

## **Vietnamese Criminal Procedure Model toward the Prevention of Wrongful Conviction**

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**Abstract:** The paper presents the basic contents of Vietnam's criminal procedure model. On the basis of analyzing the principles of criminal procedure, examine the regulations on the rights of the accused, the defendant, and the process of the investigation, the paper proves that the cross-cutting spirit of Vietnam's criminal proceedings is to ensure maximum human rights and ensure efficiency in the prevention of wrongful conviction in Vietnamese criminal proceedings in the future.

**Keywords:** criminal procedure; human rights; wrongful conviction; investigation; defendant.

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### **1. Overview of Vietnamese Criminal Procedure Model**

Vietnamese criminal procedure regarding the treatment of criminals is the result of two major influences: the French law, and Marxism-Leninism. The spirit of the law the French brought to Vietnam was that: guilt should be determined by fair and impartial means and should be assigned appropriate punishment. Vietnam was also influenced by the spirit of socialist law from the former Soviet Union. This process began in the 1960s and after national unification in 1975, socialist law was applied throughout the country.

However, Vietnam's criminal procedure system officially came into existence following the enactment of the first Criminal Procedure Code in 1988 followed by 2003 and 2015. Having assimilated some advanced ideas of an adversary proceeding system suitable to the country's practical conditions, the Criminal Procedure model of Vietnam still has typical characteristics of an inquisitorial one.

If you look at the criminal proceedings from the perspective of a lawsuit, you will find that criminal proceeding is a dispute over guilty or innocent, and between the State who give the prohibition and - the defendant - the person considered to be in breach of the prohibition. Such disputes have been resolved by means of legal proceedings and therefore the mode of settlement is different between countries.

The first way is either the parties find a common solution and are satisfied with it or the party acknowledges the other party's claim. The second way, it is the discovery of truth, and each party is forced to find the truth, the truth of the case. Criminal procedure of Vietnam chose the second way. The features of the inquisitorial criminal system expressed in the following: (i) in the Vietnamese legal system, any criminal case is considered an infringement upon the public order and common interests of the society which the State is responsible for handling. The handling of criminal cases totally depends on the State's will. Victims have no right to choose case-handling methods (except a few cases otherwise provided for by law). (ii) The goal of finding the facts is set and the burden of proof and find the facts of cases are the duty of procedure-conducting agencies. The accused may not make a plea bargain. (iii) The investigative and inquisitive method is employed in the stage of investigation and prosecution by the investigators, prosecutor and at court hearings, the investigative and inquisitive method is still largely used by the trial panel through questioning about each circumstance of the case, in order to verify the truthfulness and accuracy of proof furnished in the case file, interrogating witnesses and examining relevant material evidence. (iv) The process of handling a case is divided into procedural stages that include filing of criminal case, investigation, prosecution and adjudication, which are sequential and all aim at finding the facts of a case. (v) The positions and roles of different participants in criminal procedures are clearly distinguished. In Vietnam's criminal procedure system divides criminal procedure participants into two groups: (a) procedure-conducting agencies, including investigative agencies, procuracies and courts, and (b) parties involved in the procedures, including accused, defendants, victims, defense counsels, witnesses, experts and interpreters. The first group are authorized to collect proof and make decisions related to the handling of cases while the second group are only allowed to provide evidence, documents and make claims. Proceedings at a court hearing can be seen as the continuation of investigative activities to find the facts of a case. (vi) There is always a sole official file for a criminal case made in the investigation stage and supplemented jointly by procedure-conducting agencies through all procedural stages.

Such a file contains all proof of the offense and information on the offender, serving as a basis for these agencies to perform their procedural duties.<sup>1</sup>

## **2. The Criminal Investigation Process in Vietnam**

### **2.1. System of investigating agencies in the Criminal Procedure Code of Vietnam**

Under the Criminal Procedure Code, the system of Vietnamese investigation agencies consists of specialized investigation agencies and agencies assigned to carry out certain investigating activities. Specialized investigation agencies include investigation agencies of the People's Public Security, the People's Army and the Supreme People's Procuracy. Investigation Agencies of the People's Army conduct the investigation of the criminal case against a defendant who is a serviceman, or the cases involved in military secrets or causes damage to the servicemen of the Army force. Investigation Agencies of the Supreme People's Procuracy conduct the investigation into crimes infringing upon judicial activities, corruption which occur in judicial activities, where the offenders are officials of investigation agencies, people's courts, people's procuracies. Agencies assigned with certain investigating activities include the border guard, customs, forest protection, marine police and surveillance police who conduct the investigation with caught red-handed cases when performing their duties in the period of 1 month. Other cases they have to conduct several initial response and handle emergency situations and transfer case files to specialize investigation agencies within 7 days after filing the case.<sup>2</sup>

### **2.2. The investigative measures in the Criminal Procedure Code of Vietnam**

In order to prove the truth of a criminal case, the criminal law provides that the investigating body shall carry out the following necessary investigative measures in order to collect, examine and evaluate the evidences: (i) crime scene examination, and autopsy (if any); (ii) examination of body for scars, marks, and wounds; (iii) searches; (iv) taking the statement of witnesses, and victims; (v) interrogating the accused; (vi) confrontation; (vii) identification by witnesses, victims, and accused; (viii) investigating Experiments; (ix) soliciting expertise; (x) special investigative measures (visual, audio, and electronic data surveillance).<sup>3</sup>

Searches and special investigative measures are the investigative measures that must be approval by the procurator before the implementation. For the other investigative measures, the investigators must inform the equivalent Procuracy of the time and location of the investigation. Procurators must be present to supervise the activities. The procurators' absence shall be specified in writing. To assess the adequacy and completeness of the evidence system, it is necessary to consider whether the evidence collected by the investigating authorities is contradictory and whether the evidence gathered to clarify all the issues that need to be proven in a criminal case.

Article 85 of the Criminal Procedure Code of Vietnam states that: "When investigating, prosecuting and adjudicating criminal cases, the investigating bodies, procuracies and courts must prove:

1. Whether criminal acts have occurred, time, places and other circumstances of the criminal acts;
2. Who have committed the criminal acts; being at fault or not, intentionally or unintentionally, whether they have the penal liability capacity; purposes and motives of the commission of such crimes;
3. Circumstances aggravating and circumstances extenuating the penal liability of the accused or defendants, and personal details of the accused or defendants;
4. The nature and extent of damage caused by the criminal acts.
5. Causes and conditions of crime;
6. Other circumstances related to the elimination of penal liability, exemption from criminal liability and penalty exemption".<sup>4</sup>

## **3. The prevention of wrongful conviction in the Criminal Procedure Code of Vietnam**

In the Criminal Procedure of Vietnam, the procuracy exercises the right on behalf of the state prosecute the defendant and supervise the criminal procedure to assure that the investigation, prosecution, adjudication apply to the exact entities and the omission of crime as well as the conviction of innocent does not occur. So that, the procuracies will supervise the law observance in investigation activities to ensure that they comply with the Criminal Procedure Code. They will request or propose investigation bodies to redress unlawful activities in their investigating activities. In other words, all investigation activities of the police are under the supervision of the procurator. Moreover, all the investigative measures related to the constitutional right of the accused must be

<sup>1</sup>Le Huu The and Nguyen Thi Thuy (2010), Perfecting the criminal procedure model in Vietnam, Vietnam Law and Legal Forum, <http://vietnamlawmagazine.vn> published 27/12/2010.

<sup>2</sup> Article 5-9 of the Law of the Organization Criminal Investigation Agency 2015 of Vietnam.

<sup>3</sup> Chapters 11-16 of the Criminal Procedure Code 2015 of Vietnam.

<sup>4</sup> Article 85, see 3.

approval by the procurator before executed. Procurator can request the police to conduct necessary investigative measures and annuls illegal decisions of the police. On the other hand, procurator also can directly perform certain investigation activities to verify evidences or to respond to unjust cases, omission of crimes or breach of Criminal Procedure laws.

Persons facing criminal proceedings are classified into four groups, roughly aligned with the stage of the criminal litigation cycle, and their rights generally evolve and increase as the case matures. These categories include: (i) Denunciated or persons against whom a criminal complaint has been made but preceding arrest; (ii) Detainees, or persons who have been arrested in case of emergency, after being 'caught in the act,' or upon the execution of an outstanding arrest warrant, and who are now in custody. (iii) Accused, or persons against whom formal criminal proceedings have been initiated and; (iv) Defendants, or persons who are placed on trial as a result of not having criminal charges dismissed by the Prosecutor or by the Court during an earlier stage of the proceedings.<sup>5</sup>

It should be noted that the investigating body in general and the police do not have the right to arrest person without the approval of the Procuracy. Under the Penal Code 2015, the police only have the right to keep the person in an emergency, and within 12 hours of keeping the person, the police must send a document proving the grounds to keep the person to the procuracy for approval. The Procuracy also has 12 hours to consider approving or not approving the keeping order. After the keeping approval, the maximum time for temporary detaining person is from 3 - 9 days. After nine days, the police must collect enough evidence to treat the detainees as the accused. Otherwise, the police must release the detainees. The decision on detention of the accused must be approved procuracy before execution. The times in custody for the investigation of the accused is: (i) less serious crime: 2 months - 3 months; (ii) serious crime: 3 months - 5 months; (iii) very serious crime: 4 months - 7 months; (iv) special serious crime: 4 months - 16 months or in the special situation with the approval of the Chief of People's Supreme Procuracy: until completed the period of the investigation. Many of the rights associated with the adversarial criminal justice process are provided to each category of arrested persons, and many of the rights to review charging documents and evidence increase accordingly as the case comes closer to an actual trial.

Right to remain silent<sup>6</sup>: One of the more substantial new rights in the Criminal Procedure Code that brings Vietnam's legal framework into better alignment with fundamental international fair trial standards is the right to remain silent during custodial police interrogations. The right to remain silent - or as contained in the Criminal Procedure Code, "the right of no obligation to provide statement against themselves or to admit guilt" - is a foundational tenet of the International Covenant on Civil and Political Rights, which was ratified by Vietnam in 1982. This right is made applicable to all classes of detained persons in the Criminal Procedure Code, including detainees, the accused and defendants. This accompanying right to be informed that right also provided in the Criminal Procedure Code in Article 60. The right to remain silent is also one of the requirements of the Convention Against Torture ratified by Vietnam in 2015.<sup>7</sup>

Right to review evidence maintained by the State: Another foundational principle of the adversarial process now contained in the Criminal Procedure Code is the right of a criminal defendant to review or copy evidence related to their case. This right is made more meaningful by including the right to review not only the evidence that the prosecutors intend to use to prove a defendant's guilt, but also evidence that points to the defendant's innocence.<sup>8</sup>

Right to present evidence and opinions:<sup>9</sup> This right, as set forth in the Criminal Procedure Code Article 60, should allow defendants and their lawyers to use the evidence they become aware of under the right to review, but it is not the only way a defendant can enjoy this right. Under the right to present evidence, they can conduct an independent investigation so that a lawyer or a defendant can discover facts that would otherwise not be presented to a judge by the prosecutor. The Ministry of Public Security and the Supreme People's Court have also established and implement rules and procedures to ensure that these rights are fully enforced and respected.

Regarding interrogation, Article 183 states that, investigators, before interrogating an accused, must inform procurators and defendant lawyers of the time and location for interrogation. Procurators, if necessary, shall participate in the accused interrogation. Investigators, before conducting the first session of interrogation,

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<sup>5</sup>Scott Ciment (2016), How the 2015 Criminal Procedure Code changes Vietnam's criminal justice legal framework, Vietnam Law and Legal Forum, <http://vietnamlawmagazine.vn> published 01/07/2016.

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<sup>7</sup>Scott Ciment (2016), see 5.

<sup>8</sup>Scott Ciment (2016), How the 2015 Criminal Procedure Code changes Vietnam's criminal justice legal framework, Vietnam Law and Legal Forum, <http://vietnamlawmagazine.vn> published 01/07/2016.

<sup>9</sup>Scott Ciment (2016), see 7.

must explain to the accused his rights and duties as defined in the CP Law. Such activities shall be recorded in writing. Accused interrogation cannot be occurred at night, unless otherwise indispensable. Reasons must be clarified in the written record. In general, the interrogation of the accused who was under 18 years old is no more than 02 sessions per day and no more than 02 hours per session. Procurators interrogate suspects, who claim innocence or complain of investigative activities. Accused interrogation at a detention facility or the office of investigation authorities shall be visual/audio recorded. Accused interrogation at other places shall be recorded at the requests for the accused. The Criminal Procedure Code also states that: confessions of the accused or defendants shall only be regarded as evidences if they are consistent with other evidences of the cases. Confessions of the accused or defendants must not be used as unique evidences for conviction.

In summary, the 2015 Criminal Procedure Code, with the spirit of ensuring human rights and civil rights, has made new advanced regulations on the investigation of criminal cases, more clearly defined the legal rights and lawful interests of suspects, defendants and lawyers, and closely supervised the investigation activities of law enforcement agencies. The 2015 Criminal Procedure Code has played an important role in preventing wrongful conviction in Vietnamese criminal proceedings in the future.

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