



## Ensure principles of Litigation- Practice application in the trial of criminal cases in Vietnam

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### Abstract

Litigation in criminal trial activities is a pillar principle that is decisive in the outcome of criminal case resolution. Whether or not the accused person is convicted of one crime/many crimes and is subject to a level of punishment specified in the Penal Code (CrPC) depends on proving the crime through the results of litigation at the court. Through criminal trials, the litigation agency (THTT) carries out the work of fighting and preventing crime, and at the same time implementing mechanisms to ensure human rights and citizens' rights. With that importance, the Party has issued many resolutions on judicial reform, focusing on the principle of litigation. The 2013 Constitution and the Criminal Procedure Code (CrPC) have institutionalized the Party's policy through the provision that "the principle of litigation in trial is guaranteed". However, in reality, the implementation of this principle still faces many obstacles from agencies, people conducting proceedings, and participants in proceedings.

**Keywords:** Litigation principles; criminal procedure; right to defend

### Introduction

The principle of "Litigation in trial is guaranteed" is recognized in the 2013 Vietnamese Constitution and the 2015 Vietnam Criminal Procedure Code. Since the 2013 Constitution and the 2015 Criminal Procedure Code took effect, the subjects conducting proceedings and participating in proceedings in criminal cases have promoted their litigation rights as allowed by law in the fight against crime, protecting the legitimate rights and interests of people. citizen. Mostly, the Court's verdict is based on the results of arguments at trial. The situation of unjust and wrongful convictions in criminal proceedings has been fundamentally overcome. According to the Summary Reports of the Supreme People's Court, from 2016 to 2022, the People's Courts at all levels did not allow wrongful convictions to occur. At the same time, "Courts at all levels continue to focus on litigation at trial in a substantive and effective manner, creating conditions and ensuring that participants in the proceedings fully exercise their rights and obligations according to regulations." under the law".

In general, the judicial activities of the Courts at all levels have seen clear changes. The concept of "pocket trials" and "on-the-record" trials has gradually been replaced by "substantive litigation" trials. The concept of "litigation trial" appears more and more not only in the mass media but in court cases. Defense counsel in particular and litigation participants in general are given appropriate time by the Trial Council to debate and respond to representatives of the prosecution agency. The role and position of the defense counsel (the mainstay is the lawyer) in criminal trials is thereby also enhanced and truly effective in defending and protecting the legal rights and interests of the defendant. accusation.

Besides the positive aspects mentioned above, the practice of trial activities still has many shortcomings, in which the principles of litigation in many cases have not been applied in a substantive and effective way. Many judgments are not the result of arguments at trial; In some cases, the Trial Council becomes the third charging body (after the

Investigation Agency and the Procuracy); is the person who "shows the way" for the Investigation Agency and the Procuracy to close procedural loopholes or guide the indictment of the defendant through decisions to return additional investigation files. The nature of trial activities is to comprehensively review and evaluate evidence of guilt and innocence, not just review evidence of guilt. Therefore, the Court returning additional investigation files to the Investigation Agency and Procuracy to find more evidence to incriminate or correct procedural violations is essentially against basic principles. of the Criminal Procedure Code: Principle of presumption of innocence; the principle that judges and people's jurors are independent and obey only the law; The principle of litigation in trial is guaranteed. In order for the principle of "litigation in trial to be guaranteed", it is necessary to stop the situation of returning additional investigation files or overlooking procedural violations by the Investigation Agency and the Procuracy and stop the situation of "reporting court", "appealing for judgment" which is actually still taking place in some cases and some courts.

### Discussions

#### 1. Legal basis

As people who participate in teaching, research as well as directly participate in many criminal cases and regularly interact with litigation agencies, the author highly appreciates the efforts of system of agencies conducting proceedings in compliance with the Constitution and the Criminal Procedure Code on adversarial principles. However, as mentioned, there are still many cases where agencies and people conducting proceedings incorrectly understand the principles of litigation, deliberately causing difficulties for subjects participating in the proceedings, leading to enforcement of the proceedings., protecting human rights and civil rights is affected to some extent.

Therefore, in order to fully implement human and civil rights that have been conferred under the 2013 Constitution, the authors believe that it is necessary to be fully aware of the principle of "guaranteed litigation in trial".

Currently, according to the authors, the State's laws on the principle of "guaranteed litigation in trial" are quite fully regulated. Specifically:

2013 Constitution, in Clause 5, Article 103 of the Constitution: "The principle of litigation in trial is guaranteed"

Article 26 of the 2015 Criminal Procedure Code stipulates: "During the process of prosecution, investigation, prosecution, and trial, investigators, prosecutors, other persons with authority to conduct proceedings, and the accused, the defense counsel and other participants in the proceedings all have equal rights in presenting evidence, evaluating evidence, and making requests to clarify the objective truth of the case.

Documents and evidence in the case file transferred by the Procuracy to the Court for trial must be complete and legal. The trial of a criminal case must be attended by all persons as prescribed by this Code. In case of absence, it must be due to force majeure or objective obstacles or other cases prescribed by this Code. . The Court is responsible for creating conditions for the Procurator, the defendant, the defense counsel, and other participants in the proceedings to fully exercise their rights and obligations and to litigate democratically and equally before the Court.

All evidence to determine guilt, evidence to determine innocence, aggravating circumstances, mitigating circumstances of criminal liability, applying points, clauses and articles of the Penal Code to determine crimes and decide on penalties. fines, compensation for the defendant, handling of evidence and other details that are significant in resolving the case must all be presented, debated and clarified at the trial.

The Court's judgments and decisions must be based on the results of inspection and evaluation of evidence and the results of litigation at the trial."

Recently, Resolution 27-NQ/TW dated November 9, 2022 of the Party Central Committee on continuing to build and perfect the socialist rule of law state of Vietnam in the new period, has inherited and develop perspectives on building a rule-of-law state according to Ho Chi Minh's ideology. In section 7, part IV of the Resolution states:

"- Improve policies and laws related to justice, ensure respect and protection of human rights and civil rights. Complete the mechanism to prevent, stop and handle all illegal acts of interference in judicial activities; Ensure the independence of the court according to its jurisdiction; judges and jurors judge independently and only obey the law.

- Building judicial procedural institutions with trial as the center and litigation as a breakthrough; ensuring democratic, fair, civilized, rule of law, modern, rigorous, accessible judicial proceedings, ensuring and protecting human rights and civil rights...

- Complete the mechanism to overcome the situation where the relationship between court levels is an administrative relationship, ensuring independence between trial levels and the independence of judges and jurors during trials. Clearly define the tasks of first instance trial, appellate trial, review of judgments and decisions according to cassation and retrial procedures;.."

## 2. Practical application

Up to this point, the above three documents are an important legal basis for operating the principle of "guaranteed trial

litigation". The spirit of these three documents shows that litigation does not only take place at the trial stage or at trial, but the litigation process takes place from the time the case is prosecuted and the defendant is prosecuted. At the same time, the subjects of litigation under these regulations are also clearer: The accusing party (Investigation agency; Procuracy); exculpatory party (Defense, accused); The party protecting the legal rights and interests of the litigant in a criminal case (the person protecting the litigant's rights is the victim, civil plaintiff, civil defendant...); Other subjects participating in the proceedings are specified in chapter IV of the Criminal Procedure Code... With this regulation, it can be affirmed that: the scope, space, time and subjects of the litigation are expanded to maximum possible level.

However, in reality, litigation during the investigation and prosecution phase still has many limitations. Due to the limitation of the paper, the authors would like to focus on analyzing the practical application of litigation principles by the accused and the defense. These are the two subjects most strongly affected by criminal proceedings.

Regarding litigation activities at the trial, although there are still some problems, compared to the previous stages (investigation, prosecution), the litigation at the trial stage is somewhat more open and democratic. be further promoted. At the investigation stage, litigation activities of the accused and the defense are very difficult to carry out. This comes from the specific characteristics of the investigation and prosecution activities of the agency conducting the proceedings and the regulations on the rights of participants in the proceedings, the rights of the defense counsel, and those protecting the litigants' rights as stipulated in Clause 1 of this Article. Chapters IV and V of the Criminal Procedure Code on "participants in proceedings", "defenders, defenders of the litigants' legitimate rights and interests". Specifically:

### Regarding the litigation rights of accused people, mainly suspects and defendants

Regarding the legal provisions of chapters IV and V of the Criminal Procedure Code, according to the author, they are quite complete. However, the actual exercise of rights, including the rights of defense counsel at the investigation and prosecution stage, has many shortcomings. For example, in Article 60 of the Criminal Procedure Code, it regulates "the accused", in clause 2, it is listed that the accused has many rights, including a very important right: "Read, write copies of documents or digitized documents related to the indictment, exculpation or copies of other documents related to the defense since the end of the investigation upon request;" (point i, clause 2). However, it is very difficult for most defendants, to say the least, "impossible" to exercise this right. Reason: According to the provisions of Article 232, within 02 days from the date of completion of the case investigation, the investigating agency must transfer the case file to the People's Procuracy at the same level. During these two days, even if the defendant wanted to read or copy documents, he could not do so. Therefore, although this regulation is very good and progressive, in reality it is not feasible.

Also in Article 60, the defendant has the right to present testimony and present opinions, without being forced to give testimony against himself or forced to admit his guilt (point d, clause 2). From a positive perspective, this is understood as the defendant's "right to silence" during the investigation

phase. However, in reality, how many defendants dare to apply this right during the investigation phase, especially defendants who are in detention? At the investigation stage, on one side is the Investigation Agency with full power, on the other side is the defendant who is being subjected to measures to restrict freedom (or at risk of having restrictive measures applied if not "cooperate" with the investigation agency?) In many cases, the defendant who reports incorrectly with the investigator's will/orientation is considered insincere, unrepentant, and will be prosecuted. The mitigating circumstances specified in point p, clause 1, article 51 of the Criminal Procedure Code "sincerely declare and repent" do not apply. Even if the defendant is on bail but reports inconsistently with the direction of the investigation, he or she may be considered uncooperative and will be subject to strict sanctions such as temporary detention.

At this stage, the suspect worked with the investigator with a very cautious and fearful attitude. Therefore, they cannot and do not dare to exercise their right to litigate as allowed by law with investigators/procurators. Furthermore, during the interrogation of the suspect, the investigator always requires the suspect to present the "focus" of the questions and content posed by the Investigation Agency, not to present outside the content of the question. In fact, there are many cases where investigators ask closed questions (yes/no?) that are incriminating. If the defendant's answer does not include an explanation (to arrive at a yes or no conclusion), the true nature of the case cannot be clarified or the cause and motive of the act cannot be explained. But the defendant's explanation was not accepted/recorded by the investigator. When he went to Court, the defendant claimed that he was forced to confess... but could not prove the confession. This disadvantage of detained suspects during the interrogation of the accused has not yet been overcome. The National Assembly has also anticipated this situation, so Article 183 of the Criminal Procedure Code stipulates: Interrogation of the accused at detention facilities or at the headquarters of the Investigation Agency, the agency assigned to conduct a Some investigative activities must be recorded on audio or video with sound. The interrogation of the suspect at another location is audio-recorded or video-recorded with sound at the request of the suspect or the agency or person with authority to conduct proceedings. Audio and video recording with sound has not yet been fully implemented. Audio and video recording with sound during the interrogation of suspects in some key cases has recently been implemented. The reason the installation of audio and video recording equipment has not been deployed synchronously is due to lack of funding.

Also in Clause 2, Article 60, the defendant has a very important right to present evidence and documents; present opinions on relevant evidence, documents, and objects and request people with authority to conduct proceedings to inspect and evaluate. The law gives the accused the right to be proactive in litigation right from the investigation stage. If you exercise this right well, the defendant will protect his or her legitimate rights and interests right during the investigation stage. In fact, participating in many cases, the author found: The defendant can only exercise his rights if he is on bail for investigation; If you are detained, you will have almost no opportunity to exercise this right to protect yourself. On the other hand, during the investigation process, it is very difficult for the accused to access

evidence collected by the Investigation Agency because documents collected during the investigation phase are regulated as non-disclosed documents. If you do not have or know what documents the Investigation Agency has collected, beneficial or unfavorable to you, the defendant cannot argue with the Investigation Agency. This inadequacy has a significant impact on the psychology and testimony of the suspect when facing investigators and prosecutors.

Clause 2, Article 61 of the Criminal Procedure Code regulates the rights of the defendant (when there is a decision to bring the case to trial), in addition to the same rights as the defendant, a number of additional rights are also stipulated such as: i) Request the presiding judge to ask or personally ask the trial participants if the presiding judge agrees; debate at trial; l) Review the court minutes and request to record amendments and additions to the court minutes;

In fact, no defendant who comes to court can exercise the right to personally question the trial participants or see the court minutes or request to record amendments and supplements to the court minutes. Regarding the right to "argue at trial" (point i, clause 2, article 61 of the Criminal Procedure Code), currently most defendants are able to exercise this right, but how effective it is, there are still many issues to be resolved. table. For defendants on bail or defendants with defenders, preparing arguments with the Procuracy or other participants in the proceedings (victims, civil plaintiffs, civil defendants...) is relatively convenient. profit. However, for defendants who are detained, they are almost not allowed to bring any documents other than investigation conclusions and indictments when going to court. Depending on each detention facility, the process of applying for papers, pens to write petitions, and preparations for the day of trial are not the same: Some places are ready to support the suspect/defendant, but there are also places that limit the provision of such documents. Paper and pen provided. Therefore, when the defendant goes to court, he must prepare the content presented in his mind. One party is fully prepared with documents, evidence, legal documents and supported by the support department; One side came to court with empty hands and handcuffs, showing the inequality in litigation activities between the accused and the accused.

#### ***Regarding the right of defense counsel to litigate***

According to Article 72 of the 2015 Criminal Procedure Code, defense counsel includes: Lawyers; representative of the accused person; People's Advocate; legal aid in case the accused person is eligible for legal aid. Rights of defense counsel (including defense counsel invited by the defendant, relatives or appointed by the prosecution agency in cases where a defense attorney is required) according to the provisions of Clause 2, Article 73 of the Procedural Code Criminal procedure, which is expanded compared to the 2003 Criminal Procedure Code. Specifically: Defense counsel can participate in proceedings from the time the arrested person is present at the headquarters of the Investigation Agency, the assigned agency. conduct some investigative activities or since the decision to temporarily detain; After each testimony or interrogation by the competent person ends, the defense counsel may question the arrested person, the detainee, or the accused; (point b); Collect and present evidence, documents, objects, and

requests (point h); Inspect, evaluate and present opinions on relevant evidence, documents and objects and request the person competent to conduct proceedings to examine and evaluate (point i).

The defense's participation from the investigation stage partly has a positive impact on the investigation and interrogation of the accused. The presence of a defense attorney helps the defendant feel more confident in working with investigators; Limit coercive confessions, bribery, and use of corporal punishment by investigators. However, the role of defense counsel (including defense counsel invited by the defendant or relatives) during the investigation stage also has certain limitations. Most of the defense counsel who attended the deposition only witnessed the process of questioning whether the accused was bribed, coerced, or subjected to corporal punishment. Although paragraph 2, point b, clause 2, Article 73 of the Criminal Procedure Code allows defense counsel the right to question detainees, arrestees, and suspects after each testimony and interrogation session. However, in reality, the defense's questioning must be approved by the investigator. If the investigator does not allow questions to further clarify the content of the interrogation, the defense will not be able to do so and it will not be shown in the minutes of testimony and interrogation of the accused person.

Point d, Clause 2, Article 73 of the Criminal Procedure Code, the defense counsel "is informed in advance by the competent authority conducting the proceedings of the time and place of taking statements, questioning and the time and place of the proceedings." Carry out other investigation activities according to the provisions of this Code. Clause 1, Article 11, Circular 46/2019/TT-BCA dated October 10, 2019 of the Minister of Public Security stipulates the time for the defense counsel to be present as follows: The agency is handling the case, the case The need to give advance notice of the time and place of proceedings in which defenders, defenders of the legitimate rights and interests of victims, litigants, denounced persons, and persons proposed to be prosecuted have the right to participate. At least 24 hours in cases where the defender or protector of legal rights and interests resides in the same province or centrally run city as the agency handling the case or incident, 48 hours in the case of defenders, defenders of legal rights and interests residing in a different province or centrally run city from the agency handling the case or incident before the date of proceeding. In case the defense counsel or protector of legitimate rights and interests agrees with the Investigator or Investigation Officer on an earlier deadline, the implementation of procedural activities will be carried out according to that agreement. In fact, investigators and investigation officers notify the defense of the time and location of investigative activities which do not ensure the prescribed time and are mostly notified by phone. Therefore, the defense attorney is very passive and confused in arranging time to attend interrogation sessions. The author once received a phone call at 10:00 a.m. from the investigator, requesting to be present in Hanoi at 2:00 p.m. the same day to attend the interrogation. With a period of 4 hours to travel more than 1700km (SG-HN) and check in on the plane, buy tickets, travel to the airport... the defense cannot be present as requested, so must refuse to attend. According to regulations, the Investigation Agency still conducts interrogations of the accused without the defense counsel present. This reality poses many challenges for

defenders in cases where the geographical distance between the investigation agency and the defender is beyond a province or city.

Article 73, Article 80 of the Criminal Procedure Code; Article 12 of Circular 46/2019/TT-BCA dated October 10, 2019 of the Minister of Public Security allows defense counsel "to meet detainees in emergency cases, arrestees, temporary detainees, Can is in detention". Organizations and competent persons create conditions for defense counsel to meet detainees in cases of emergency, arrested or detained, but in reality this right of defense counsel is almost impossible to exercise. Because, when the defense counsel requests to meet privately with a defendant who is in detention during the investigation phase, he must send a plan and expected content of working with the defendant to the Investigation Agency and Procuracy. The working content must be approved by these two agencies before the meeting can take place. Thus, the private meeting and work between the defense attorney and the defendant is no longer private but is interfered with and controlled. Furthermore, when the defense attorney is allowed to meet the defendant, he is also supervised by prison officials, even sitting next to him to listen to the conversation between the defense attorney and the defendant. In particular, there are cases where the case file has been processed by the court and prepared for trial, but when the defense attorney registers to meet the defendant in prison, it is not resolved. The court said that the defense counsel who wants to meet the defendant must have a judge and court clerk attend these meetings. The Court based on Clause 3, Article 10, Joint Circular 01/2018/TTLT-BCA-BQP-TANDTC-VKSNDTC dated January 23, 2018 of the Ministry of Public Security, Ministry of National Defense, Supreme People's Court, The Supreme People's Procuracy to supervise the defense activities of the defense counsel: "In case it is necessary to supervise the meeting, the Head or competent person of the agency handling the case shall coordinate with the detention facility." keep a supervisory organization". Prison officers, judges, and secretaries supervise while the defense counsel works with the defendant if deemed necessary, but must ensure the principle of "in sight, out of hearing" to ensure the right to access the defendant. defense counsel's privacy. This is an issue that many lawyers participating in defending criminal cases have complained about in recent times.

Point h, point i, Clause 2, Article 73 of the 2015 Criminal Procedure Code stipulates that the defense counsel has the right to: Collect and present evidence, documents, objects, and requests (point h); inspect, evaluate and present opinions on evidence, documents and related objects and request persons with authority to conduct proceedings to inspect and evaluate (point i) This is a completely new regulation of Criminal Procedure Code 2015 on the rights of defense counsel. Thus, in addition to the agencies conducting the proceedings, the defense is also the subject with the right to collect evidence. To collect evidence, Clause 2, Article 88 of the 2015 Criminal Procedure Code stipulates: To collect evidence, the defense person has the right to meet the person he or she defends, the victim, witnesses and other people who know about the case to ask questions and listen to their presentations about issues related to the case; Request agencies, organizations, and individuals to provide documents, objects, and electronic data related to the defense. Clause 4, Article 88 of the 2015 Criminal Procedure Code stipulates: Agencies competent to

conduct proceedings are responsible for receiving, making delivery records, examining and evaluating evidence, documents, objects and data. Electronic data related to the case are provided by people with authority to collect evidence (including the defense counsel).

Such regulations ensure equality and greater efficiency in the litigation process. However, the mechanism for the accused and the defense to collect evidence, evaluate evidence and make requests is not clear. There are no specific sanctions when the person conducting the proceedings refuses to receive or evaluate evidence provided, submitted and included in the case file by the accused or defense counsel. Therefore, recently there has been a situation where the agency conducting the proceedings collected evidence in an incriminating direction; The accused and the defense collect and submit evidence to prove innocence. With these two sources of evidence, the Court uses evidence from the Investigation Agency and Procuracy as a basis to resolve the case without using or evaluating evidence provided by the accused or the defense. . This lack of use also provides no explanation.

In addition to the above shortcomings, litigation at trial is often still purely formal, not substantive, seriously infringing on the legitimate rights and interests of organizations and individuals. Common violations include "internal meetings" between agencies conducting pre-trial proceedings. Compared to before, these "internal meetings" have now decreased a lot, but still happen from time to time. In many court cases, the Prosecutor did not fully fulfill the obligation to respond and argue to the end with the defense to clarify the objective truth of the case, even avoiding it by responding "reserve your opinion". crime", even though that opinion is not consistent with the case file and legal regulations. Therefore, the quality and results of litigation are to some extent limited. In some trials, the presiding judge limits the defense counsel's right to question and argue; not really paying attention to the new details and evidence of the case presented by the defense. In some cases, at the trial, the content of the dispute between the accusing party and the defending party, many new details arise but the verdict is not recorded, affecting the legal rights and interests of the accused. accusation. Some judgments and decisions of the Court have not yet come from the results of litigation at the trial.

### **Conclusion, suggestions and recommendations**

The 2015 Criminal Procedure Code has overcome the shortcomings of the traditional interrogation procedure model, increased public litigation, and made the trial fairer, but has not changed the way the whole system operates. litigation system. Therefore, in order for the principle of "litigation in trial to be guaranteed", the authors would like to propose the following solutions:

First, it is mandatory to record audio and video with sound during all testimony and interrogation sessions of the accused (with or without the presence of the defense counsel). Minutes of testimony and interrogation without audio recording or video recording with sound are of course a violation of procedural order and procedures and have no legal value and cannot be used as evidence of guilt. For all investigation, prosecution, and adjudication activities, if it is determined that there is a procedural violation, all documents and evidence collected from these activities are invalid. Immediately stop the situation "although there is a

procedural violation, it does not change the nature of the case". If a procedural violation has been committed, it has no value in proving a crime.

Second, ensure that the suspect has the right to read and make copies of documents after the investigation ends. The responsibility of the agency conducting the proceedings is to create the best conditions for the defendant to access the case files. If the defendant has not read and recorded the case file after the investigation ends, the file will not be transferred to the Procuracy for prosecution procedures. All documents and evidence collected by the agency conducting the proceedings during the investigation phase must be made public to the accused, defense counsel, and other participants in the proceedings during the investigation process. not until the end of the investigation as currently prescribed.

Third, if the suspect or defendant does not ask for a defense attorney and is not in the case of appointing a defense attorney, the proceeding agency, especially the Court, must ensure that the defendant has full access to evidence. guilty or innocent before the trial.

Fourth, build a mechanism on the rights and obligations of the agency conducting the prosecution and the person conducting the proceedings in receiving documents and evidence collected and submitted by the accused and defense counsel. Specific sanctions when the person conducting the proceedings refuses to receive or evaluate evidence provided, submitted, or included in the case file by the accused or defense counsel.

Fifth, build a mechanism to ensure that defenders can fully exercise the rights specified in Article 73 of the Criminal Procedure Code and have sanctions for cases that hinder the activities of defenders.

Sixth, the judgment must fully record the arguments and responses of the Procurator, the defense counsel, the defendant, and other participants in the proceedings. Additional rights of the defense counsel: Have the right to appeal the judgment of the competent People's Court if the opinions of the defense counsel, the defendant are not fully recorded...

Seventh, there should be sanctions against Procurators who refuse to argue and respond to the opinions of the defense counsel and the defendant in clarifying the nature of the case, the details of guilt and innocence. In case at the trial, the Prosecutor refuses to argue with the defense counsel, the opinions and viewpoints given by the defense counsel and the defendant will be considered well-founded. The jury must base on that to accept the opinions of the defense counsel and the defendant and include them in the verdict.

Eighth, stop the situation where the Court returns additional investigation files to the Investigation Agency and Procuracy to collect more evidence or correct procedural violations. The Court only performs the function of adjudication, the Trial Council plays the role of an independent adjudication agency and only follows the law, objectively evaluating evidence to incriminate and exculpate guilt.

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