

Advantages of the Vietnam Criminal Procedure Model in Criminal Case Settlement and Deficiencies that Must Be Improved in the Context of International Juridical Harmony

Mac Giang Chau ¹, Nguyen Thi Bao Anh ²

^{1,2} *Lecturer, Can Tho University, Vietnam.*

Email : ¹ mgchau@ctu.edu.vn, ² ntbanh@ctu.edu.vn

Abstract

Completing the Vietnamese criminal procedure model in the direction of improvement and better protection of human rights is an essential requirement for Vietnamese criminal procedure law, particularly because countries are growing closer together, and Vietnam and other nations must deal with harmonising international criminal justice law. This article aims to analyze the advantages of the Vietnamese criminal procedure model, its deficiencies, and recommendations for improving the model in combining interrogation and litigation procedures to achieve conformity with international law. As a methodology, the author utilized data collection from documentation, law analysis writing, and comparative method to complete this article. This article demonstrates that the Vietnamese criminal procedural law reform will effectively safeguard human rights during procedures, particularly the accused's right to a fair trial. To reach a more comprehensive procedural model in the current context of Vietnam, the article proposes reasonable solutions to improve Vietnamese criminal procedure law to ensure that the good values of the interrogation procedure model are preserved while incorporating the achievements of the litigation procedure model.

Keywords— interrogation model, litigation model, combined model, human rights, the accused, the right to a fair trial.

Introduction

The interrogation procedure model and the litigation procedure model are two major and almost opposing procedural models in the procedural legal system of countries around the world. Particularly, the interrogation technique model is utilized in civil-law nations such as

France, Italy, and Spain, as well as numerous nations in Europe, Asia, Africa, and South America... And it is typical of the Judge's active engagement in uncovering the truth and proving the case. In this model, the State will play a leadership role in collecting evidence and establishing the truth of the case, and the Court will reach a decision based on documents and

evidence obtained by the police without paying attention to analyzing evidence and listening to the opinions and arguments of the parties. Meanwhile, the procedural litigation model utilized in common-law countries such as the United States, the United Kingdom, Australia, Canada, New Zealand, etc. It is characterized by the fact that the opposing parties in the case, who are prosecutors and the defenses, will confront each other in the courts to argue based on documents and evidence collected by themselves, while the Judge is an arbitrator who evaluates the arguments and evidence presented by the parties to make the decision¹.

Although the interrogation procedure model has been formed and persisted for hundreds of years, has received numerous criticisms, and has gradually been superseded by other procedural models, it does not indicate that it has no values or merit worth preserving. In contrast, the procedural litigation model is still in its infancy, and along with its unquestionable benefits, there are also significant drawbacks that must be weighed². In such an environment, constructing a harmonized procedural model that both absorbs its advantages and fixes its constraints is a historical imperative. Hence, a third procedure model was born, termed mixed procedural model, which combines the interrogation procedure model and the litigation procedure model and has been formed and developed in the law system of the countries³.

In Vietnam, the current legal system has a brief legislative history, especially in general legal

processes and criminal proceedings⁴. The civil law system profoundly influences the provisions of Vietnamese law. Therefore, it resembles the questioning technique model, which has significantly affected Asian nations due to numerous geopolitical considerations. However, under the influence of cultural exchange and internationalization in all fields, the criminal procedure model in Vietnam has gradually changed positively. It gradually limits the negatives of the interrogation procedure model and selectively absorbs the reasonable provisions of the procedural litigation model, resulting in a mixed procedural model that is particularly specific to the Vietnamese social context.

In 1988, Vietnam established its first Criminal Process Code⁵, which included rules allowing defendants to argue against prosecutors in Court. This was retained in the second CPC that was issued in 2003. Although these Rules permitted the accused to argue with the Prosecutor, they were not acknowledged as the primary basis for determining the case. In other words, litigation procedure is not acknowledged as a fundamental element of the law, and the clarification of cases in general and criminal cases, in particular, appears to rely solely on police interrogation in the pre-trial phase and jury interrogation during the trial. This egregiously violates the human rights of participants in criminal proceedings, particularly the accused.

In the context of global development in all sectors of science, technology, economy, culture, notably the strong development of information technology, etc., the perception of citizens in general and of progressing participants, in particular, is expanding daily. As a result of their increased awareness of their

¹ Van Koppen, P. J., & Penrod, S. D. (2012). *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems*. Springer Science & Business Media.

² <https://studylib.net/doc/8877412/advantages-and-disadvantages-of-the-adversarial-system-in...>

³ Ambos, K. (2003). International criminal procedure: “adversarial”, “inquisitorial” or mixed? *International Criminal Law Review*, 3(1), 1–37. <https://doi.org/10.1163/156753603767877084>

⁴ The first Criminal Procedure Code of Vietnam promulgated in 1988.

⁵ Hereinafter abbreviated as the CPC.

rights in political, social, and legal activities, etc., they require protection before the law and at the trial if they are a party to the case. In this regard, the right to a fair trial is one of the essential conditions that individuals must meet to protect their human rights. In tandem with each individual's understanding of their rights, international organizations also present perspectives and standards for countries to better defend human rights. These are the minimum requirements a nation must meet to engage in international relations.

In the early twenty-first century, due to Vietnam's increased participation in international relations and its accession to international organizations, including international treaties on human rights, the Vietnamese government's legislative philosophy underwent a radical transformation. One of the most significant changes Vietnam must make is judicial reform, particularly to protect and further enhance human rights in legal procedures. Resolution No. 08-NQ/TW of the Politburo dated January 2nd, 2002, on "Some key tasks of judicial work in the coming time" and Resolution No. 49-NQ/TW dated June 2nd, 2005 of the 9th session of the Politburo on the Judiciary Reform Strategy to 2020⁶ has fundamentally changed Vietnamese judiciary and procedural processes. In 2013, the Vietnamese Constitution, for the first time, acknowledged confrontational litigation as a significant method of resolving a case at trial⁷, resulting in a breakthrough in the modifying trial procedure. Article 26 of the 2015 CPC states that aggressive litigation is a fundamental tenet of criminal processes, which has never been recognized in the traditional Vietnamese legal system.

⁶ Hereinafter abbreviated as Resolution No. 08, Resolution No. 49

⁷ Clause 5 Article 103 Vietnamese Constitution stipulates "5. *The principle of litigation in the trial is ensured*".

Even though the CPC recognizes the principle of litigation as the fundamental principle in resolving criminal cases, the Vietnamese model of criminal procedure is still a combination of litigation procedure and interrogation procedure, with interrogation remaining the primary method of resolving the case. Hence, in Vietnam, we frequently refer to it as a hybrid procedural model, which is still skewed toward interrogation.

Compared to the laws of countries with a long legislative history, such as other branches of law, the Vietnamese criminal procedural law is still juvenile in the Vietnamese legal system. Following the socio-political context of Vietnam, the combination of typical procedure models in criminal proceedings has yielded substantial advantages and several deficiencies that must be addressed. In addition to Part I, Introduction, and Part IV, Conclusion, this article's two main sections are Part II, Some outstanding advantages of the combined model of Vietnamese criminal procedure, and Part III, Inadequacies of the combined model of Vietnamese criminal procedure and improvement solutions.

Using the primary research methods of data collection from documentation, law analysis writing, and comparative method, this article introduces the provisions of modern Vietnamese criminal procedure law, compares Vietnamese criminal procedure law with the basic theoretical characteristics of two famous procedure models, the interrogation procedure model and the litigation procedure model, and compares the positives and negatives of Vietnamese criminal procedure law in the process of enhancing it to conform to international standards. This article has two major aims: to introduce the advantages of the Vietnamese criminal procedure model to the world and to point out shortcomings and amendment alternatives to improve the

Vietnamese criminal procedure model in the future. This article aims to provide scholars with a resource for learning more about Vietnamese law and collaborating on research to make Vietnamese law more comprehensive and in line with international procedure law.

Some Outstanding Advantages of the Combined Model of Vietnamese Criminal Procedure

Given the profound influence of the interrogation procedure model and the conjunction of the litigation procedure model, Vietnam's current criminal procedure model possesses the following exceptional benefits:

- **The State is responsible for determining the truth of a criminal case to ensure the fight against crime, not to miss the crime and not to do wrongdoing**

Theoretically, the State is responsible for clarifying the truth of a criminal case and determining the State's role in the fight against crime thoroughly and uncompromisingly, which bears striking similarities to the interrogation procedure model, which is a prominent aspect of the Vietnamese criminal proceedings.

The truth must always be clarified to maintain accuracy and neutrality when attempting to solve a case. To clarify this section, we must first establish that evaluating the case's truth is not equivalent to determining guilt or innocence. Because determining the case's truth entails clarifying its history, including how it occurred, why it arose, its causes and conditions, etc. At first inspection, it is evident that this is the assumption upon which the conclusion of the right and wrong of the entire case rests. Yet, determining the reality of the case is only clarifying a tale, and concluding that the story is a crime or not depends on how the story is viewed, evaluated, and the thoughts

and perspectives of individuals involved in the case, those with jurisdiction. With the obligation not to overlook the crime and not to do wrongdoing, the Vietnamese CPC establishes that ascertaining the truth of the case is the fundamental and final purpose of criminal proceedings.

The Vietnamese CPC has stipulated that finding the truth in a criminal case⁸ is a key principle. The fact that the death penalty is still prescribed in Vietnamese criminal law is one of the primary reasons why this principle must always be recognized in Vietnamese criminal procedure law⁹. If the Court pronounces a sentence that is not per the truth of the case, a person may be executed for a crime he did not commit. In order not to cause injustice to the convicted person in general and to avoid an unjust death sentence, the objective reality of the criminal case must be determined as a prerequisite for criminal procedures.

Article 15 of the 2015 CPC stipulates that the State is responsible for deciding the truth in criminal cases. When the State accepts responsibility for resolving the issue, the quality of the case resolution process largely depends on the competent authorities' competence and impartiality. The State is the primary actor in resolving criminal matters to "*guarantee the accurate identification and fair and prompt handling of all illegal activities, prevent and suppress crimes, not let criminals slide through the cracks, and not commit innocent persons*"¹⁰. Due to these factors, the collection of evidence (including both damning and exculpatory

⁸ The principle of determining the truth of the case is prescribed in Article 11 of Vietnamese CPC 1988, Article 10 of Vietnamese CPC 2003 and Article 15 of Vietnamese CPC 2015.

⁹ Current Vietnamese criminal law (Vietnamese Criminal Code 2015, amended and supplemented in 2017) still records the death penalty at point g, clause 1 of Article 32.

¹⁰ Article 2 of Vietnamese CPC 2015

evidence) is nearly always delegated to the competent authority, as opposed to weak, non-specialized subjects. Hence, if the parties in a criminal proceeding cannot defend themselves, they should theoretically not attempt to do so. On the basis of finding the truth of the case, the State will also safeguard the parties; the State will ensure that the rights and interests of the parties are in line with the interests of the State¹¹.

Because the State must ascertain the facts of the case, the truth will become apparent as the proceedings conclude. This is ensured through a four-stage procedure for resolving criminal matters under Vietnamese law, comprising prosecution, investigation, prosecution, and trial (in which, the trial stage includes trial preparation and trial at trial). The pre-trial phase consists of the prosecution, investigation, and trial preparation phases. At these stages, when a competent body conducting criminal proceedings determines that the case is causing injustice to a person, these authorities will actively suspend handling the case against that individual to identify the true perpetrator. Hence, in theory, if a pre-trial procedure lasts several years, the accused continues to be charged, and the trial-at-trial stage begins, it indicates that the closer to the end of the process the evidence is, the more comprehensive, solid, and clear it is. Clarifying the reality of the criminal case is an indispensable requirement of the criminal case resolution procedure. By the Vietnamese model of criminal procedure, when the case reaches the trial phase, the entire image of the case has been exposed. The Court's decision is always based only on this factual reality. Hence, the

¹¹ Also, Article 2 of Vietnamese CPC stipulates that the CPC has the task to "...contribute to the protection of justice, protection of human rights and civil rights, protection of the socialist regime, protection of the interests of the State and legitimate rights and interests of organizations and individuals,..."

chance of misconduct or omission of crimes in the judgment is at its lowest. This reflects that Vietnamese courts rarely find defendants innocent but have extraordinarily high conviction rates; hence, common education and prevention goals

Moreover, owing to the support and confidence of the populace, the Court's decision appears to improve the value of the ability to suppress crime. However, this advantage of Vietnamese criminal proceedings creates a huge disadvantage in that if the truth of the case is not clarified, the investigating Agency may re-investigate the case numerous times to do so; thus, it can be argued that this violates the presumption of innocence. This deficiency will be explained in Part II of this paper.

Based on the preceding study, it can be concluded that, at this time, the Vietnamese criminal procedure model differs significantly from the litigation procedure models of the countries listed below. In most litigation procedural models, the State's obligation to clarify the reality of the case is not accorded significant weight. According to them, ascertaining the case's truth is not the State's obligation but rather the prosecutor and the defense's task through hostile argument. In the legal system, the State adheres to the invisible hand doctrine. This idea posits that *when two parties vehemently accuse and defend against each other to protect their client (or prosecutorial responsibility), they accidentally work together to uncover the truth of the case, despite neither party's intention to do so*¹². In this paradigm, the accused party (the defendant,

¹² Goodpaster, G. (1987). On the Theory of American Adversary Criminal Trial. *The Journal of Criminal Law and Criminology* (1973-), 78(1), 118. <https://doi.org/10.2307/1143577>; Vermeule, C. (2010b). The Invisible Hand in Legal and Political Theory. *Virginia Law Review*. <https://dash.harvard.edu/bitstream/handle/1/10875727/1417.pdf?sequence=1>

the defendant's attorney) may fulfill its defense job so convincingly that the Court is convinced, to the extent that the accuser (Prosecutor) was unable to sustain the charge and the defendant was acquitted. In this scenario, the defendant is acquitted, possibly since they have an excellent attorney, yet they are not innocent. In such a scenario, the Court's ruling may not be proper.

Hence, compared to the litigation procedure model, the Vietnamese criminal procedure model clearly demonstrates the benefit of the State's obligation to respect the objective reality of the case. All decisions of the Court are based on clarifying the truth, assuring fairness and justice.

- **The Vietnamese code of criminal procedure has implemented the litigation model's reasonable rules**

It is obvious that, after millennia of evolution of the legal provisions governing general procedures, the legal systems of countries are gradually converging; in the context of globalization, it can be argued that no country can be excluded from international interactions. Thus, as nations move closer together, the necessity for legal harmonization grows. The more countries' laws are harmonized, the easier it will be for economic cooperation, diplomatic activity, and mutual legal assistance to establish a consensus.

For Vietnam, up to now, Vietnam has joined most of the basic international Conventions on human rights, specifically: International Covenant on Civil and Political Rights 1966 (ICCPR) and joined on September 24th, 1982; International Covenant on Economic, Social and Cultural Rights 1966, joined on September 24th, 1982; Convention on the Elimination of All Forms of Discrimination Against Women 1979, signed on July 29th, 1980, ratified on February 17th, 1982; International Convention

on the Elimination of All Forms of Racial Discrimination 1969, joined on June 9th, 1982; Convention on the Rights of the Child 1989, signed on January 26th, 1990, ratified on February 28th, 1990, and two additional Protocols on Children in Armed Conflict (signed on September 8th, 2000, ratified on December 20th, 2001) and against the use of children in prostitution and pornography (signed on September 8th, 2000, ratified on December 20th, 2001); Convention on the Rights of Persons with Disabilities 2006 (signed on November 22nd, 2007 and ratified on February 5th, 2015); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on November 7th, 2013 and ratified on February 5th, 2015).

In light of the necessity for international law harmonization, both Vietnamese laws, in general and criminal procedure law, in particular, have evolved and now conform to international law. As a result, as a model of mixed procedure, Vietnamese criminal procedure not only keeps its useful provisions but also modifies them to be consistent with the criminal procedure laws of other jurisdictions. Since the State of Vietnam determined judicial reform toward improving the quality of litigation activities and trial-at-trial as the central activity of improving the quality of legal proceedings twenty years ago¹³, there has been a significant shift in legislative awareness toward further protecting human rights, the rights of the accused, and ensuring the fair resolution of criminal cases. Consequently, the Vietnamese criminal procedure law, despite being profoundly influenced by the interrogation procedure model, has incorporated many well-known provisions of the procedural law of other countries, including the principle of presumption of innocence, the principle of guaranteeing the accused's right to defense, and

¹³ Resolution No. 08, Resolution No. 49

the principle of litigation. This is shown in 2015 Vietnam's CPC respectively as follows:

Firstly, Article 13 of the Vietnamese CPC 2015 formally recognizes the principle of presumption of innocence as a fundamental tenet of criminal proceedings. This is the first time that the theory has been referred to by its correct name: the presumption of innocence¹⁴. Hence, *"The accused is presumed innocent until proven guilty following the order and processes outlined in this Code and a valid court judgment. Where the reasons for accusation or conviction are insufficient and unclarified according to the order and processes provided by this Code, the Agency or person competent to conduct procedures must find that the accused is not guilty."* To ensure the implementation of this principle, the Vietnamese CPC 2015 continues to recognize and amend the provisions of the law to ensure the presumption of innocence, as expressed in numerous laws, most notably Article 230, clause 1, point b *"1. The investigating authority shall issue a decision suspending the investigation if any of the following conditions are met: ...b) The investigation deadline has passed without proof that the accused committed the crime."* This is a clear demonstration of the presumption of innocence, as "failure to show that the accused committed the crime" does not necessarily imply that the accused did not do the crime. In reality, the accused may have committed a crime, but because the investigating Agency lacks sufficient evidence to prove the crime, it must

¹⁴ Previously, Vietnamese CPC 1988 (at Article 10) and Vietnamese CPC 2003 (at Article 9), *Chapter II - Basic Principles* stipulates that *"No one can be considered guilty and subject to punishment, before the court's judgment has taken legal effect"*. However, these provisions have never been called "presumption of innocence". This shows that the legislator's hesitation and avoidance in affirming the presumption of innocence is a mandatory principle in the process of solving criminal cases.

also recognize that this individual is innocent at the pre-trial stage and must not be permitted to proceed with the case. Although this content demonstrates the potential of omitting the crime, the presumption of innocence protects the protection of the person who has been injured because if the unjustly suspected were not presumed innocent, they would be easily accused. The presumption of innocent is the most important safeguard for the human rights of the accused. This is a copy of the litigation procedure model's well-known presumption of innocence¹⁵ in Vietnamese criminal procedure legislation.

Secondly, the 2015 Vietnamese CPC increases the defense rights of the accused and their attorneys. Per the mentioned policy of judicial reform since the early 2000s, whose primary objective is to improve the quality of litigation activities at trial, the Vietnamese criminal procedure law is more receptive to the legal positions of other nations regarding the need to further protect the human rights of the accused. To do this, the Vietnamese criminal procedure legislation has been steadily impacted by the laws of other nations under the litigation procedure model, resulting in the expansion and improvement of the accused's defence right and access to an attorney. This is seen by the notion of guaranteeing that the defendant has a defence has been acknowledged in all iterations of the Vietnamese Constitution¹⁶ and is increasingly provided for in the CPC¹⁷. In particular, the 2015 issuance of the Vietnamese Civil Code marks a step forward in the State of Vietnam's

¹⁵ Ferguson, P. R. (2016). The Presumption of Innocence and its Role in the Criminal Process. *Criminal Law Forum*, 27(2), 131–158. <https://doi.org/10.1007/s10609-016-9281-8>

¹⁶ The 67th Article of Constitution 1946; Article 101 of Constitution 1959; Article 132 of Constitution 1999; Article 31 of Constitution 2013

¹⁷ Article 12 of the CPC 1988; Article 11 of the CPC 2003; Article 16 of the CPC 2015

approach to defending the human rights of the accused. This is evidenced by the fact that, before to 2015, the provisions of Vietnamese criminal procedure law never acknowledged the right of the defense to collect evidence¹⁸. However, the 2015 CPC, in addition to stipulating new defense rights¹⁹ in order to create favorable conditions for the protection of the accused, explicitly provides in clause 1 of Article 88 that the defense has the right to collect evidence. Under the State's right to gather evidence to clarify the case, particularly the prosecutor's office, the defense has the right to collect evidence following the law. This is a crucial strategy that directly influences breaking the governmental monopoly in gathering evidence and solving criminal cases, so defending the human rights of the accused and preserving the objectivity and fairness of the processes.

Lastly, the notion of litigation in the trial was first specified expressly in the Vietnamese Constitution (2013)²⁰ and the Vietnamese CPC (2015). Similar to the principles on the presumption of innocence discussed previously, although provisions with an adversarial nature have been recognized in the CPC since 1988, the principle of litigation has never been mentioned in the CPC between 1988 and 2003.

¹⁸ Although the provisions of the CPC 1988 and 2003 still exist that allow the defense counsel to have the right to prove (clause 2, 3 Article 36 of the CPC 1988; clause 2 Article 58 of the CPC 2003), in essence, these provisions only allow the defense to conduct simple proving actions such as meeting with the person they are defending, collecting documents and objects at the request of the person they are defending. According to the provisions of these two Codes, the defense is not entitled to collect evidence.

¹⁹ Clause 1 Article 73 of the CPC 2015

²⁰ Clause 5 Article 103 of Vietnamese Constitution 2013 stipulates "5. *The principle of litigation in the trial is guaranteed*". Previous Vietnamese Constitutions, including the 1946, 1959, 1992 Constitutions, have never specified any content related to litigation in legal proceedings.

In addition, the subject of litigation has never been reflected in the Codes' Chapter on fundamental principles in criminal procedures. By the aforementioned judicial reform approach, Article 26 of the 2015 Vietnamese CPC says that litigation is a key concept in criminal processes that must be observed and ensured during criminal proceedings. This is the result of more than 20 years of legislative and amendment of Vietnamese criminal procedure law in the direction of focusing on litigation, particularly litigation at trial initiated in the 2000s under Resolutions No. 08 and 49, demonstrating that Vietnamese criminal procedure law is transforming in the direction of significantly enhancing litigation. Equal litigation at trial is recognized in the Constitution and the current CPC as a fundamental principle and an orthodox procedure that allows parties to confidently argue with the Prosecutor, an important and distinctive method of the litigation procedure model that allows the accused and their attorneys to have equal rights with the prosecution in presenting opinions, documents, and evidence to protect the legitimate rights and interests of the accused at trial as described in the principle of *equality of arms*²¹- a crucial and distinctive way in the litigation procedural model for guaranteeing the right to a fair trial, which neither the pre-existing criminal law of 2015 nor the Constitution versions before to 2013 permitted to be implemented.

²¹ Equality of arms is a concept born from Article 6 *Right to a fair trial* – European Convention on Human Rights. The principle *equality of arms* is understood as *equal arms* (some translated documents in Vietnam often translate as *equality right to arms*) which requires equality between the opportunities given to the parties to the proceedings (for example, each party can call witnesses and have the right to cross-examine witnesses called by the other party). In some cases, this may include requesting financial assistance to enable the accused to pay for his or her attorney. See also: Oxford University. (2001). *Dictionary of Law. 5th (fifth) Revised Edition*, Oxford University Press.

The equal argument presented by the prosecutor and the defense at trial is the distinguishing factor between the interrogation and litigation models. It serves as a public benchmark for evaluating a case's level of justice and equality. Different from the interrogation procedure model, in which the argument at trial is almost a formality in which the Court and the Prosecutor do not focus on the accused party's argument, and also different from the litigation model, in which the litigation court does not aim to clarify the truth but only to ensure fairness, the combined procedure model of Vietnam is quite harmonious because, in this procedural model, the Court strikes a balance between interrogations and litigation²², and ensures interrogation to uncover the truth of the case while ensuring litigation to protect the fairness and human rights, particularly the human rights of the accused; concurrently, through litigation at the trial, the Court clarified the truth of the case, as in the invisible hand theory of the legal field.

In addition to the three principles of presumption of innocence, guaranteeing the right to defense, and equal litigation, litigation procedure is renowned for its principles of *consent to plead guilty and guaranteeing the accused's right to silence* under the Miranda Warning, which is pursued by many jurisdictions with litigation and combined procedure models. As for the content of *consent to plead guilty*, Vietnamese criminal procedure law has not yet been officially codified into written principles. However, over the years, the regulations on mitigating circumstances in Vietnam's Criminal Code have contained the content that "sincerely declare" is one of the mitigating circumstances that cause the

accused's punishment to be reduced²³. As for the rules on the *right to silence*, although this right was not entrenched as a fundamental principle in the 2015 CPC, suspects and accused persons have the freedom not to speak and are "*not coerced to testify against themselves or admit guilt*"²⁴. These provisions have never been acknowledged in the Constitution or prior editions of the Vietnamese CPC. In light of this, recognising these provisions in Vietnamese law demonstrates the close relationship between Vietnamese criminal procedure law and the litigation procedure model, where human rights and the right to defend oneself against accusations are prioritized over determining the truth of the case.

Even though these are two well-known procedures of the litigation procedure paradigm, they continue to be plagued by numerous debates and issues²⁵. Vietnamese criminal procedure legislation accepts these two methods but is unwilling to codify them as fundamental principles of criminal procedure, demonstrating the reluctance of Vietnamese legislators. This demonstrates Vietnam's wisdom and is prudent in developing criminal procedure law by learning from international procedural models. Thus, it may be stated that Vietnam's criminal procedure legislation is rapidly adopting and

²² See Article 306 to 325, Section V of Vietnamese CPC 2015

²³ Point s, clause 1, Article 51 of the CPC 2015, amended and supplemented in 2017

²⁴ Point d, clause 1, Article 58; point c, clause 2, Article 59; point d, clause 2, Article 60; point h, clause 2, Article 61 of the CPC 2015;

²⁵ Tina Wan, *The Unnecessary evil of plea bargaining: an unconstitutional conditions problem and a not-so-least restrictive alternative*

https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/issue_17/07_Wan_Macro.pdf; Xem thêm Turner, J. I. (2017, March 9). *Plea Bargaining*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930521 ; Gray, A. (2017). *The Presumption of Innocence Under Attack*. *New Criminal Law Review*, 20(4), 569–615. <https://doi.org/10.1525/nclr.2017.20.4.569>

emulating the provisions of the laws of nations pursuing the litigation procedure model.

- **The pre-trial phase is essential under Vietnamese criminal procedure law, but the trial-at-trial remains the major phase**

Characterized by the need to determine the truth of the case as the foundation for a fair and accurate trial, Vietnamese criminal proceedings have an effective combination of accomplishments in investigation and interrogation activities during the pre-trial period with trial-at-trial. Although pre-trial is an important stage, the trial remains the central one.

Due to the profound influence of the litigation procedure model and the duty to determine the truth of the case, the pre-trial investigation stage in Vietnamese criminal proceedings holds a prominent position in the criminal justice resolution process. According to the Vietnamese CPC, the pre-trial phase consists of prosecution, investigation, prosecution, and trial preparation. At these pre-trial stages, Vietnam's criminal procedure law stipulates that the State is responsible for proving and clarifying the truth of the case²⁶ and if there are insufficient grounds to charge the suspect with the crime, the competent authority must apply the principle of presumption of innocence, suspending the case and declaring the suspect innocent²⁷. Thus, it is assumed that the suspect will be acquitted if the investigating Agency cannot prove the actual crime. Consequently, criminals will not be prosecuted. This would be a state failure in the fight against crime. In the

process of settling criminal cases, the investigating Agency and the Procuracy always try their best in the pre-trial phase, with a particular emphasis on the investigation stage. They attempt to clarify the entire truth of the matter

to assist the Court in determining that the crime was not missed and that no wrongdoing occurred. Accordingly, the Vietnamese CPC stipulates that the pre-trial stage must ensure a thorough investigation of the case. If, during the trial stage, the Court discovers that the truth of the case has not been fully investigated, the Court of the first instance must return the file to the investigating Agency for further investigation²⁸, and the Court of appeal must return the file for re-investigation²⁹ to further clarify the story.

Consequently, it is conceivable that the investigation phase is the phase that embodies the vast majority of the criminal case resolution process. The investigating Agency must clarify in advance all matters necessary for the Court's final decision. Suppose there are errors or omissions during the investigation phase. In that case, it is challenging to reach an accurate and objective verdict that does not overlook the crime and does not commit wrongdoing.

The clear significance of the pre-trial stage is reflected in a distinguishing feature of the Vietnamese criminal procedure legal system and a distinguishing feature of the interrogation procedure model, namely the existence of a criminal case file formed from the pre-trial stage that develops most significantly during the investigation stage until the case is resolved. Stemming from the fact that the truth of the case must be clarified and the burden of proof belongs to the competent authorities, to express everything is done properly and objectively

²⁶ Article 85 of Vietnamese CPC 2015 stipulates "When investigating, prosecuting and adjudicating a criminal case, the competent procedure-conducting agency must prove..."

²⁷ See the provisions on suspension of the case mentioned in footnote 14

²⁸ See Article 280 of Vietnamese CPC 2015

²⁹ See Article 358 of Vietnamese CPC 2015

according to the provisions of law, Vietnamese criminal procedure law requires that all procedural steps must be carried out along with the documents system, and collected evidence must be presented in a unified and systematic criminal case file which is established from the earliest days when the police received information about the crime³⁰. Since most documents and evidence are collected by agencies responsible for crime prevention, these documents and evidence are collected by these agencies and clearly demonstrate the prosecution's position. The collected papers and evidence have been verified and analyzed by these agencies to filter from the very first steps to verify that the acquired documents and evidence are "clean", without a doubt. These records and evidence demonstrate the chronological order of procedural actions and the close relationship between procedural phases from the case's beginning until the trial's conclusion (including all appeals activities after the sentence is pronounced).

Consequently, it can be observed that the criminal case file represents the achievements of the entire legal process, reflecting the objectivity, accuracy and completeness of the proceedings, and is proof of the legal procedures explaining the facts of the case. The criminal case file is a logical collection of "clean" evidence and excludes the arbitrary influence of anyone on these documents and evidence and seems to exclude all Court's wrong perceptions in the case. The criminal case file set is regulated and repeated numerous times in the Vietnamese CPC, most notably in Article 131 of the 2012 CPC. Although this is a clear and transparent collection of procedural activities as well as their result and a benefit of Vietnamese criminal proceedings, it is also an indication of the lack of democracy and fairness in the Vietnamese procedural model and

³⁰ See Article 131 of Vietnam's CPC 2015

interrogation procedure model³¹. This will be further clarified in Part II of this article.

Another very important advantage of Vietnam's criminal procedure needs to be confirmed that, in Vietnamese criminal proceedings, not only the investigating Agency and the Procuracy is responsible for clarifying the truth of the case in the pre-trial stage where the Court in the trial stage (trial preparation and trial-at-trial) must also have the responsibility to clarify the truth of the case³². To provide a fair trial without deleting content that must be tried and under pressure to avoid creating an unjust judgement or excluding offenders, it is the Court's responsibility to ensure that all case details are revealed and reviewed at future court hearings. To fulfill this responsibility, and most importantly, not to stray from the orbit of the "truth" clarified by the competent authority in the pre-trial stage, before the trial is opened, the Court must study the case files established in a unified and systematic manner by the competent authorities at the pre-trial stage. The study of this file allows the Judges (and Jurors) time to consider each procedural activity, document, and piece of evidence gathered by their own professional qualifications, expertise, and experience, thereby forming their own adjudicative thoughts and opinions on the case, in the spirit that the trial must ensure accuracy, objectivity, and the absence of criminals and

³¹ *INQUISITORIAL SYSTEMS OF JUSTICE - SEMINAR PROCEEDINGS, LONDON (ENGLAND), 1978* | Office of Justice Programs. (n.d.-e). <https://www.ojp.gov/ncjrs/virtual-library/abstracts/inquisitorial-systems-justice-seminar-proceedings-london-england>

³² Article 15 of Vietnamese CPC stipulates "...Within the ambit of their tasks and powers, the agency competent to conduct proceedings must apply lawful measures to determine the truth of the case in an objective, comprehensive and complete manner, and clarify the evidence. evidence to determine guilt and evidence to establish innocence, aggravating and mitigating circumstances of the accused's criminal liability."

wrongdoing. Based on studying the case file and the views of the competent authorities in the previous proceedings and other relevant subjects, the Court has conditions to reflect and give its opinion on the case, which is important for making fair decisions at the trial.

During the trial, the Vietnamese CPC stipulates that the responsibility of Judges (and Jurors) concerning interrogation must be emphasized clearly. Since they continue to be responsible for determining the truth of the case, they assume the responsibility of proving and clarifying how the case transpired during their trial before the Court. Thus, most of trial time and processes are devoted to the questioning technique of the Judge and Prosecutor. Thus, the thorough interrogation of related parties conducted by competent authorities during the pre-trial phase is once again transferred to the Court so that it may continue to use the testimonies and public statements of the parties during the trial to clarify the truth. It can be said that the Court's clarification of the truth is intended to minimize errors in the pre-procedure phase or, if errors do occur, to detect them in time to prevent wrongdoing. The Vietnamese criminal procedure model demonstrates the State's desire to discover the complete truth - which is always likely to be concealed or misunderstood in a criminal case - in the service of a judgment that ensures the accuracy of the Court from which justice is administered. In this regard, it can be claimed that Vietnam's criminal procedure model has excellent objectives that merit respect.

Along with the harsh questioning of the Court, the Procurator, and the attorneys during the trial, as mentioned in the previous section, the fact that the 2013 Constitution and Vietnamese CPC stipulate that litigation is a fundamental principle that always ensures to be practiced at hearings and deliberations must always *be based on documents, the evidence examined at*

*trial*³³, and the fact that attorneys are permitted to cross-examine³⁴ demonstrate that, although the pre-trial process and case file are very important, the trial-at-trial is the Court's basis for determining whether the defendant is innocent or guilty, and the sentence demonstrates the significant impact of litigation. In the end, the sentencing can only be based on the litigation results at trial, as the mode of operation of the litigation procedure model, which the Vietnamese Constitution had never officially recognized before 2013.

This provision demonstrates that, although the trial of a criminal case is influenced by the results of the pre-trial stage, as is the case with the interrogation procedure model, the trial-at-trial is the heart of resolving criminal cases in the same manner as the trial according to the litigation procedure model. This regulation not only promotes the value of the pre-trial phase but also ensures the independence and fairness of the Court and prevents the exclusion of criminals and the commission of injustice during the trial.

All of the points above indicate that Vietnam's criminal procedure law has made significant changes in the settlement of criminal cases based on preserving the achievements of the interrogation procedure model and, at the same time, the reasonable absorption of the preeminent regulations of the country following the litigation procedure model, aiming at the common goal of protecting human rights, particularly the human rights of the accused, while still ensuring the goal of presumption of innocence. In addition to the advantages as mentioned above, the modern Vietnamese criminal procedure law contains a number of new points worth recognizing³⁵. All of these

³³ Clause 2, Article 326 of Vietnam CPC 2015

³⁴ Article 307, 309, 310, 311 of Vietnam CPC 2015

³⁵ See also: <https://vietnamlawmagazine.vn/how-the-2015-criminal-procedure-code-changes-vietnams->

regulations demonstrate the selective receptivity of the Vietnamese CPC to the regulations of other countries following the litigation procedure model, representing a very specific and useful combined procedure model for Vietnam in the context of the fight against crime following international law.

Inadequacies Of The Combined Model Of Vietnamese Criminal Procedure And Improvement Solutions

Although the current Vietnamese criminal procedure law has incorporated the successes of the interrogation and litigation procedure model, the present CPC has many flaws that prevent it from protecting the human rights of the accused in particular and the participants in the proceedings in general, and has not ensured a fair criminal case settlement process. Clarifying these inadequacies and providing solutions to improve Vietnam's criminal procedure law is an indispensable requirement of the law-making process. These include the following key issues:

- **The case file shows the State's monopoly and the solution to balance the interests of the parties**

As stated, the case file is both an advantage and a significant disadvantage. On the one hand, it demonstrates the monopoly of the State in proving and has a significant impact on the Judge's thinking, rendering the Judge no longer independent and objective in making decisions; on the other hand, it denies the participants in the proceedings and the accused the opportunity to express their views, needs, and opinions.

The fact that the competent authority forms a uniform and systematic criminal case file for

[criminal-justice-legal-framework-5420.html](https://vietnamlawmagazine.vn/more-rights-for-the-accused-defense-counsels-in-criminal-proceedings-5417.html) ;
<https://vietnamlawmagazine.vn/more-rights-for-the-accused-defense-counsels-in-criminal-proceedings-5417.html>

the Court to study and adjudicate shows the state monopoly and causes the exclusion of details, documents, evidence and opinions of participants in the proceedings, and at the same time greatly influences the will of the trial panel at the trial.

Article 131 of the 2015 Vietnamese CPC states:

“Article 131. Case file

1. When conducting procedures in the stage of prosecution and investigation, the investigating Agency must compile a case file.

2. The case file includes:

a) Orders, decisions and requests of investigating Agencies and Procuracies;

b) The procedural minutes made by the investigating Agency and the Procuracies;

c) Evidence and documents related to the case.

3. The case file must include evidence and documents collected by the Procuracies and Courts during the prosecution and trial stages.

4. A list of documents must accompany the case file. The document list specifies the document's name, number of records, and characteristics lucidly. If additional documents are added to the case file, they must be added to the document list. The case file must be managed, kept and used under law.”

As determined, a criminal case file is a collection of documents and evidence collected, examined, verified, and evaluated by a competent authority (which have been cleaned according to the will of the competent authority) as well as procedural documents of the entire criminal case resolution process carried out by these agencies. It means that documents and evidence submitted by other subjects (if any) will only be included in the

criminal case file if the competent authority agrees. Otherwise, they will not be recognized as documents and evidence of the case. Thus, documents and evidence collected by other subjects must be handed over and subject to examination and evaluation by these agencies. This gives them complete authority to accept or reject a document or evidence. And if the rejected documents and evidence are not included in the case file, they will be of no use to the proceedings and will be of even less use at the court hearing. Meanwhile, the documents and objects provided by these subjects are very meaningful for proving a certain content, and they are nonetheless valuable to a certain subject in a criminal case.

The criminal case file, in addition to having been screened and excluded from documents and evidence provided by other subjects that are not satisfied by competent authorities, is also a place to clearly reinforce the State's point of accusation, in which the criminal acts, the course of the case, the testimonies of the participants in the proceedings are identified and analyzed according to the accusing lens of the competent authority that the participants in the proceedings have almost no opportunity to adjust or correct. This is a great disadvantage for the participants in the proceedings, especially for the accused, seriously infringing on the right to defense and the human rights of the accused. If these people want to speak for themselves, they can only rely on a direct, continuous, public trial at the Court. Due to the profound influence of the interrogation procedure model, the Court is, in theory, once again responsible for determining the truth of the case and continues to investigate and prosecute crimes based on interrogation and suppression, with the content based on the pre-trial criminal case file. It is difficult for them to separate their personal views from the case files. In other words, the Court's adjudication

seems unlikely to achieve independence and objectivity when the criminal case file has largely shaped its opinion.

Besides, according to the Vietnamese criminal procedure model, the participants in the proceedings in general and the accused in particular do not really have the opportunity to express their views, needs and opinions. Due to the existence of the case file, this consequence is also on the verge of occurring. As analyzed, at the pre-trial stage, the investigation and interrogation are conducted by the proactive procedural steps of the State. The accused and their defense, if they actively take measures to prove themselves (such as requesting an agency or organization to conduct an assessment, valuation, etc., requesting relevant subjects to provide documents and evidence...), the results of these activities are not automatically recorded and included in the case file if the competent procedural authorities do not agree with them. This makes the trial stage, especially at the trial, the Trial Panel, the Prosecutor, in many cases, only focus on questioning rather than arguing. Accordingly, most of the questions raised by the Trial Panel were to clarify the contents shown in the case file, and the participants in the proceedings answered questions according to the pre-oriented orientation of the Judge (and the Jurors). This means that the Judge's questioning (interrogation) at the trial revolves around the main axis, which is the content that the Court wants to clarify, and that is not necessarily the whole content of the case or the contents that the adjudicated person wants to be considered. Meanwhile, the Prosecutor is responsible for maintaining and protecting the indictment, the content of the charge and their views on charging the accused. By their technique, the Prosecutor will naturally raise questions that, if answered, will make the accused's likelihood of being charged more obvious.

In the meantime, at the argument stage, the Court is no longer focused on listening to the parties' argument since it has already formed its view and impression of the case based on the case file and the interrogation conducted during the court hearing to explain the relevant elements. To provide the appearance that the trial is democratic and fair, the majority of the defense's efforts to acquit the accused are procedural. It appears that the trial now allows the Court to bolster the claim made by the Prosecutor in the indictment rather than affording the accused the chance to defend themselves. This again constitutes a grave violation of the accused's human rights and renders the Court's verdict unjust.

Imagine, then, that during the pre-trial phase, neither the participants in the proceedings nor the accused have the option to offer evidence in their own defense; instead, they must rely on a fair and open trial in Court. Since the Court has a predetermined opinion, the trial (especially the argument) is extremely formal, making it nearly hard for the accused to attempt to prevail. This causes the accused to believe that the truth about the case is not being heard from their own perspective, causes them to feel mentally oppressed, and the punishment is undemocratic, unfair, and even creates injustice.

As stated in the preceding sections, a criminal case file is both a benefit and a detriment to criminal procedures in Vietnam. In theory, the existence of a criminal case file is an objective necessity that is necessary to ensure a fair trial because it ensures that the defendant is fully informed of the allegation's facts and allows the defendant and their attorney to be fully informed of the charges against them, to access legal representation, and to review the evidence to prepare their defense appropriately³⁶. As

evaluated, however, criminal case files prepared per the 2015 Vietnamese CPC rules appear to be created solely by competent procedure-conducting authorities, revealing the monopoly and one-sidedness in evidence collection.

In order to protect the inherent advantages of the criminal case file and eliminate its deficiencies, the CPC must provide more open regulations on the case file, in the direction of maintaining the case file; during the upgrade process, the Vietnamese criminal procedure law must permit the parties in the criminal procedure to prepare their own set of documents and evidences, and case files prepared by the parties must be immediately submitted to the competent authorities (Investigative Agency, Procuracy, Court). When reviewing the case file during the trial preparation phase, the Court must simultaneously review all of the documents provided by the parties; the investigating Agency and the Procuracy have no right to arbitrarily destroy any documents and evidences collected by the parties in their files, nor do they have the right to comment on the case files of the litigants. Consequently, Article 131 of the CPC must clearly state the following:

Article 131. Case file

1. When conducting procedures in the stage of prosecution and investigation, the investigating Agency must compile a case file.

2. The case file includes:

- a) Orders, decisions and requests of investigating Agency and Procuracies;*
- b) The procedural minutes made by the investigating Agency and the Procuracies;*
- c) Evidence and documents related to the case.*

³⁶ "Criminal Proceedings and the Right to a Fair Trial: The Role of the Criminal Dossier" by Emma Foubert -

https://www.researchgate.net/publication/324812316_Criminal_Proceedings_and_the_Right_to_a_Fair_Trial_The_Role_of_the_Criminal_Dossier

3. *The case file must include evidence and documents collected by the Procuracies and Courts during the prosecution and trial stages.*

4. *A list of documents must accompany the case file. Document list specifies the document's name, number of records, and characteristics lucidly. If additional documents are added to the case file, they must be added to the document list. The case file must be managed, kept and used following law.*

5. *Participants in the procedure have the right to build their own files, which may include legitimately gathered evidence, documents, and objects about the case. Case files created by procedural participants must be duplicated and sent to the investigative Agency, the Procuracy, and the Courts.*

Suppose additional relevant evidence, documents, and objects are obtained and added to the case files of procedure participants. In that case, these must be supplied with copies for the investigating Agency, the Procuracy, and the Court.

Investigative Agency, Procuracy, and Courts are not permitted to reject or accept procedure participants' case files, nor are they permitted to add their opinions to the case files provided by procedure participants.

Participants in the procedure must be accountable for the accuracy and legality of the case files they create.”

This content, as defined in Article 131, would promote fairness between the parties in gathering evidence under the concept of equality of arms. It will greatly broaden the rights of procedural participants to voice their opinions and points of view. In addition, when procedural participants can create their own case files and present them to the Court, the trial panel will no longer be influenced by the

view of the investigating Agency and Procuracy. At that point, the trial panel will have a comprehensive and objective approach to the case, furthering the objective of finding the truth of the matter and ensuring trial fairness.

- **The right to evidence of the accused and all participants in the proceeding is not guaranteed**

Because the Vietnamese model of criminal procedure displays the vigorous repression of crime by the State, it reveals the unequal relationship between the State and the parties, particularly the accused, in criminal procedures. As previously stated, according to the provisions of the Vietnamese CPC, the State is responsible for establishing the truth of the case as a foundation for the Court's accurate and objective verdicts. With this responsibility, the State becomes the topic of all procedural operations (investigation, prosecution, trial) as well as the subject of criminal case proof. The government educates a team of highly skilled crime-solving professionals to demonstrate and elucidate the case's truth. This team is part of the Agency with the capacity to solve criminal cases. Therefore, when it is sent to solve a case, it will work under the State's wishes, ensuring that the legal actions they do are always carried out. The other party is the accused (and other participants in the processes), who are not experts in proving activities and do not have the authority to employ the power of the State. Given this relationship, it is evident that this type of procedure lacks balance and justice. It can also be claimed that, to secure an accurate and objective case resolution without excluding criminals and committing injustice, the public and the parties in criminal processes have only one option: to have faith in the impartiality and skill of the authorities. Vietnamese criminal procedure legislation severely restricts the accused's right to self-evidence. Many limits on

order and procedures apply to these regulations. In addition, the right to collect evidence of the participants in the proceedings is restricted to the defense counsels of the accused and other players in the proceedings, particularly the lawyers; if they are not the defense counsels, they have no right to gather evidence. This is represented in clause 2, Article 88 of the Vietnamese Civil Code of 2015:

Article 88, Clauses 2 and 3 of the Vietnamese CPC states:

“Article 88. Evidence Gathering

1. ...

2. *To collect evidence, defense counsels have the right to meet with the defendant, victims, witnesses, and other individuals familiar with the case to ask questions and listen to their presentations on matters related to the case; request agencies, organizations, and individuals to provide documents, objects, and electronic data related to the defense.*

3. *Other proceedings players, agencies, organizations, and individuals may provide evidence, papers, items, electronic data, and case-related information.*

4. ...”

Protecting the rights and interests of the ruling class is of the utmost importance when a state enacts laws to safeguard its state regime. The fact that the State grants itself priority rights to protect itself and places itself in a position of strength while pushing criminals - activities that must be eliminated from society - down to the position of being suppressed and punished is, therefore, a necessary objective³⁷. Yet, this is

only significant if the individual is a criminal and subject to punishment. Suppose they are accused of committing a crime (such as when the settlement of the criminal case is ongoing and there is no legally binding conviction, meaning they are not criminals). In that case, it is imperative that they be given a fair opportunity to defend themselves. However, with the existing form of criminal procedure in Vietnam, this is not a legitimate condition. In other words, while protecting the State and the ruling class's interests is essential, the State must also ensure that those accused of crimes have a fair opportunity to defend themselves against state allegations. Hence, under Vietnam's current criminal justice system, the emphasis appears to be on effectively charging the accused rather than providing them with a fair opportunity to defend themselves. This might ultimately result in the conviction of innocent persons for crimes they did not commit.

Other than the accused, whose right to present evidence is fundamental in criminal proceedings, no other subject has the right to present evidence. This is evident from Article 15's Establishing the truth of the case concept, as only the accused has the right to prove their innocence.

Article 15 of the CPC states:

“Article 15. Determining the truth of the case

The competent Agency conducting the proceeding bears the burden of establishing guilt. The accused may but is not needed to prove their innocence.

...”

Hence, according to this theory, neither the victim nor the parties involved in the proceeding have the right to prove the case's

³⁷ Feeley, M. M. (1973b). Two Models of the Criminal Justice System: An Organizational Perspective. *Law & Society Review*, 7(3), 407. <https://doi.org/10.2307/3052922>

merits or their losses. This rule is therefore, extremely unjust.

To remedy this deficiency, the Vietnamese CPC 2015 requires the following modifications and additions:

+ Firstly, the 2015 CPC must be added to clause 2 of Article 88, the subjects' right to collect evidence, in the immediate future. Hence, the article must be revised to read:

“Article 88. Evidence Gathering

1. ...

2. *In order to collect evidence, defense counsels, defenders of legitimate rights and interests of victims, litigants, defenders of legitimate rights and interests of denounced persons or proposed for the prosecution have the right to meet with the defendant, victims, witnesses, and other individuals familiar with the case to ask questions and listen to their presentations on matters related to the case; request agencies, organizations, and individuals to provide documents, objects, and electronic data related to the defense.*

3. *Other proceedings participants, agencies, organizations or any individual may present evidence, documents, objects, electronic data and present matters related to the case.*

4. ...”

When updated so that all sides' attorneys have equal rights to collect evidence, such as the right of defense attorneys, this section will create a level playing field for the parties in settling the case.

Long-term, Vietnam's criminal procedure law must be more permissive in granting the accused and other procedure participants the ability to gather evidence so that *“the participants in the proceedings have the right to*

take legal action to collect evidence. The gathered material must be forwarded immediately to the relevant entity handling the proceeding”. This clause, if acknowledged, will truly create justice between the parties in gathering evidence to prove the crime and will further protect the human rights of the participants in the case.

+ Finally, it is necessary to add to Article 15 that other parties to the procedure have the right to substantiate their case. Thus, the following amendments should be made to Article 15:

“Article 15. Determine the truth of the case

The competent Agency conducting the proceeding bears the burden of establishing guilt. The accused may but is not needed to prove their innocence. Other procedure participants can provide evidence of their rights and responsibilities in the case.

...”

These fundamental provisions, once amended, will contribute to ensuring the fairness of the trial, thereby protecting the human rights of procedure participants. Moreover, when the right to prove other subjects is expanded, it is also a technique to counter the proof activities of the procedural authority, so ensuring that the case's truth will be determined.

- **The right of the accused to remain silent and to be represented by an attorney is not fully respected**

Although there is a mixture of litigation procedure and interrogation procedure in Vietnamese criminal proceedings, the interrogation procedure model remains highly influential, and because of the emphasis on exploiting the truth, the accused's right to remain silent and the right to an attorney is not fully respected.

Due to the profound influence of this model and the fact that the purpose of interrogation is to uncover the truth of the case, in the Vietnamese criminal procedure model, the competent authority always strives to resolve the criminal case quickly and with sufficient information according to their wishes, so the competent authority does not truly respect human rights and the rights of the accused. In this model, the accused's right to remain silent to protect themselves is either not regulated or is regulated but denied by the provisions of the CPC, causing the accused to be unaware of or oblivious to their right to protect themselves with their silence and allowing their damaging statements to be used as grounds for accusations.

This is evident from the following provisions:

+ Firstly, the Vietnamese Criminal Procedure Code of 2015 permits accused parties to remain silent *“not to be compelled to testify against themselves or acknowledge guilt”*³⁸. Chapter XXXII of the CPC, however, provides for the Handling of acts impeding procedure as follows:

“Chapter XXXII

- **Handling Acts of Criminal Procedure**

Article 466. Handling of persons who obstruct the procedural activity of competent procedure-conducting agencies

Depending on the gravity of their violations accused persons or other procedure participants who commit one of the following acts may be escorted, extradited, warned, fined, held in administrative custody, compelled to remedy consequences, or investigated for

³⁸ Point d, clause 1, Article 58; point c, clause 2, Article 59; point d, clause 2, Article 60; point h, clause 2, Article 61 of the CPC 2015

criminal liability by the competent procedure-conducting Agency:

1. *Forging or destroying evidence, so impeding the resolution of cases;*
2. *Falsifying assertions or supplying fake documentation;*
3. *Denying to declare or give documentation and property;*
4. *...”*

Similarly, although Articles 58, 59, 60, and 61 of the 2015 Vietnamese CPC enable accused persons to keep silent to protect themselves, Article 466 says they will be punished if they submit false testimony or papers or refuse to disclose or disclose or deliver documents and objects. The provisions of Article 466 demonstrate that to assure the exploitation of the truth in a criminal case, the law ultimately compels the accused to confess and offer proof of their crime. In other words, the requirements of Article 466 fully nullify the rules on the right to silence formerly recognized for the accused, so gravely intruding on their right to silence for self-defense.

+ Vietnam's criminal procedure law seeks to delay the participation of the defense counsel in the proceedings, as they believe that the earlier the defense appears, the more different the State's case-solving process is; in many cases, to further protect the State's interests, Vietnamese CPC only permits defense counsels to participate in the proceedings after the conclusion of the investigation³⁹:

³⁹ It should be added that, according to the provisions of Vietnamese CPC 2015, the investigation process can take many years (Article 172 of the CPC 2015). When the investigation process is over and it is found that the accused continues to be criminally handled, it will lead to the prosecution and trial stage. These two stages

Article 74 of the Vietnamese CPC provides:

“Article 74. The period when defense counsels engage in proceedings

From the prosecution of the accused, the defense has been involved in the proceedings.

In the event of an arrest or temporary detention, defense counsels shall participate in the proceedings from the time the arrested person is present at the headquarters of the investigating Agency or Agency assigned to conduct a number of investigative activities, or from the date of the provisional detention decision, whichever is later.

If it is necessary to keep the investigation secret for offenses that threaten national security, the Head of the Procuracy should have the ability to decide whether or not to allow the defense counsel to participate in the hearings once the investigation has concluded”.

According to this Article of the 2015 Vietnamese CPC, the right of the accused to a defense attorney in a timely manner is gravely violated, as by the time the case reaches the end of the inquiry phase, the proceedings may have gone on for years. Hence, the investigation phase concludes without the participation of the defense, indicating that the State’s proof has been undertaken in secret⁴⁰. Consequently, if “*defenders participate in the proceedings beginning after the investigation*”, their involvement in the procedures to defend the accused is already too late. While participating after the investigation period, the defense attorney can only get the conclusions of the investigating Agency regarding the case’s records, evidence, and particulars. They have been fully stripped of their rights, including the

may last for several months (Article 240 and 277 of the CPC 2015).

⁴⁰ See Article 177 rules on investigative secrecy

right to be there when their client, the defendant, is being interviewed and to be present at the scene of examination or confrontation, etc. Hence, they cannot be present on time to collect valuable evidence for the client. In other words, if the investigative Agency intentionally disregards evidence in favor of the accused to achieve a swift prosecution, the defense attorney has no access to the material to protect their client. This provision illustrates the powerful monopoly of the State in resolving the case; at the same time, it is highly dangerous for the accused and utterly unfair in the acquisition of evidence, resulting in major violations of the accused’s human rights.

To preserve the human rights of the accused, it has been urged by the United Nations that this section of the Vietnamese Criminal Procedure Code be amended as quickly as possible so that those accused of infringing on national security get access to a defense attorney sooner⁴¹.

+ Lastly, the 2015 version of the Code of Criminal Procedure of Vietnam permits direct interrogation of the accused following the prosecution. Article 183, clause 1, states as follows:

⁴¹ The 4th recommendation of the UN’s recommendations for the provisions of the 2015 CPC, amended and supplemented in 2017 and the provisions of the 2015 CPC is as follows: “*Recommendation 4: Revise articles 119, 172, 173 and 74 of the 2015 Criminal Procedural Code to bring them into line with article 9 of ICCPR and the related international standards, including for cases under national security offences. In particular, revised articles should establish clear grounds for ... and ensure access to a lawyer from the onset of the detention, including for cases under national security offences*”. See also: <https://vietnam.un.org/sites/default/files/2019-08/UN%20Recommendations%20on%20PC%20and%20CPC%20of%20Vietnam%20-%202017%20May%202017.pdf>

“Article 183. Interrogation of the accused

1. The Investigator shall conduct the interrogation of the accused as soon as the decision to prosecute has been made....”

In the interim, the following regulations govern the timing of defense counsel participation in court proceedings:

“Article 74. Period when defense counsels engage in proceedings: *From the prosecution of the accused, the defense has been involved in the proceedings”.*

“Article 78. Procedures for defense registration:

...

4. Within 24 hours from the date of receipt of all documents specified in clauses 2 or 3 of this Article, the Agency competent to conduct proceedings must examine the documents to ensure that they are not in the case of refusal of registration for defense counsel specified in clause 5 of this Article, enter the defense registration book, immediately send a written notice of the defense to the defense registrant and the detention facility, and preserve all documents related to the defense; If the prerequisites are not met, the application for registration of a defense must be denied, and the reasons must be provided in writing”.

From the preceding provisions, it is clear that the accused is questioned as soon as a prosecution decision is made, whereas the defense must wait for the consent of the competent authority and may be permitted to participate in proceedings after 24 hours or may not be permitted to participate in proceedings at all. Hence, the defense cannot be present during the initial interrogation of the accused. Again, this violates the defendant’s right to timely protection in a criminal proceeding, as the

accused will be influenced by police practices that produce adverse statements. Even, the absence of defense counsel during the initial interrogation can result in the accused being coerced or planted to make false confessions, tortured, and forced to confess to crimes they did not commit.

Given the aforementioned deficiencies, the CPC must courageously make the following adjustments and additions:

+ Firstly, include the accused’s right to remain silent in the system of fundamental principles of criminal procedure;

+ Secondly, delete the provisions of clauses 2 and 3 of Article 466 as stated above.

+ Thirdly, allow defense counsels to engage in the proceedings from the moment an individual is arrested, detained, or prosecuted, and eliminate all other restrictions on when defense counsels may participate in the processes. Article 74 will thus read as follows:

“Article 74. Period when defense counsels engage in proceedings

From the prosecution of the accused, the defense has been involved in the proceedings.

In the event of an arrest or temporary detention, defense counsels shall participate in the proceedings from the time the arrested person is present at the headquarters of the investigating Agency or Agency assigned to conduct some investigative activities or from the date of the provisional detention decision, whichever is later”.

+ the criminal procedure law should mandate that the accused must have an attorney present during interrogation, especially when questioned for the first time. Hence, Article 183 will read:

“Article 183. Interrogation of the accused

1. The Investigator shall conduct the interrogation of the accused as soon as the decision to prosecute has been made. All cases of interrogation of the accused require the presence of the defense attorney, unless the accused refuses the defense counsel, or the defendant consents to the interrogation in his or her absence”

Early access to the defense affords the accused significant opportunity to protect themselves throughout the conclusion of a criminal case⁴². The elimination of the clause that delays the participation of the defense counsel in the Vietnamese CPC is the ideal way for the accused to take advantage of the benefits that the defense institution offers to the criminal procedures. When these ideas are enacted, the right of the defendant in a criminal proceeding to defend himself or herself will be fully effective.

- **The principle of presumption of innocence is applied quite conservatively**

Because the Vietnamese criminal procedure concentrates on finding the facts of the case, the criminal procedure regulations have attempted to find a way to charge the accused until the very end; hence, the presumption of innocence is not truly a factor. This is demonstrated by the following:

+ First, the provision that allows the Court to request more inquiry and re-investigation to explain the accused’s crimes and impose a stronger sentence:

As previously stated, the purpose of the regulation on requesting additional

⁴² See also: https://www.undp.org/sites/g/files/zskgke326/files/publications/13-89016_eBook.pdf

investigation in the pre-trial stage (investigation and prosecution) is to ensure the exercise of the State’s prosecution rights, ensure the settlement of criminal cases does not exclude criminals and does not involve wrongdoing. Yet, clause 1 of Article 280 of the CPC grants the Court the authority to return materials for further inquiry throughout the trial phase (trial preparation and trial-at-trial) as follows:

“Article 280. Documents returning for additional investigation

1. In one of the following instances, the Judge presiding over the court session shall refer the case file to the Procuracy for further investigation:

- a) As insufficient evidence to show one of the matters mentioned in Article 85 of this Code, which cannot be supplied at trial;*
- b) As evidence that, in addition to the act pursued by the Procuracy, the accused committed further acts that the Criminal Code classifies as crimes;*
- c) As grounds to think that there are other accomplices or other individuals who have committed activities classified by the Criminal Code as crimes related to the case but who have not yet been granted permission to prosecute the case or the accused;*
- d) The prosecution, investigation, and prosecution of major procedural infractions.*

2. ...”

According to this provision, the Court is not only responsible for returning the case file for additional investigation to ensure the case is accurate and objective (points a and d) but also for ensuring the conviction of the accused or further prosecution of the accused (points b and c). Thus, it can be seen that, despite the existence of the presumption of innocence in

Article 13 of the CPC 2015 and the case of suspension in the trial stage (Article 282), the Court is still not completely prepared for the accused's innocence, but does everything possible to ensure an accurate prosecution of the accused, so as not to overlook the crime, while the investigating Agency, the Procuracy failed to prove in this regard during the previous proceedings process. In other words, it is evident that in the situation described in points b and c above, neither the investigative Agency nor the Procuracy conducted an investigation, whereas the Court desired to pursue charges. This is a grave violation of the presumption of innocent.

In addition, the reinvestigation regulation specifies that criminal cases will be reinvestigated as follows:

“Article 358. Cancellation of first-instance verdicts for re-examination or retrial

1. In the following cases, the appellate trial panel vacates the initial judgment for re-investigation:

a) As evidence that the level of first instance missed criminals or offenders, or to prosecute or investigate offenses more serious than those stated in the level of first instance;

b) The investigation at the level of the first instance is insufficient, and the level of appeal cannot complement it;

c) As a major breach of procedure during the investigation and prosecution phases.

2. ...”

Similar to the request as mentioned above for more inquiry by the Court, a re-investigation or re-trial may appear fair if it is for the aim of not causing injustice or protecting the accuracy of the prosecution process and is brought up during the pre-trial phase (prosecution,

investigation, prosecution). Yet, the right of the Court to return the case file to request a re-investigation, as allowed for in point an of Article 358, and brought by the Court during the trial stage, clearly violates the presumption of innocence. Because according to the Vietnamese model of criminal procedure, when a case has reached the trial phase, it means that a competent agency has spent many years proving the truth in this criminal case. However, they could not prove the commission of a crime, the commission of a new crime, or the commission of another offender, so the Procuracy did not pursue further prosecution. In this instance, the Court's decision to return the case file for re-investigation and re-prosecution is a violation of the presumption of innocence, and the Court, in addition to its adjudicating function, has performed an additional prosecution function on its own, which is not part of its mandate.

It should be noted, however, that the Procuracy performs the prosecution function in the instances outlined in points b and c of Article 280 and point An of Article 358 if a crime is required to be tried by the Court and to ensure that the crime is not left out of the State's crime prevention and fighting efforts. The Procuracy will be able to request that the investigative Agency conduct an inquiry to define the nature of the new crime and the identity of the new offender so that the Court can try them in the future. Hence, to uphold the presumption of innocence, the Court must forego its authority to require additional re-investigation if these rights are intended to increase the number of criminals or guilty parties.

In light of the above reasons, Articles 245, 280, and 358 should be revised as follows:

+ First, for Article 280: points b and c in clause 1 should be abolished, and point d should be modified. Then, the law will state as follows:

“Article 280. Documents returning for additional investigation

1. In one of the following instances, the Judge presiding over the court session shall refer the case file to the Procuracy for further investigation:

a) As insufficient evidence to show one of the matters mentioned in Article 85 of this Code, which cannot be supplied at trial;

b) The prosecution, investigation, and prosecution of major procedural infractions may result in unfairness for the accused.

2. ...”

Hence, during the trial time, if the Procuracy believes that the case fits under points b or c, the Procuracy may request that the trial be postponed, and the Procuracy shall decide about the additional investigation or prosecute a new case. To protect the interests of the accused, the Court cannot make the defendant’s situation worse without a new prosecution by the Procuracy; in other words, the Court has no authority to make the trial more severe than the Procuracy’s prosecution.

+ Secondly, for Article 358: clause 1 should be amended by removing point a and correcting point b. Then, the law will state as follows:

“Article 358. Cancellation of first-instance verdicts for re-examination or retrial

1. In the following cases, the appellate trial panel vacates the initial judgment for re-investigation:

a) The incomplete investigation at the first-instance level **may result in unfairness for the accused**, which the appellate level cannot supplement;

b) As a major breach of procedure during the investigation and prosecution phases.

2. ...”

Hence, identical to the suggestion for Article 280 above, the Appellate Court has no right to request a harsher trial for the accused. Even if the Court lacks sufficient evidence to convict the accused, it should apply the principle of innocence presumption and declare the prisoner innocent. When these restrictions are altered, the presumption of innocence for the accused becomes effective and relevant in practice. In other words, if the contents above are invalidated, the Court will dismiss any new or more severe allegations against the defendant. Only then will the Court properly perform its adjudicatory function and ensure the application of the presumption of innocence while maintaining and enhancing the burden of proof of the competent authority at the pre-trial stage, ensuring accuracy, not omitting crimes, and not committing wrongdoing.

Conclusion

In general, the CPC of 2015 has used the successes of both the interrogation procedure model and the litigation procedure model to create a more harmonic and suitable combination procedure model for the Vietnamese environment. The article describes the accomplishments of the new Vietnamese CPC, as illustrated by the following points:

Firstly, Vietnam’s criminal procedure legislation stipulates that the State is responsible for establishing the truth in criminal cases, defining the State’s thorough and uncompromising role in the fight against crime. By discovering the truth of the case, the closer one gets to the conclusion of the process of solving a criminal case, the clearer the truth of the case becomes, which is a crucial factor in

ensuring that the Court's verdict is fair and free of wrongdoing.

Secondly, in light of the need for international law harmonization, the Vietnamese criminal procedure, as a model of combined procedures, not only keeps its useful features but also conforms to the criminal procedure legislation of the countries.

In conclusion, the Vietnamese criminal procedure has an excellent blend of the achievements of inquiry and questioning in the pre-trial and the trial-at-trial; while the pre-trial stage is significant, the trial remains the core stage.

However, constructing a new procedure model in a short time will undoubtedly result in numerous deficiencies. To further enhance the Vietnamese criminal procedure model and harmonize it with the laws of other nations while keeping the inherent benefits of the Vietnamese criminal procedure model, the following alternatives have been proposed:

Firstly, the Vietnamese CPC must stipulate that all parties involved in a proceeding have the right to submit their own case file. A copy of this case file must be provided to the appropriate procedure-managing Agency. A competent agency conducting a procedure cannot reject a case file submitted by a procedure participant. Hence, during the trial phase, the Court must review the case file created by the investigative Agency and the Prosecution in addition to the case file created by the procedural participants. The case files exist concurrently so that the Judge is no longer biased from the accuser's perspective, so achieving the objective of ascertaining the truth of the case and providing a fair trial;

Secondly, the Vietnamese CPC has to allow defense attorneys, accused individuals, and other participants in the procedures additional

authority to prove and collect evidence. Such individuals must have the same rights as the accuser when discovering evidence to defend their legitimate rights and interests; the only requirement is that they must not violate the law when presenting evidence. Since these individuals have the right to present evidence, the case settlement also protects the truth and fairness;

Thirdly, the Vietnamese Communist Party must guarantee the accused the right to remain silent and the right to an attorney without delay. This is a fundamental human right for those who face suspicion and allegations from the State. Providing accused persons with the right to remain silent and have counsel early ensures their right to defense is truly implemented. It is crucial to safeguard the proceedings from unfairness and misconduct and defend the accused's human rights.

Finally, to protect the human rights of the accused and prevent injustice, Vietnam's criminal procedural law must be more assertive in its application of the presumption of innocence. In the short future, the Court's right to return case files for extra investigation and re-investigation should be repealed if the additional investigation and re-investigation are to charge the defendant with additional crimes. To ensure that no crime is overlooked in this instance, the Procuracy must effectively promote its prosecutorial responsibility.

In addition to the above-mentioned major legal flaws and proposed solutions, the Vietnamese CPC, which follows the combined procedure model, contains many other legal flaws that require study and adjustment. With the immediate solution system outlined in this article, the author hopes to address some of the most glaring flaws in the current Vietnamese criminal procedure law to make the provisions of the criminal procedure more effective in the

fight against crime, thereby further enhancing the human rights of the accused in particular and the participants in the proceedings in general; concurrently, to harmonize Vietnamese law with international standards.

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