcomings in the policies and laws on the management and the operational modes of the administrative apparatus, management content and the working modes of the administrative organs. Consequently, the specialized agency can make informed recommendations for timely adjustments that would minimize the occurrence of administrative complaints.

Regarding personnel, public servants in these organs should be carefully selected and must have the necessary professional qualifications. Those directly resolve the complaints must have at least five years of working experience in state management

area and legal knowledge. For the moment, it is possible to select from officials doing complaints and denunciation settlement work in state inspectorate agencies.

Simultaneously, in order to ensure the operational effectiveness of the state administrative organs, it is necessary to develop provisions to avoid direct interventions from other organs and organizations, including the Party's organizations of the same level, in receiving and settling specific cases. This certainly does not contradict the principle of Party’s leadership over the state and society, and is in line with the present Party’s policy to renovate the ways in which the Party provides such leadership over the state apparatus in particular and the political system in general.

****