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# REPORT

## ON
## THE RIGHT TO COUNSEL IN CRIMINAL LAW AND PRACTICE IN VIETNAM


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# ABBREVIATIONS

In this Report, the following abbreviations are used:

| | |
|---|---|
| - Criminal Code | CC |
| - Criminal Procedure Code | CPC |
| - United Nations Development Program | UNDP |
| - Investigation Body | IB |
| - International Covenant on Civil and Political Rights | ICCPR |
| - Bar Association | BA |
| - Certificate of Defence Counsel | COD |
| - United Nations | UN |
| - Fatherland Front | FF |
| - People's Procuracy | PP |
| - Socialist Republic of Vietnam | SRVN |

Definitions for some words used in this Study

- **Defendant** means a person against whom criminal proceedings have been initiated .[1]
- **The accused** means a person whom the courts have decided to bring to trial.[2]
- **Judicial support organizations** mean agencies and organizations providing the services of lawyers, legal consultancy, examination, notary and criminal record.[3]
- **Litigation authorities** mean bodies authorized by law to exercise certain procedural powers and duties, including investigation bodies, procuracies and courts in criminal cases, or courts and procuracies in civil or administrative cases.[4]
- **Judicial body** means a state agency which performs the judicial power, one of three powers of the state. Judicial bodies have to protect the law by dealing with civil, economic, labour, and administrative disputes between natural persons or between natural persons and legal entities, and must also issue judgments and awards in the name of the state which ensure the legitimate rights and interests of natural persons and legal entities.[5] In this Research, a reference to Judicial bodies is a reference to the "judicial power" invested in courts, procuracies and investigation agencies.

[1] CPC, Article 49.1.
[2] CPC, Article 50.1.
[3] Law Dictionary – Judicial Publishing House – Encyclopaedic Dictionary Publishing House, 2006, p.72
[4] Law Dictionary – Judicial Publishing House – Encyclopaedic Dictionary Publishing House, 2006, p.201
[5] Law Dictionary – Judicial Publishing House – Encyclopaedic Dictionary Publishing House, 2006, p.201 and 202

- **Legal practising office** means a working office of a legal practice organisation, including its head, branch and transaction offices.
- **Certificate of Defence Counsel (COD)** means a document granted by the investigating bodies, procuracies or courts to an individual who is qualified as provided for by law certifying that he/she can perform the defence in a particular case.[6]
- **Appointed counsel** mean counsel appointed by provincial bar associations to participate in the proceedings in mandatory death cases.
- **Legal aid collaborating counsel** means counsel who voluntarily participate in legal assistance, collaborating with state legal assistance centers; they are qualified and have been recognised and granted with collaborator cards by Director of the Department of Justice.[7]
- **Invited counsel** means private counsel who are invited by concerned parties to protect their legitimate rights and interests in criminal cases, civil cases, administrative cases or invited by an accused, defendant, arrestee or their legal representatives to defend in criminal cases.[8]
- **Defence counsel** means a person who acts to protect the legitimate rights and interests of arrestees, accused or defendants.[9]
- **Counsel for protecting interests of concerned parties** mean counsel for victims, civil plaintiffs and/or civil defendants.
- **Arrestee** means the accused or defendants who are subject to an arrest order for temporary detention by litigation authorities: to prevent the commission of a crime; because there are grounds to believe that they may an the investigation, prosecution or trial; because they may continue committing offenses; or to ensure the enforcement of a judgment.[10]
- **Detainee** means a person arrested in emergency circumstances; offenders caught red-handed; persons arrested under an order, or asa result of a confession or self-surrender and offenders against whom custody decisions have been issued.[11]
- **Suspect** means an arrestee or detainee being suspected of having committed criminal acts or preparing to commit criminal acts.[12]
- **Litigation participants** comprise arrestees, the accused, the defendant, the victim, the plaintiff in a civil case, defendant in a civil case, persons with related rights

[6] CPC, Article 56.4.
[7] Law on Legal Aid, Articles 22.1 and 23.
[8] CPC, Article 56.1, Article 59.1; Civil Procedure Code, Article 63.2 2004 and Law on Administrative Procedures, Article 55.2.
[9] CPC, Article 58.3(b).
[10] CPC, Article 80 and Article 88.
[11] CPC, Article 48.1.
[12] CPC, Article 71 and Article 81.

and obligations in the case, witnesses, the defender, persons protecting the rights and obligations of concerned parties, experts; interpreters in criminal cases.[13]

- **Litigation authorized officers** includes the heads and deputy heads of investigating bodies, investigators; chairmen, vice-chairmen of procuracies, procurators; presidents and vice-presidents of courts, judges, people's jurors, court clerks in criminal cases; and presidents of courts, judges, people's jurors, court clerks, chairmen of procuracies, procurators in civil or administrative cases.[14]

- **Legal practising organization** means an organization which registers to provide legal services.[15] Legal practising organization may be a Law office or a Law company.

- **Legal aid consultant** means state officials, working at state legal aid centers, who have been granted a legal aid card by the chairman of the provincial people's committee upon the request of the director of the provincial department of justice.[16]

- **Legal aid centre (LAC)** means a state legal aid centre, which is under the management of a provincial department of justice and which has been set up by provincial people's committees to provide free legal services for the poor; persons who have contributed to the revolution, lonely elderly persons, the handicapped and children without support (homeless); ethnic minorities who have a permanent residence in areas with exceptionally difficult socio-economic conditions.[17]

- **Legal consultancy centre (LCC)** means an organization set up by a socio-political organization, a socio-politico-professional organization, a socio-professional organization, specialized law training establishment or law research institute registered to operate with competent state agencies to carry out the activities of legal consultancy on a not-for-profit basis.[18]

- **Law office** means an organization which is set up by a lawyer, is organized and operates in the form of a sole proprietorship.[19]

- **Mandatory case** means a case where the accused or defendant is charged with offenses punishable by death under the Penal Code or where the accused or defendant is a minor or person with physical or mental defects, but where they or their legal representatives do not seek the assistance of defence counsel. In these latter cases the investigating bodies, procuracies or courts must request bar associations to assign law offices to appoint defence counsel for such persons or

[13] CPC, Chapter IV; Civil Procedure Code, Chapter VI and Law on Administrative Procedures, Article 47.
[14] CPC, Article 33.2; Civil Procedure Code, Article 39; Law on Administrative Procedures, Article 34.2;
[15] Article 32 and Clause 1 Article 39 Law on Lawyers 2006.
[16] Law on Legal Aid, Article 22.2.
[17] Law on Legal Aid 2006, Article 3, Article 10 and Article 14.
[18] Decree No. 77/2008/ND-CP dated 16/07/2008 of the Government on legal consultancy, Article 1, Article 3.
[19] Law on Lawyers, Article 33.1.

request the Vietnam Fatherland Front Committees or the Front's member organizations to appoint defence counsel for their members.[20]

[20] CPC, Article 57.2.

# THE RIGHT TO COUNSEL IN CRIMINAL LAW AND PRACTICE IN VIETNAM

## CHAPTER I
## OVERVIEW OF INTERNATIONAL STANDARDS ON THE RIGHT TO COUNSEL IN CRIMINAL CASES

### 1. The right to counsel in the international legal framework

The right to counsel is part of the *jus cogens*[21] norm of a right to a fair trial.[22] The constellation of rights that make up the fair trial norm (often referred to as due process rights or minimum guarantees for adjudication in accordance with procedural laws) are articulated in the subparagraphs of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[23] These individual rights, including the right to counsel, do not themselves amount to *jus cogens* norms as they may be interpreted contextually or even derogated from for the higher purpose of achieving the goal of a fair trial.[24] Nonetheless, for the purposes of this study, it is sufficient to note the customary international law status of the right to counsel[25] and that consideration of this right in the human rights and international criminal justice contexts has focused on the denial of *effective* access to legal counsel as compromising the right to a fair trial.

International Covenant on Civil and Political Rights

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[21] A *jus cogens* norm, or peremptory norm of general international law, is defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (*Vienna Convention on the Law of Treaties*, 1155 UNTS 331, entered into force 27 January 1980, Article 53). See also, R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed. 1992), 7-8; C.L. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties* (1976), p. 11.

[22] The right to a fair trial is a category of norm sometimes described as a 'derivative *jus cogens* norm', because, while they do not appear in non-derogable provisions of multilateral treaties or other sources, they are essential to the protection of other *jus cogens* norms: see, F.F. Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases, & Analysis* (2006), p. 36 (however, this compartmentalised view does not appear to be of significance to the status of a right such as the fair trial right, that mandates certain conduct by States and others to comply with its content). See generally, Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law* (1989); Antonio Cassese, *Human Rights in a Changing World* (1990).

[23] These rights are reflected in a wide range of regional human rights instruments and the constitutional frameworks of international and internationalised criminal tribunals, discussed below. Other human rights instruments, while broadly relevant to the rights of persons in contact with the criminal justice system (including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and the Beijing Statement of Principles on the Independence of the Judiciary) do not relate directly to the right to counsel and are therefore not considered further in this Report.

[24] A detailed discussion of this issue can be found in, Gideon Boas, *The Milošević Trial: Lessons for the Conduct of International Criminal Proceedings* (2007), chapter 1.

[25] See, Martin et al., above n **Error! Reference source not found.**, p. 36 (n 43); Generally, Meron, above note **Error! Reference source not found.**

Article 14(3) of the ICCPR[26] provides that in the determination of a criminal charge, everyone shall be entitled, as a minimum:

> …
> (a) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (b) … to defend himself … through legal aid of his own choosing; to be informed, if he does not have legal aid, of this right; and to have legal aid assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it...

Article 14 of the ICCPR sets out the content of all-important norms of a right to a fair trial. The UN Human Rights Committee (HRC) has had cause to consider breaches of these provisions in the context both of General Comments[27] and individual complaints.[28] Due to the overlapping of Articles 14(3)(b) and 14(3)(d), simultaneous breaches of the two provisions are often found. Examples of violations of the right to counsel of one's choosing considered by the HRC have included cases in which a person is detained without being able to communicate with his counsel, trials by special tribunal, and the appointment of defence counsel by authorities against the will of the accused.

*a. Right to adequate time to prepare for trials, including time to consult with counsel*

In General Comments 32, the HRC noted that 'the availability or absence of legal aid often determines whether or not a person can access or participate in relevant proceedings in a meaningful way.[29] What is meant by 'adequate time' in Article 14(3)(b) will depend on circumstances of each individual case and counsel should have sufficient access to the accused and be able to raise a reasonable request to a court or tribunal for an adjournment.[30]

*b. Right to confidential communication with counsel*

Another aspect of Article 14(3)(b) is confidential communication between counsel and their clients. The HRC states that such communication should take place 'in conditions that fully respect the confidentiality of their communications'.[31]

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[26] GA Res 2200A (XXI) 21 UN GAOR Supp. (No. 16) at 52, UN Doc A/6316 (1966), entered into force 23 March, 1976.
[27] The Human Rights Committee issues general comments on thematic issues relating to human rights under the ICCPR.
[28] Optional Protocol One of the ICCPR provides for individuals from States which have ratified this Protocol to complain directly to the Human Rights Committee.
[29] General Comment No. 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial', 27 July 2007, para. 10.
[30] Ibid, para. 32.
[31] Ibid, para. 34.

Concerns have been raised when a defendant or accused is not permitted to access counsel, cannot afford counsel and/or is either not assigned any counsel or assigned with an inadequate or inappropriate counsel, or where confidential communication with counsel is refused. These concerns are reflected in the following examples considered by the HRC.

*Examples of violation of the right to counsel*

In *Kelly v Jamaica* (537/1993), the HRC found violations of Article 14(3)(b) where the accused was not permitted to communicate with a lawyer of his choosing for five days after being taken into custody. In *Gridin v. Russian Federation* (770/77), Article 14(3)(b) was violated after the complainant was denied a lawyer for the first five days after arrest and, after access to counsel was granted, he was not given an opportunity to consult with counsel in private. In *Estrella v Uruguay* (74/80), the HRC found there had been a breach because the author's choice of counsel was limited to one of two officially appointed defence lawyers, whom he met only four times in over two years. In *Lopez Burgós v Uruguay* (52/79), the Committee found a breach of Article 14(3)(d) because the author was forced to accept legal counsel who had connections with the government. In *Pinto v Trinidad and Tobago* (232/87), the Committee found that the complainant should not have been forced to accept a court-appointed lawyer who had performed poorly in the trial at first instance, when the author had already made the necessary arrangements to have another lawyer represent him before the Court of Appeal. In *Khomidova v Tajikistan* (1117/02), the complainant's son was held for an extended period without access to counsel and was subsequently provided with counsel by investigating authorities, whom he neither trusted nor was able to communicate with privately. In *Siragev v Uzbekistan* (907/00), the complainant's right to communicate with counsel in private was refused. Furthermore, his counsel was only permitted to get access to relevant records shortly before the hearing and his reasonable request for an adjournment of tribunal was refused without reasons.

*c. No absolute right to counsel of choice*

The HRC's decisions acknowledge that while an accused should have the right to access counsel in relation to criminal proceedings (this right does not appear to extend to civil proceedings), it does not provide him/her the right to choose counsel at his/her own will where such counsel is being funded by legal aid. In such circumstances, the seriousness of the offence and complexity of proceedings will be considered (see, *O.F. v Norway* (158/83); *Lindon v Australia* (646/95)).[32] Counsel must be provided under legal aid at all stages of proceedings in cases involving capital punishment.[33]

[32] See also, General Comment No. 32, para. 10.
[33] Ibid, para. 38 and cases cited at n79.

European Convention for Protection of Human Rights and Fundamental Freedoms of Human[34]

Article 6.3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of Human (ECHR) provides that:

> Everyone charged with a criminal offence has the following minimum rights:
> …
> (c) to defend himself… through legal aid of his own choosing or, if he does not have sufficient means to pay for legal aid, to be given it free when the interests of justice so require;
> …

Although a regional human rights court, the European Court of Human Rights (ECtHR) often produces well-reasoned jurisprudence that can be relied on in considering the interpretation and impacts of analogous provisions under the ICCPR. At times the ECtHR has given greater articulation to the rights under consideration in its jurisprudence.

On a preliminary point of principle, the Court has held that the Convention is intended to 'guarantee rights that are not theoretical or illusory but rights that are practical and effective' and that this is particularly so 'in view of the prominent place held in a democratic society by the right to a fair trial'.[35]

*d. The right to counsel under legal aid*

As with HRC decisions, the ECtHR has dealt with instances including a refusal by authorities to grant an accused access to defence lawyers and the failure to provide defence lawyers to those having no money. The latter aspect of the right, as with the analogous ICCPR provisions,[36] requires a two-prong test when it comes to the right to counsel under Article 6.3(c): (1) the person charged with a criminal offence does not have sufficient means, and (2) the interests of justice require the assignment of counsel.[37] The interests of justice will in principle call for legal representation to be provided 'where deprivation of liberty is at stake'.[38]

*e. Denial of access to counsel can include short periods*

While cases that have been determined by the HRC tend to deal with refused access to counsel over several days, in two cases in the United Kingdom, the ECtHR has

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[34] Other regional human rights treaties contain analogous provisions and reflect the same position with respect to the right of access to counsel: see, Article 7.1 of the African Charter on Human and Peoples' Rights (ETS No. 5, opened for signature 4 November 1950, entered into force 3 September 1953); Article 8.2 of the *American Convention on Human Rights* (OAS, Treaty Series, No. 36, adopted 22 November 1969, entered into force 18 July 1978).
[35] *Artico v Italy* A.37 (1980) 3 EHRR 1, para. 33.
[36] See, General Comment No. 32, para. 38; *Z.P. v. Canada* (341/88), para. 5.4.
[37] Ibid, para. 34.
[38] *Benham v United Kingdom* (1996) 22 EHRR 293, 61.

confirmed that denial of access to counsel within a shorter period might amount to a breach.[39]

In *Whitfield and Ors v United Kingdom* (46387/99, 48906/99, 57410/00 and 57419/00), three complainants complained about violations of Article 6(3) due to refusal of legal representation. For each complainant, the adjudicating body had assumed that legal representation was unnecessary for adjudication and, further assumed that one complainant did not even need to consult his lawyer before the hearing. The Court concluded that such complainants were denied the right to be legally represented due to a violation of the guarantee of such rights contained in the second paragraph of Article 6.3(c) of the Convention.

*f. Further rights to counsel in pre-trial stages*

Significantly, ECtHR has held that while the right to counsel certainly applies to court proceedings, it also applies to the pre-trial stage of a case. Indeed, as Mowbray has noted, the 'greater the potential detriment to the defence of an impecunious suspect a pre-trial event poses the stronger such a person's claim to free legal aid under this provision'.[40]

In *Öçalan v. Turkey*, the complainant had been held in police custody in Turkey for almost seven days, questioned by the security forces, a public prosecutor and a judge of the National Security Court, but received no legal aid during that period and had had to make several self-incriminating statements that subsequently became crucial elements in the indictment and the public prosecutor's submissions, and a major contributing factor in his conviction. The Court noted that Article 6 may be relevant before a case is sent to trial if, and in so far as, the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it, but that 'in each case, [the question] is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair trial'.[41]

<u>International criminal courts and tribunals</u>

The rights of the accused contained in Article 14(3) of the ICCPR are also mirrored in the constitutional frameworks of international criminal courts and tribunals.[42]

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[39] See, *John Murray v United Kingdom* (1996) 22 EHRR 29 (48 hours); *Averill v United Kingdom* (2000) 31 EHRR 36.

[40] Alastair Mowbray, *Cases and Materials on the European Convention of Human Rights* (2nd ed., 2007), 457. See also, *Berlinski v Poland* 27715/95;30209/96 [2002] ECHR 505 (20 June 2002) paras. 75, 77.

[41] *Öçalan v. Turkey* (46221/99), para. 133,

[42] See, Article 67 of the *Rome Statute of the International Criminal Court* ('ICC') (ICC-ASP/1/3, adopted by the Assembly of States Parties; First session; New York, 3-10 September 2002); Article 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') (32 ILM 1159 (1993), *as amended* by Security Council Resolution 1660 of 28 February 2006); Article 20.4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) ((1994) 33 ILM 1602, *as amended by* Security Council Resolution 1534 of 26 March 2004).

The right to a fair trial has been considered by these international courts as the fundamental premise upon which international criminal proceedings are to be conducted. In many aspects the success or failure of these proceedings has been measured based on the benchmark of the fair trial norm.[43] The provisions relating to the right to counsel in these courts are stipulated in Article 14(3)(b) and (d) of the ICCPR. Interestingly, the application of due process rights, such as the right to counsel, have in principle been interpreted based on particular contexts. The International Criminal Tribunal for the Former Yugoslavia (ICTY), for instance, has stated that the human right origin has strongly influenced Tribunals' interpretation of the application of rights (and, indeed, most awards related to such rights invariably refer to decisions of the HRC or ECtHR for their high persuasion). Nevertheless, the ICTY also noted that international criminal law is a special system of law in which human rights might be interpreted or constructed in a manner that is consistent with the particularities of that system.[44]

Despite noting that international criminal law is a special system of law, the right of an accused to counsel and the right to have counsel provided for those who cannot afford counsel has not been interpreted in a manner consistent with the human right regime. In fact, the element of interests of justice contained in Article 14(3)(d) is never in question in this system due to the invariable gravity of the international crimes being prosecuted (for instance: genocide, crimes against humanity and war crimes).

There are a number of ways in which consideration of the fair trial norm in these tribunals is of relevance to the right to counsel studied in this report. Firstly, these institutions apply fair trial rights in an international context. In doing so, they interpret the legal status of substantive and procedural law, including the right to counsel and associated rights. At times they comment upon such rights based on customary law and they draw from the practices of various domestic jurisdictions to fill in gaps. It is possible that this practice is consistent with identifications of general principles of international law.[45]

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[43] See, Boas, above note 24, particularly chapters one and five.

[44] See, Boas, above note 24, pp. 69-78; Patrick L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) Vol. 11 no. 3 *European Journal of International Law*, 569 at 572-3. *Cf* Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (2003), p. 5; Christoph Safferling, *Towards an International Criminal Procedure* (2001), p. 36. *Contra* Gabrielle McIntyre, 'Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY', in Gideon Boas and William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2002), 193.

[45] See, Article 38(1)(c) of the ICJ Statute. General principles of law are not derived from the consensual (conscious or unconscious) behaviour of States; rather they are used to fill gaps in international law rules or, otherwise put, to fill a *non liquet* in international law: see, Malcolm Shaw, *International Law* (6th ed., 2008), 98. The ICTY has, for example, used this source to identify the elements of rape in international law: *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 175.

Instruments of the international criminal tribunals that articulate details of the right to counsel have served to reinforce the human rights articulation and interpretation of these rights and to complement these with further guarantees.[46]

## 2. Sub-Conclusion

The right to counsel is the right of due process, which is protected by international laws on human rights and international customary law. It is a part of the *jus cogens* norm of a right to a fair trial. The right to access counsel in pre-trial stages and trial proceedings, particularly in serious or complex cases, has been reinforced by the HRC and ECtHR and it is embedded in the international criminal justice system. The right to counsel also extends to the provision of free legal counsel to an accused who cannot afford it; however a margin of appreciation exists for States to interpret this in the context of the gravity of the offences charged and available funds. As articulated in the ICCPR, and mirrored in other regional human rights and international criminal law instruments, the test will be one of the means and the interests of justice.

In international laws on human rights, the right to counsel is constituted from 9 rights, including:

(i) the right to have a counsel of one's choosing;
(ii) the right to adequate time to prepare for trial, including time to consult with counsel;
(iii) the right to confidential communication with counsel;
(iv) the right to counsel under legal aid;
(v) the right to adjournment of proceedings to consult counsel;
(vi) the right to self-defence;
(vii) the right to counsel as an act of protecting the accused's interests;
(viii) the right not to proceed with the assistance of an unqualified or insufficiently independent counsel when other counsel are available;
(ix) the right to counsel in all proceeding stages with respect to capital punishment.

The following study on the right to counsel in 5 countries, and practical survey in Vietnam, will be based on the above 9 constituent rights.

[46] See generally, ICTY, ICTR and ICC Statutes and Rules of Procedure and Evidence; ICTY and ICTR Directives on Assignment of Defence Counsel; and, ICC Regulations

## CHAPTER II

## A COMPARATIVE REVIEW OF HOW THE RIGHT TO COUNSEL IS AFFORDED IN SELECT JURISDICTIONS

Four domestic criminal justice systems have been surveyed in relation to the issue of the right to counsel. These systems have been chosen for their diversity. One of these systems (Australia) reflects the adversarial criminal justice system; the other three (China, Japan and Germany) reflect civil law criminal justice models of greater relevance to Vietnam. The jurisdictions selected also provide broad geo-legal representation, covering Asia, Europe and the Pacific (the Australian example also adequately covering the internationally significant Anglo-American model).

### 1. China

### 1.1. Structure of the Chinese Criminal Justice System

Within the structure of the Chinese criminal justice system, legal entitlement to counsel increases step-wise as a case proceeds from pre-trial investigation, to the laying of charges, to the determination of guilt or innocence at trial. Each of these stages falls within the purview of its own distinct institutional arrangement. Investigations are completely controlled by the police, charges are laid by prosecutors and trials are conducted by courts.[47] None of these institutions are subject to mutual oversight, with little facility for 'checks and balances'. In the absence of cross-institutional supervision, each body enjoys complete domain over its own area of control, and is subject only to the political authority of the overarching Chinese Communist Party and its rule-making body, the National People's Congress. The entrenchment of the judicial system within China's political system deprives the courts of independence: Courts are accountable to particular political committees.[48] The lack of cross-institutional monitoring deprives the courts of their accountability

### 1.2. Sources of Chinese Criminal and Procedural Law

There is no single overarching notion of the right to counsel in Chinese criminal law. Although the Constitution provides limited due process guarantees, essentially amounting to a narrow prohibition on unlawful detention. The Constitution neither confers a right to counsel, nor sets out any other substantive rights within the criminal justice process.[49] Moreover, the Constitution is not self-executing and courts

[47] Ira Belkin, 'China' in Craig M. Bradley (ed.), *Criminal Procedure A Worldwide Study* (2nd ed., 2007), p. 91.
[48] Ibid, p. 92.
[49] *Constitution of The People's Republic of China*, adopted at the Fifth Session of the Fifth National People's Congress on 4 December 1982, adopted at the First Session of the Eighth National People's Congress on March 29, 1993), article 37.

lack the authority to invoke it in their decisions.[50] In the absence of constitutional protection, the right to counsel in front of each constituent institution of the Chinese criminal justice apparatus is governed by its own statutory source of law, and rests on diverse bases of authority for enforcement.

**1.3. Substantive Law and Application**

In China, crimes and their associated punishments are set out in the *Criminal Law*, as substantively revised in 1997, informed by various subsequent amendments by the National People's Congress. The right to counsel in criminal proceedings is determined largely by the *Criminal Procedure Law*, as broadly amended in March 2012,[51] as well as by the *Law on Lawyers and Legal Representation* of 1996, as amended in 1998.[52].

***Investigation***

With respect to the right to counsel during the investigation stage of criminal proceedings, the revised *Criminal Procedure Law* entreats the public security authorities to safeguard the rights to defence and other procedural rights of criminal suspects.[53] A criminal suspect has the right to appoint a 'defender' as legal counsel at any point from the time that have first been interviewed by the investigating authority or have been made subject to compulsory measures.[54] The investigating authority has an obligation to inform a criminal suspect that they have this right.[55] Those appointed as counsel must be attorneys-at-law.[56] Where a criminal suspect is in detention, counsel may be appointed on their behalf by a 'custodian/guardian' or close relative.[57] Upon a request for counsel by a criminal suspect, the investigating authority is compelled to 'convey the message promptly'.[58]

Where financial difficulties or other reasons preclude a criminal suspect from appointing counsel, the suspect or their close relatives may apply to a legal aid agency for *pro bono* legal assistance.[59] If the conditions for provision of legal aid are satisfied, the relevant service provider is obligated to assign a qualified lawyer as counsel to the suspect.[60] The basic eligibility requirement for legal aid is that a

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[50] Ibid, p. 93.

[51] Decision of the National People's Congress on the Amendment of the Criminal Procedure Law of the People's Republic of China, Order of the President of the People's Republic of China No.55, adopted at the fifth meeting of the 11th National People's Congress on 14 March 2012. The Decision will come into force on 1 January 2013.

[52] Law on Lawyers and Legal Representation, promulgated by the 19th meeting of the Eighth National People's Congress Standing Committee on 15 May 15 1996 and subsequently revised in April 1998.

[53] Criminal Procedure Law of the People's Republic of China, sect. 14(1), as amended 14 March 2012, with amendments to enter into force on 1 January 2013.

[54] Criminal Procedure Law, sect. 33.

[55] Criminal Procedure Law, sect. 33.

[56] Criminal Procedure Law, sect. 33.

[57] Criminal Procedure Law, sect. 33. The language of the law leaves it unclear whether this provision augments or detracts from the suspect's right to appoint counsel of their own choosing. That is, whether the fact of detention in and of itself abrogates a suspect's or defendant's right, or effective ability, to appoint counsel of their own choosing.

[58] Criminal Procedure Law, sect. 33.

[59] Criminal Procedure Law, sect. 34.

[60] Criminal Procedure Law, sect. 34.

criminal suspect has not retained a lawyer due to 'financial difficulty', the local standard for which is established by the governments of the provinces, autonomous regions, and centrally-administered municipalities.[61] There is no general obligation on the investigating authority to request legal aid on a suspect's behalf. However, where a criminal suspect is being investigated for charges that, if upheld, may result in a sentence of life imprisonment or death, and the suspect has not appointed their own legal counsel, the relevant public authority (police, prosecutor or court, depending on the stage of the proceedings) has an obligation to engage a legal aid agency to assign counsel to the suspect,[62] irrespective of the economic circumstances of the suspect.[63]

During an investigation, the appointed defence lawyer may provide legal assistance to the suspect, including opinions; make a complaint or accusations on their behalf; apply for the alteration of compulsory measures; and request information from the investigating authority about the crimes suspected and other relevant information about the case.[64] Prior to the closure of an investigation, the investigating authority must, upon request, hear and document the opinion of the suspect's counsel.[65] If, at any stage during the proceedings, counsel considers that public authorities or their staff are interfering with the exercise of procedural rights, they have the right to issue a complaint to the prosecutor's office, or the next highest authority, which is then obliged to promptly review the complaint and, if verified, correct the interference.[66]

A criminal suspect or defendant held in detention or under residential surveillance has the right to correspond with, and be interviewed by, their legal counsel.[67] Where counsel requests to correspond with or interview a detained criminal suspect or defendant, the detention facility is obligated to arrange such a meeting within 48 hours.[68] While the law provides no general guarantee of confidential communication between a suspect or defendant and their counsel, it does prohibit the monitoring of meetings between defence counsel and a suspect or defendant in detention,[69] and this prohibition extends also to residential surveillance.[70] Additional 'defenders' may also interview or correspond with the criminal suspect or defendant held in detention, but only with the permission of a court or the prosecutor.[71]

***Prosecution***

Once the investigation stage is complete, the case is transferred to the National Prosecutor (the 'procuratorate') for review and prosecution. During this stage, the suspect's right to counsel is extended is some respects. Commencing from the date of

[61] Regulations on Legal Aid, adopted 16 July 2003 at the 15th executive meeting of the State Council, effective as of 1 September 2003, articles 11 and 13.
[62] Criminal Procedure Law, sect. 34.
[63] Regulations on Legal Aid, article 12.
[64] Criminal Procedure Law, sect. 36.
[65] Criminal Procedure Law, sect. 159.
[66] Criminal Procedure Law, sect. 47.
[67] Criminal Procedure Law, sect. 37.
[68] Criminal Procedure Law, sect. 37.
[69] Criminal Procedure Law, sect. 37.
[70] Criminal Procedure Law, sect. 37.
[71] Criminal Procedure Law, sect. 37.

review of a case by the prosecutor's office, counsel may access, excerpt, and copy filed materials on the case,[72] and may verify the evidence with the suspect.[73] The prosecutor's office has an obligation to notify the criminal suspect of their right to appoint legal counsel within three days of receiving case materials transferred for its review.[74]

***Trial proceedings***

Upon deciding to proceed to trial, the court has its own separate obligation to notify the defendant of their right to appoint legal counsel within three days.[75] During the trial, counsel may present materials and opinions attesting to the innocence of the defendant, to the pettiness of the crime(s) alleged, or to the need for mitigated punishment or exemption from criminal liability, and may act to safeguard the procedural rights and 'other legitimate rights and interests' of the defendant. [76] Counsel may also apply to the court or the prosecutor to subpoena evidence that may prove the innocence of the defendant.[77] The opinion of counsel must also be heard by the Supreme People's Court, where the Court is reviewing a case that may result in capital punishment.[78]

***Application in practice***

While the recent amendment of the *Criminal Procedure Law* introduces some advancements of the right to counsel in China, it remains to be seen how rapidly and effectively these will be implemented in practice. At present, the majority of criminal defendants on trial in China are not represented by a lawyer at all, with official sources indicating that only 30% of criminal cases had a legal defence of some kind, a figure supported by independent scholarship.[79] The 1996 revision of the *Criminal Procedure Law* was followed by a sharp drop in the number of criminal cases with legal representation,[80] rather than an increase, despite some black letter improvements in coverage of the right to counsel. For those suspects and defendants who do have legal representation, full client access during detention is often restricted.[81]

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[72] Criminal Procedure Law, sect. 38.

[73] Criminal Procedure Law, sect. 37. Other defenders may also access, excerpt, and copy such materials, but only with the permission of a court or the prosecutor's office, sect. 38.

[74] Criminal Procedure Law, sect. 33.

[75] Criminal Procedure Law, sect. 33. This obligation is separate from, and additional to, the obligation of the investigating authority (e.g. police) to make such a notification upon the commencement of an investigation or compulsory measures. and must deliver must deliver an indictment to the defendant no less than 10 days in advance of the hearing date, sect .182.

[76] Criminal Procedure Law, sect. 35.

[77] Criminal Procedure Law, sect. 39.

[78] Criminal Procedure Law, sect. 240.

[79] As referenced in Empty Promises, above note, p. 25: Liu Jinxing, 'Why Are Lawyers Unwilling to Defend Criminal Cases?' (*lüshi weihe buyuan zuo xingshi bianhu*?), *Procuratorate Daily* (*jiancha ribao*) 7 April, 1999, p. 4; Gao Qiong, 'Lawyers And Criminal Denfence' (*lüshi yu xingshi bianhu*), in Fan Chongyi et al., *Special Commentary on the Criminal Procedure Law (xingshi susong fa zhuanlun)* (1998), p. 168; Zhang Gen et al., 'The Ins And Outs of the Legal Aid System Coming into Birth in China' (zhongguo *falü yuanzhu zhidu dangsheng de qianqian houhou*) (1998), p. 36. All three articles conclude similar figures of defence representation.

[80] above note, p. 25.

[81] As outlined in an interview with Professor Xu Jingcun, Deputy Director of the Chinese Ministry of Justice's research project into further *Criminal Procedure Law* revisions at South Central University of

The recent revisions to the *Criminal Procedure Law* generally improve access to legal counsel, relative to the superseded legislation. Chinese law nevertheless retains severe criminal penalties for lawyers that may restrict the effective right to counsel of an accused, providing for up to seven years imprisonment for a lawyer who 'entices a witness into changing his testimony in defiance of the facts'.[82] Such provisions were used by the authorities to detain more than 500 lawyers between 1997 and 2002.[83] These types of sanctions effectively constrain the legitimate legal defence of those under investigation for, charged with, or convicted of, criminal offences in China.[84]

Access to counsel is further qualified in cases involving a suspected crime endangering state security, the crime of terrorism, a particularly serious crime of bribery and crimes involving so-called 'state secrets'.[85] In such cases, a defence lawyer is required to seek permission from the investigating authority, rather than the detention facility, to meet with the suspect or defendant. [86] Anecdotal evidence claims that the 'state secrets' provision is often used to deny access to clients, even when requests for approval are made.[87] Given the separate nature of the Chinese legal institutions and the complete control by police over the investigation stage of a case, a decision to prevent access to legal counsel on the basis of 'state secrets' is non-reviewable, and therefore constricts effective enjoyment of the right.

### 1.4. Conclusion

Although some minimal safeguards for the right to counsel are included in the recently revised *Criminal Procedure Law*, in particular with expansion of constituent rights in the investigation and prosecutorial review stages, in practice their application is limited by the unaccountable nature of the institutions comprising the Chinese criminal justice apparatus, failure of the law to provide penalties for non-enforcement of public obligations, and legal avenues for the disruption of legal

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Politics and Law: 'An Expert Explains and Analysis the Ministry of Justice Key Topics in the Draft Revision of the Criminal Procedure Law' (2005) Available at (Chinese): http://www.czdlaw.com/News/show.asp?id=3&typeid=2.

[82] Tom Kellogg, 'A Case for the Defence' (2003) 2 *China Rights Forum* 31.

[83] Bill Savadove, 'Justice Remains Shanghaied in City's Law Courts; Intimidation and Physical Violence Against Lawyers Is on the Rise, and Getting a Fair Trial is still Far from Guaranteed', *South China Morning Post*, 7 February , 2006.

[84] Biddulph, above note, p. 119.

[85] Defining what constitutes a state secret is quite vague. Article 9 of *Provisions Concerning Several Issues in the Implementation of the CPL* defines a cases involving state secret as 'cases whose details or nature involves state secrets' (Belkin, above note **Error! Bookmark not defined.**, p. 101). Belkin provides two examples illustrating the elasticity of the concept: 'In one case, a Xinjiang businesswoman, Rabiya Kadeer, was convicted of disclosing state secrets when she mailed published newspaper articles about the Xinjiang separatist movement to her dissident husband in the United States. In another case, Song Yongyi, a U.S. Permanent resident, a researcher and librarian at Dickinson University, was charged with disclosing state secrets when he gathered materials concerning the Cultural Revolution for his research'.

[86] Criminal Procedure Law, sect. 37.

[87] 'Empty Promises: Human Rights Protections and China's Criminal Procedure Law in Practice' (Human Rights In China, 2001).

access, particularly where allegations involving so-called 'state secrets' or state security, terrorism, or serious bribery are at stake.

## 2. Japan

### 2.1. Sources of Japanese Criminal and Procedural Law.

*The Constitution of Japan* is the nation's supreme law, prevailing over all other laws and acts of government.[88] Coming into effect in 1947, the post-war constitution was developed largely around Anglo-American ideas and includes an entire chapter dedicated to guaranteeing fundamental human rights.[8990] The Japanese *Code of Criminal Procedure* outlines Japanese criminal procedure including specific provisions related to the various rights accorded to criminal suspects and defendants.[91]

### 2.2. Substantive Law and Application

Article 11 of the Constitution establishes the purpose behind this chapter; prescribing that the Japanese people shall not be prevented from enjoying any of the fundamental human rights. Furthermore, these rights are guaranteed and conferred as eternal and inviolate rights. This chapter of the Constitution also expressly outlines and clarifies the right to counsel under Japanese law.

Article 34 provides that no person shall be arrested or detained without the immediate privilege of counsel. Furthermore, Article 37(3) provides that '[a]t all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State'.[92] Although this appears to constitutionally enshrine the rights accorded to United States of America criminal suspects by the *Miranda* decision, a narrower interpretation actually applies as a result of translational uncertainty.[93] The English language version of the Japanese constitution is regarded within academic and legal circles as semi-official, with the official Japanese version the formal document. The use of the word 'accused' in the English version actually indicates that the right to have State appointed counsel does not apply to suspects, who have yet to become 'accused' through the indictment process.[94] This is more clearly stated and confirmed in the Japanese version of the text where *keiji hikokunin* (criminal defendant) is used

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[88]Article 98, The Constitution of Japan (English translation): http://www.solon.org/Constitutions/Japan/English/english-Constitution.html, 15 April 2009.
[89] Hiroyuki Hata and Go Nakagawa, *Constutional Law of Japan* (1997), p. 19.
[90] Chapter III: 'Rights and Duties of the People', The Constitution of Japan.
[91]Code of Criminal Procedure (English translation): http://www.cas.go.jp/jp/seisaku/hourei/data/COCP_1-2.pdf, 15 April 2009.
[92]Article 37, Constitution of Japan (English translation): http://www.solon.org/Constitutions/Japan/English/english-Constitution.html, 15 April 2009.
[93] Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis* (2003), p. 307.
[94] Yuji Iwasawa, *International Law, Human Rights, and Japanese Law* (1998), p. 273. Iwasawa contends that a purposive interpretation of this section to include suspects is potentially historically and systematically correct; providing an interpretation in line with international treaty obligations (p. 274).

in Article 37. As such, there is no right to State appointed counsel prior to indictment.[95]

This interpretation of the constitutional provisions is supported by laws in the Japanese *Code of Criminal Procedure*. Article 30 expressly separates the accused and the suspect, providing for both to be able to appoint counsel at any time, at their own expense.[96]

This is of particular concern given the powers granted under the *Code of Criminal Procedure* for interview. Suspects may be held for up to 23 days in substitute prisons,[97] with confessions during this time not considered to be coerced, and with access to counsel limited only to suspects able to afford to retain legal representation.[98] Less than 20% of suspects retain counsel during the pre-indictment stage of proceedings as a result of this limitation to State appointed legal representation.[99] Most importantly, even where counsel is able to meet with their client, the privilege of counsel extends only to obtaining legal advice and assistance, but not for assistance during interviews where counsel may not be present.[100]

In response to international non-government organizations' calls for the right to counsel to be extended to Japanese suspects,[101] and compensation suits lodged by defence counsel who were restricted access to clients in detention,[102] the Japanese government, and subsequently the judiciary, have confirmed their interpretation of Article 14(3)(d) of the ICCPR to only extend to criminal defendants – not to suspects.[103] Article 98(2) of *The Constitution of Japan* provides that treaties concluded by Japan shall be faithfully observed and as such, are provided superior status under the Constitution. Although the *ICCPR* is a treaty, interpretive documents and resolutions, such as the United Nation's General Assembly's *Body of Principles* that articulate the inclusion of suspects and those detained as having a full right to counsel, do not have binding status under Japanese law, and their use has been rejected by Japanese courts.[104]

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[95] Ibid, p. 271.
[96] The right of a suspect to appoint their own counsel, at their own expense, is further reiterated under the *Criminal Procedure Code*, Articles 39 and 204. Articles 76, 77 and 272 expressly indicate the State's obligation to inform the accused after the institution of prosecution that they may request the appointment of counsel where accused is unable to appoint counsel for themselves.
[97] Substitute prisons, the *Daiyo Kangoku* system, exist separately to the standard prison system, providing detention for pre-indicted suspects.
[98] Goodman, above note 93, p. 308.
[99] Iwasawa, above note 94, p. 271.
[100] Goodman, above note 93, p. 312.
[101] Amnesty International (*Amnesty International, Japan: The Death Penalty and the Need for More Safeguards against Ill-Treatment of Detainees* 1991); Human Rights Watch (*Human Rights Watch: Prison Conditions in Japan* 1995); and, International Bar Association (*International Bar Association: The Daiyo Kangoku (Substitute Prison) System of Police Custody in Japan: Report by the International Bar Association* 1995), have each published such reports.
[102] An extensive list of such cases are provided in Iwasawa, above note 94, p. 272.
[103] See. Iwasawa, above note 94, p. 272.
[104] Iwasawa, above note 94, p. 273.

Even where a suspect is able to retain counsel, Article 39(3) of the *Code of Criminal Procedure* empowers the police and prosecution to determine the date, place and time of the lawyer-client interview based on vague restrictions such as: when doing so is necessary for the investigation and where such designation does not unduly restrict the suspect's rights to prepare for defence. Although defence lawyers and international bodies have claimed that this provision constitutes a violation of human rights law,[105] Japanese courts have held that it is to be interpreted narrowly and in doing so is not a contravention of Article 34 of the Japanese Constitution nor Article 14(3)(b) of the *ICCPR*.[106]

The Japanese Constitution contains no express right to confidential communication between client and counsel. Article 39(3) of the Japanese *Code of Criminal Procedure* provides that an accused person or suspect in custody may communicate with counsel, in person or through documents, without the presence of officials.[107]

This right is restricted where the prevention of the escape of the accused or protection of the sanctity of evidence is required.[108] Furthermore, a public prosecutor or a judicial police official may restrict the communication where they deem it necessary for their investigation prior to prosecution. This is qualified by the requirement that such designation does not unduly restrict the right of the accused to prepare a defence.[109]

The Japanese Federation of Bar Associations states, however, that in practice the right to confidential communication between client and counsel is regularly breached, even where the defendant has moved into the prison system.[110]

### 2.3. Conclusion

Although the Japanese Constitution enshrines the right to counsel as a fundamental right and freedom, the consistent qualifications restricting State appointed counsel, to criminal defendants and not suspects, greatly limits the right as interpreted by the international community, and arguably the initial drafters of the constitution. The potential for defence access to a client is further limited by practice and judicial and executive interpretations of the constitution; limitations generally considered by the international community as breaches of the fundamental right to counsel.

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[105] *Police Cell Detention in Japan- the Daiyo Kangoku System* Report, referred to in Iwasawa, , above note 94, p. 275 (example cases are available at 276).
[106] See, Iwasawa, above note 94, p. 275
[107]The *Code of Criminal Procedure*. English translation available at: http://www.cas.go.jp/jp/seisaku/hourei/data/COCP_1-2.pdf, 23 May 2009.
[108]Japanese *Code of Criminal Procedure*, Article 39(2).
[109] Ibid, Article 39(3),
[110] Alternative Report to the Forth Periodic Report of Japan on the International Covenant on Civil and Political Rights, Japanese Federation of Bar Associations. Avaliable at: http://jfba-www1.nichibenren.jp/ja/kokusai/humanrights_library/treaty/liberty_report-4th_jfba_en.html, 23 May 2009.

## 3. Germany

### 3.1. Sources of German Criminal and Procedural Law

The German constitution, *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany) came into force post-World War Two in West Germany, and was retained post-reunification. The key source of German criminal procedure law, and of relevance to the right to counsel, is the *Strafprozeßordnung* (the *Code of Criminal Procedure* (CCP)). This code has been in force since 1877 with minimal amendments.

### 3.2. Substantive Law and Application

Article 1 of the German constitution provides for the recognition of the inviolable and inalienable nature of human rights and their binding effect on the legislature, executive and judiciary. However the constitution does not provide for an express right to counsel; rather this is found within the CCP.[111]

The CCP contains a full chapter dedicated to the statutory rights and procedures for access to counsel for individuals under the criminal system.[112] The first section of this chapter provides that the accused shall have 'the assistance of defence counsel at any stage of the proceedings'.[113] On the surface, this section appears to cover the entire criminal process without access to counsel being limited to the pre-trial or trial stages;[114] however more specific provisions clarify the difference between the right to counsel (and its extent) and the right to presence of counsel. The CCP requires that the suspect be informed of these rights at the beginning of each interview, whether by police,[115] judge or prosecutor,[116] whether or not the suspect has been taken into custody or had charges laid against them.[117] This information need only be provided to those being treated as suspects, and not where the police question someone 'informally'.[118]

Because the suspect cannot in fact be compelled to appear for police interrogations,[119] the presence of counsel is not mandated.[120] Prior to police interrogation, the suspect has the right to consult defence counsel.[121] In practice, however, the police usually permit defence counsel to be present,[122] as the practice appears to be that suspects

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111 English translation available at: http://www.iuscomp.org/gla/statutes/StPO.htm, 23 April 2009.
112 Chapter XI, German *Code of Criminal Procedure*.
113 Section 137, German *Code of Criminal Procedure*.
114 Christian Fahl, 'The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany' (2007) 8 (11) *German Law Journal*, 1053.
115 Section 163a(4), German *Code of Criminal Procedure*.
116 Section 163a(3), German *Code of Criminal Procedure*.
117 Thomas Weigend, 'Germany', in Craig M. Bradley (ed.), *Criminal Procedure A Worldwide Study* (2nd ed., 2007), p. 257.
118 Because there is a lack of recognised suspicion of the suspect: see, Weigend, ibid, p. 257.
119 Fahl, above note 114, p. 1059.
120 Weigend, above note 117, p. 257.
121 Section 136, German *Code of Criminal Procedure*.
122 Christoph Safferling, *Towards an International Criminal Procedure* (2001), p. 104.

will remain silent unless their counsel is present.[123] Where a statement is made in the presence of counsel, counsel has the right to intervene in the interrogation for the purposes of counselling and questioning.[124] Because the suspect is compelled to attend prosecutorial and judicial interrogations,[125] the right to counsel does exist.[126] The CCP expressly provides for the presence of defence counsel during judicial interrogation[127] and during an interrogation by the prosecutor.[128]

The CCP provides for mandatory appointment of counsel for cases that might give rise to severe sanctions,[129] or special impairment of defendants' ability to defend themselves.[130] The presiding judge makes such an appointment by post-indictment,[131] however counsel may be appointed at the investigatory stage where the public prosecution office requests appointment of defence counsel.[132] The German Federal Court of Appeal has found that an obligation exists on the prosecutor to request such an appointment where the suspect is required to exercise important rights.[133]

The German *Code of Criminal Procedure* provides that the accused shall be entitled to communicate with defence counsel in writing and orally.[134] Where the accused is charged with crimes of terrorism,[135] such contact may be interrupted.[136] However, this provision has not been used since 1977.

The right to refuse to give testimony on professional grounds for defence counsel and attorneys-at-law concerning information entrusted to them or that became known to them in this capacity is protected under the *Code of Criminal Procedure*.[137] Section 97 of this Code ensures that any notes containing confidential information taken by counsel are not subject to seizure. These restrictions only apply when in the custody of the person with testimonial immunity,[138] except where they are in the

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[123] Weigend, above note 117, p. 258. Weigend states: 'if a suspect […] has not yet retained an attorney, police must make reasonable efforts to assist the suspect in finding an attorney willing to represent him. […] German law does not contain a strict rule that questioning must stop once the suspect has demanded to talk with counsel'.
[124] Safferling, above note 122, p. 104.
[125] Section 163a(3), German *Code of Criminal Procedure*.
[126] Safferling, above note 122, p. 104.
[127] Section 168c(1), German *Code of Criminal Procedure*.
[128] Section 168a(3), German *Code of Criminal Procedure*.
[129] Section 140, German *Code of Criminal Procedure*.
[130] Weigend, above note 117, p. 257.
[131] Section 141, German *Code of Criminal Procedure*.
[132] Section 141(3), German *Code of Criminal Procedure*.
[133] BGHSt. 46, 96 (2000), as referenced in Weigend, above note 117, p. 258, setting out examples of where the suspect wishes to 'confront a prosecution witness who will not be available at the trail'.
[134]German *Code of Criminal Procedure*, Section 148(1): available at: http://www.iuscomp.org/gla/statutes/StPO.htm, 23 May 2009.
[135] German *Penal Code*, Section 129a; see also, Christian Fahl, 'The Guarantee of Defence Counsel and the Exclusionary Rules on Evidence in Criminal Proceedings in Germany' (2007) 8(11) *German Law Journal*.
[136] *Introduductory Provisions to the Constitution of Courts Act*, Sections 31-38 (referenced in Christian Fahl, ibid.
[137]German *Code of Criminal Procedure*, Sections 53(2) and 53(3).
[138]German *Code of Criminal Procedure*, Section 97(2).

custody of the mail office.[139] These rules do not apply in situations where counsel is suspected of being an accessory to the crime.[140]

### 3.3. Council of Europe Obligations

Germany is a member of the Council of Europe and a contracting party to the European Convention on Human Rights,[141] Article 6 of which provides for the right to legal representation.[142] The decisions of the Court about the content of the right to legal counsel (discussed above) are therefore of significance to the manner in which German national courts interpret and apply this domestic criminal process right, in a manner that differs from the other domestic jurisdictions surveyed in this report.

### 3.4. Conclusion

Although the German constitution does not expressly provide for the right to counsel in criminal proceedings, it is an explicit right contained within the German *Code of Criminal Procedure*. There is no right to counsel during the investigatory stage of proceedings; however it exists for all post-indictment stages of criminal procedure, including the mandatory appointment of counsel by the courts.

## 4. Australia

### 4.1. Substantive Law and Application

The Australian legal system is governed by the *Constitution of the Commonwealth of Australia*. There is no express constitutional right to counsel, however the right to a fair trial exists as a fundamental common law right.[143] Furthermore, the High Court has held that the Australian constitution includes the right to a fair trial through implied notions of judicial fairness under the Australian constitution.[144]

In the High Court decision of *Dietrich v R*,[145] the majority of the Court held that the indigent accused had a right to legal representation as a component of the common law right to a fair trial.[146] The effect of this right is to grant powers to courts to stay criminal proceedings if the absence of counsel would result in an unfair trial in serious criminal proceedings.[147] The Court's ruling did not recognise an absolute right of such an indigent accused to be provided with legal aid. The determination of

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[139] 38 BGHSt 46, referenced in Christian Fahl, above note 135.
[140] German *Code of Criminal Procedure*, Section 97(2).
[141] Germany is bound by Resolution 1031 (1994) to honour commitments entered into when joining the Council: http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1031.HTM, 26 April 2009.
[142] See above discussion concerning the right to counsel in international and regional human rights.
[143] Confirmed unanimously in *Barton v R* (1980) 147 CLR 75.
[144] Deane J *Dietrich v R* (1992) 109 ALR 385 at 408. See, Gideon Boas, '*Dietrich*, the High Court and Unfair Trials Legislation: A Constitutional Guarantee?' (1993) 19(2) *Monash University Law Review* 265.
[145] (1992) 177 CLR 292.
[146] Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from injustice: human rights law in Australia* (2004), p. 229.
[147] David Malcolm, 'Does Australia Need a Bill of Rights?' (1998) 5(3) *Murdoch University Electronic Journal of Law*.

State funding for an accused is, not unlike the approach in international human rights law, based on an assessment of a range of factors including means and the interests of justice. The *Dietrich* ruling did, however, impose a procedural step in the criminal system that highlights the importance of the right to counsel and empowered judges to refuse to proceed with a trial where an accused is unrepresented.[148][149]

**4.2. Human Rights legislation**

In Victoria and the Australian Capital Territory, human rights charters have been introduced.[150] Under Section 25(2)(b) of the Victorian Charter of Human Rights and Responsibilities, a person charged with a criminal offence is given 'adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her'. Further provision for legal aid, specifically the requirement that a suspect may have access to legal aid, is made under Sections 25(2)(e)-(f). This provision has not yet been expressly held to include the right to counsel during pre-trial investigation.

An example of how State criminal legislation broaches legal representation is s 464C(1) of the Victorian *Crimes Act 1958*, that requires police to inform a suspect of their right to communicate with a legal practitioner unless it is a situation of urgency affecting the safety of others. It is important to note however that if evidence is collected without regard to this section there is no provision to exclude it from proceedings. Moves towards a uniform *Evidence Act* across States, initiated by the Australian Law Reform Commission, have resulted in provisions that render evidence inadmissible if it is considered unfairly prejudicial.[151] Following the reasoning in *Dietrich* it is possible that this may be used to assert a right to counsel in order to ensure that the accused is not unfairly prejudiced in respect of the collection of evidence.

The South Australian *Criminal Law Consolidation Act 1935* contains an express provision for the right to counsel, however this does not appear to cover the investigatory stage, nor does it appear to mandate legal representation to be provided by the State.[152]

Client legal privilege is a recognized rule of common law in Australia that provides for the protection of the right to confidential communication between a client and counsel, now covered under a number of Australian statutes.

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[148] Different States within the federated Commonwealth of Australia have enacted legislation in response to the *Dietrich* ruling; for example, the State of Victoria passed amending legislation to allow judges the discretion to order legal aid to be granted, in lieu of an order staying the proceedings.
[149] Section 360A(2), *Crimes Act 1958* (Vic).
[150] Also, there are currently nationwide discussions regarding the possible implementation of an Australian statutory Bill of Rights that would implicate the right to counsel if introduced.
[151] Sections 135(a),137 *Evidence Act 2008* (Vic).
[152] Section 288 *Criminal Law Consolidation Act 1935* (SA) provides: 'A person charged with an offence may be represented by counsel'.

Most notably, section 23G(2)(b) of the Australian Commonwealth *Crimes Act 1914*, provides that if a person under arrest or in police custody wishes to communicate with legal counsel, the investigating official must allow this communication to occur in circumstances in which, as far as practicable, will not be overheard. An exception to this, restricted by stringent requirements, is where compliance with the right to confidential communication is likely to result in a perversion of justice.[153] Furthermore, the Australian Commonwealth *Evidence Act 1995* protects client legal privilege, preventing the inclusion of evidence that would result in the disclosure of a confidential communication made between the client and a lawyer.[154] These provisions have been replicated in the implementation of uniform Evidence Acts in Australian States.[155]

### 4.3. Conclusion

Under the Australian constitution and common law, there is no express right to counsel. However, where an absence of counsel is likely to lead to an unfair trial, criminal proceedings may be stayed in order to obtain legal aid, or an order for funding made directly by the court. There are no substantive limits on the access to legal representation for those who are able to retain legal counsel and indigent accused that are provided legal representation under the legal aid system.

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[153] Section 23L *Crimes Act 1914* (Cth). This only applies in exceptional circumstances, and must be authorized by police officer of the rank of Superintendent or higher, or other delegated persons. The exception acts to authorize the limit on defence counsel where their communication is suspected to destroy or alter evidence, intimidate a witness, or aide in an accomplice's avoidance of apprehension.

[154] *Evidence Act 1995* (Cth), sections 118 and 119, Part 3.10, Division 1.

[155] Evidence Acts in Victoria, New South Wales and Tasmania exactly replicate the Commonwealth provisions (sections 118 and s119). The South Australian *Evidence act 1929*, section 59IR(4) provides that communication between lawyer and client is 'absolutely privileged'.

## CHAPTER III

## OVERVIEW OF VIETNAMESE LEGISLATION ON THE RIGHT TO COUNSEL

### 1. Vietnamese policies and legislation on the right to counsel

Since President Ho Chi Minh announced the Declaration of Independence, founding the Democracy and Republic of Vietnam in 1945, the State has experienced several development periods with requirements for new reform. In the Instruments of the IXth Party Congress in 2001, the Party set out that Vietnam needs to continue speeding up the innovation of organization and operation of the State, promoting democracy and reinforcing legislation, concurrently setting up the Vietnamese socialist rule-of-law state of the people, by the people and for the people.

On 2 January 2002, the Politburo promulgated Resolution No. 08-NQ/TW on several focus tasks in judicial activities in the coming time. The Resolution stated that 'the duty of constructing the Vietnamese socialist rule-of-law state in the coming time requires judicial task to have strong changes, to implement well the targets of strictness, justice and democracy'[156] ('Resolution 08'). Resolution 08 has reinforced previous viewpoints on judicial reform.[157] The Resolution has raised both common viewpoints and specific policies and solutions to the reform of each judicial body (including courts, procuracies, police, judgment execution, and lawyers). With respect to defence work, Resolution 08 has paid much attention to the role of lawyers and asks judicial bodies to ensure lawyers' involvement in legal proceedings. The Resolution has specified: 'it is necessary to improve prosecution quality of prosecutors at trials, ensure democratic adversary between prosecutors at trials and lawyers, counsel and other participants in proceedings',[158] 'judicial bodies are required to facilitate lawyers' participation in proceeding process, for instance, interrogating the defendant, studying case files, arguing democratically at the trial and so on'.[159] Judgments must be based mostly on adversarial trials, on the basis of a full and comprehensive examination of the evidence and opinions of prosecutors, as well as the defence counsel and accused.[160]

On the basis of the orientation for judicial reform set out in Resolution 08, the Criminal Procedure Code ('CPC') was amended in 2003. This CPC stipulates the right to counsel of the accused (including the right to self-defence, the right to have other persons defend, and cases where designated counsel is a must), the role of lawyers in general and defence counsel in particular in each procedural stage

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[156] Resolution No. 08/NQ/TW dated 25 December 2001, Item II
[157] Hoang The Lien, *Some opinions of the Party and State on judicial reform from 1986 until now,* page 1, Workshop on Judicial Reform in Vietnam, 2002.
[158] Resolution No. 08/NQ/TW dated 25 December 2001, Item II.B.1.b
[159] Resolution No. 08/NQ/TW dated 25 December 2001, Item II.B.1.d
[160] Resolution No. 08/NQ/TW dated 25 December 2001, Item II.B

(investigation, prosecution, and adjudication), as well as promoting adversarial practices at trials. [161]

In order to reinforce the achievements from implementation of Resolution 08 and to promote judicial reform, the Politburo proceeded to promulgate Resolution No. 49-NQ/TW on the Strategy of judicial reform up to 2020 (dated 2 June 2005) to implement the policies and tasks of judicial reform ('Resolution 49'). Resolution 49 states that the target of judicial reform is to establish a judicial system of spotlessness, sustainability, democracy and strictness with the nature of justice protection to gradually modernize, to serve the people and the Vietnamese socialist fatherland. The Resolution also identified judicial activities with the effectively implemented and highly valid adjudication as the centre.[162]

Accordingly, one of the tasks of judicial reform up to 2020, defined in Resolution 49, is to 'renovate the organization of trials, determine more clearly the position, powers, and responsibility of litigation authorised officers and litigation participants towards ensuring publicity, democracy and strictness; to improve the adversarial quality at trials, considering it as a breakthrough in judicial activities'.[163] Resolution 49 also set out that it is necessary to improve mechanisms to guarantee that lawyers could properly exercise their adversarial role at trials.[164] This overarching policy is the basis for judicial bodies to facilitate lawyers in the whole procedural process, aiming at 'improving adversary quality'.

It is necessary to emphasize further that, before the promulgation of Resolution 49, the Politburo had promulgated Resolution No. 48-NQ/TW dated 24 May 2005 on the Strategy for the construction and perfection of Vietnamese Legal System to 2010 with vision to 2020 ('Resolution 48'). According to this Resolution, one of the orientations for developing and perfecting the Vietnamese legal system is to 'strongly innovate judicial procedures towards democracy, equality, publicity, transparency and closely with convenience and ensuring the people's participation and supervision over judicial activities; as well as ensuring the quality of adversarial approaches at trials, using adversarial results at trials as an important basis for final judgment and considering this as a breakthrough in improving judicial activities'.[165] Resolution 48 has also determined that an important orientation of the Party in the development of lawyers in Vietnam is to develop lawyers of sufficient political quality, morality and professional ability, at the same time, it is necessary to heighten the responsibilities of law-practicing organizations, and further promote the self-control of socio-professional organizations of lawyers.[166]

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[161] Criminal Procedure Code 2003, Article 11, Article 35, Article 56, Article 57, Article 58, Article 59, Article 132, Article 190, Article 200, Article 207, Article 209, Article 210, Article 211, Article 212, Article 213, Article 214, Article 215, Article 216, Article 217, Article 218, Article 222, Article 229, Article 231, Article 245, Article 246, Article 305 and Article 312.
[162] Resolution 49-NQ/TW dated 2 June 2005, Item I.1
[163] Resolution 49-NQ/TW dated 2 June 2005, Item II.2.2
[164] Resolution 49-NQ/TW dated 2 June 2005, Item II, point 2.3
[165] Resolution 48-NQ/TW dated 2 June 2005, Item II, point 1.5
[166] Resolution 48-NQ/TW dated 2 June 2005, Item II, point 1.5

In order to implement the strategic tasks set out by the Party in legal and judicial reform, satisfying the objective of the Vietnamese socialist rule-of-law state, numerous documents of Vietnam have mentioned the necessity for counsel in legal proceedings.

Constitution

The Constitution provides that: 'The right to counsel of the accused is guaranteed. They may defend themselves or have someone act as counsel for them. Then, the lawyer organization is formed to assist the accused and other concerned persons in protecting their legitimate rights and interests and to contribute to the protection of socialist legislation'.[167]

In accordance with the above article of the Constitution, the State has clearly determined the right to counsel of the accused in criminal cases. Such a right is met by either the accused's self-defence or the accused's right to have counsel through asking another person to defend him/her in accordance with the International Covenant on Civil and Political Rights to which the Socialist Republic of Vietnam committed as signatory on 24 September 1982.

Criminal Procedure Code

Pursuant to the Criminal Procedure Code No. 19/2003/QH11 dated 26 November 2003 of the National Assembly of the Socialist Republic of Vietnam, defence counsel of defendants or accused may be: i) Lawyers; ii) Legal representatives of arrestees, defendants, accused; iii) people's advocates.[168]

The CPC provides as follows: 'Investigating Body, Procuracy or Court, within three days from the day of receiving a proposal from Defence counsel enclosing documents relating to the defense, shall consider the issuance of a certificate of Defence Counsel to enable him to exercise his duty, should the certificate be refused, specific reasons shall be given. With respect to the case of detention, the Investigating Body within 24 hours from the time of receiving the proposal of Defence Counsel enclosing documents relating to the defense, shall examine, issue a certificate for Defence Counsel to enable him to exercise his duty. Should the Investigating Body refuse to issue the certificate, specific reasons shall be given.'[169] One defence counsel may defend several arrestees or accuseds in the same case, provided that their rights and interests do not conflict with each other. Several defence counsel may defend only one arrestee, defendant or accused.[170]

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[167] Constitution of the Socialist and Republic of Vietnam in 1992 which amended and supplemented by the Resolution No. 51/2001/QH10 of the Assembly dated 25/12/2001, Article 132.
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In order to protect the right to counsel, in some cases, if the arrestee, defendant, accused or their legal representatives does not have any defence counsel, the investigation bodies, procuracies or courts must request the local bar association to have a law office appoint a defence lawyer for such persons or request the Vietnam Fatherland Front Committee or its member organizations to appoint defence counsel for any member of their organizations in custody.[171]

The rights and obligations of defence counsel are also stipulated in the CPC, which provides that defence counsel shall participate in proceedings from the initiation of prosecution against the accused. In case of an arrest in urgent cases and arrest of offenders caught red-handed or wanted, defence counsel shall participate in proceedings from the time where the decisions on temporary custody are issued. In case it is necessary to keep the investigation of a national security infringement crime secret, the Director of the People's Procuracy shall decide whether to allow defence counsel to participate in proceedings from the completion of the investigation stage.[172]

The CPC provides, at Article 58(2), that defence counsel shall have the following rights:

- To be present when testimonies are taken from arrestees or when defendants are interrogated; and, raise questions to the arrestee or the defendant if it is approved by investigators; to be present in other investigation activities; to read minutes of the procedural activities in which they have participated and procedural decisions related to the persons whom they defend;
- To request investigation bodies to inform them in advance of the time and places of interrogation so as to be present when the defendant is interrogated;
- To request a change of litigation authorised officers, appraisal experts and/or interpreters in accordance with the provisions of this Code;
- To collect documents, objects and circumstances related to their defence from the arrestees, the defendants, the accused, and their relatives, or from agencies, organizations and individuals at the requests of the arrestees, the defendants or accused, provided that such information is not subject to State secrets or business secrets;
- To present documents and objects as well as claims;
- To meet the arrestees; to meet the defendant or accused being under temporary detention at a camp;
- To read, take notes of and copy records in the case files, which are related to their defence, after completion of investigation stage in accordance with regulations of laws;
- To participate in questioning and arguing at hearings;

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ch amended and supplemented by the Resolution No. 51/2001/QH10 of the Assembly dated 25/12/2001, Article 132.
lemented by the Resolution No. 51/2001/QH10 of the Assembly dated 25/12/2001, Article 132.

- To complain about procedural decisions and acts of the bodies and persons having competence to conduct proceedings;
- To appeal against court judgments or decisions if the accused are juveniles or persons with physical or mental defects.[173]

The defence counsel, prosecutors, accused, victims, civil plaintiffs, civil defendants, persons with related interests and obligations and their legal representatives and lawyers all have equal rights to present evidence, documents and objects and to make claims and argue equally before court. Courts are responsible for facilitating them to exercise those rights with a view to clarifying the objective truths of the cases.[174] The defence counsel, counsel for the victims' interests, civil plaintiffs or civil defendants have the right to request the Trial Panel to change the litigation authorised officers.[175]

At the investigation stage of criminal cases, when interrogations are conducted in the presence of the defence counsel, the investigators must explain to them their rights and obligations in the course of interrogation of the defendant. The defendant, the defence counsel and/or legal representatives shall all sign in the interrogation minutes. Where defence counsel are allowed to question the defendant, the minutes must contain full questions of the defence counsel and answers of the defendant.[176] Upon termination of the investigation, within two days from issuing the investigation conclusion reports, the investigation bodies must send the investigation conclusion reports, the proposal for prosecution or the investigation conclusion reports attached with the decision on investigation suspension and the case files to defence counsel.[177]

At the prosecution stage, within three days after issuing one of the decisions on i) prosecution of the defendant; ii) returning the files for additional investigation; iii) suspending or temporarily suspending the case, the procuracy must inform the defendant and their defence counsel thereof; and deliver the indictments, decision on suspending or temporarily suspending the case to the accused. During this stage, defence counsel may read the indictments, take notes and copy documents in the case files which are related to the defence in accordance with provisions of law and may also raise requests.[178]

Law on Organization of the People's Court

The Law on Organization of the People's Court No. 33/2002/QH10 dated 02/04/2002 of the National Assembly of the Socialist and Republic of Vietnam ('Law on the Organization of the Peoples' Courts') provides that: 'Courts ensure the right to

ion No. 51/2001/QH10 of the Assembly dated 25/12/2001, Article 132.
the Assembly dated 25/12/2001, Article 132.
d 25/12/2001, Article 132.
.
CPC, Article 132 Clause 3
177 CPC, Article 162 Clause 4
178 CPC, Article 166 Clause 1

counsel of the accused as well as the right to protect legitimate rights and interests of the concerned parties'.[179]

Ensuring the accused's right to counsel has been delineated through the above-mentioned adjudication policy and through including the principle of access to counsel in legal documents of the tribunal sector:

> If the defendant, accused or their legal representative do not invite any defence counsel and at the court's request, a law office has assigned defence counsel, or the Vietnamese Fatherland Front Committee and its member organizations have assigned the people's advocate to act as counsel for their members, the Court must inform the defendant, accused and their legal representative in cases where such defendant or accused are juveniles or person with physical or mental defects for acknowledgement. Such information may be made into a specific document, or written in the decision on bringing the case to trial.[180]

Law on Organization of the People's Procuracy

One of the important functions of the People's Procuracy is 'to implement the prosecution right and to supervise the abidance of laws in the adjudication of criminal cases'.[181]

To concretize the latter function in strict accordance with procedural sequences and formalities in relation to the right to counsel of the defendant or accused, the Chief of SPP and the Minister of Justice have unanimously agreed with the courts and set out, by way of regulation, that people's procuracies have the responsibility of requesting counsel for the accused in cases where the accused is juvenile and neither the accused nor his legal representative invite any defence counsel.[182]

Law on Lawyers

The Law on Lawyers provides clearer regulations on the role and functions of lawyers in procedural activities, especially regarding the role of ensuring the right to counsel in criminal cases.

First, the Law on Lawyers emphasizes principles of legal practice including (i) observance of laws; (ii) observance of the rules on legal professional ethics and conduct; (iii) independence, honesty and respect for objective truths; (iv) use of lawful measures for best protection of clients' legitimate rights and interests and (v)

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[179] Law on Organization of the People's Court, Article 9

[180] Resolution of the Judge Council of the Supreme People's Court No. 03/2004/NQ-HDTP dated 02/10/2004 providing guidelines for implementation of some regulations in the first section on 'General regulations' of the Criminal Procedure Code 2003 (hereinafter referred to as 'Resolution 03/2004/NQ-HDTP') Item II

[181] Law on Organization of the People's Procuracy No. 34/2002/QH10 dated 02/04/2002 of the National Assembly of the Socialist and Republic of Vietnam (hereinafter referred to as 'LOPP'), Article 3

[182] Resolution No. 03/2004/NQ-HDTP, Item II

accountability before the laws for lawyer practicing activities.[183] Furthermore, the Law on Lawyers also prohibits acts directly impacting the right to counsel of the defendant or accused such as 'disclosing the information on cases, affairs or clients which comes to their knowledge in their process of professional practice, unless it is agreed by clients in writing or otherwise provided for by laws' and 'establishing contacts or relations with litigation authorised officers or litigation participants; with other cadres or civil servants to act against the laws in settlement of relevant cases'.[184]

The Law on Lawyers also determines types of documents that lawyers may be required to submit to the litigation authorities in their counsel activities. These regulations are supplementary; setting out matters that are not stipulated in the CPC.

Law on Legal Aid

In policy, legal aid is the State's responsibility, in which practicing organizations, lawyers, and other bodies, organizations and individuals shall participate in the implementation, contribution, and support for legal aid activities.[185]

In accordance with the Law on Legal Aid, legal aid consultants shall participate in proceedings as defence counsel of the arrestees, defendant or accused to counsel and protect legitimate rights and interests of the concerned parties in criminal cases.[186]

In criminal procedures, legal aid consultants and legal aid collaborated lawyers defend legal aided persons who are arrested, charged or accused. They also protect rights and interests of legally aided persons who are victims, civil plaintiffs, civil defendants or persons with interests and obligations related to criminal cases.[187]

Moreover, the litigation bodies must grant certificates of defence counsel or certificates for defence counsel of involved parties' interest in criminal cases to legal aid consultants and collaborated lawyers not more than three days from the date of receiving the document assigning persons to participate in proceedings from the State Legal Aid Centres. The grant of certificates of defence counsel to the collaborated lawyers assigned by the practising organizations or by himself or herself shall be done in accordance with regulations of the Criminal Procedure Code and Law on Lawyers.[188]

Ordinance on Organization of Criminal Investigation

Regarding the principles of investigation in criminal cases, the Ordinance on Organization of Criminal Investigation No. 23/2004/UBTVQH11 dated 20/08/2004 of

[183] Law on Lawyers, Article 5.
[184] Law on Lawyers, Article 9.
[185] Law on Legal Aid No. 69/2006/QH11 of the National Assembly of the Socialist and Republic of Vietnam dated 29/06/2006 ('Law on Legal Aid') Article 6
[186] Law on LA, Article 21
[187] Law on LA, Article 29
[188] Law on LA, Article 39 Clause 2

the Standing Committee of the National Assembly has regulated that 'All investigation activities must conform to the CPC. Investigation activities must respect the truth; be performed in an objective, comprehensive and adequate way; find out exactly and promptly all acts of offence; clarify evidence to identify whether the person is guilty or not, as well as circumstances aggravating and extenuating the penal liability of offenders, concurrently not to omit offenders and do innocent persons an injustice'.[189]

**2. Sub-conclusion**

Legal provisions in relation to the right to counsel of the arrestees, defendant, and accused have partially met the requirements of international regulations on the guarantee of human rights in proceedings, including the right to counsel and the right to a fair trial.

For more thorough study on the improvement of Vietnamese laws with respect to the right to counsel, it is necessary to consider and compare each 'auxiliary' right constituting the right to counsel under international laws and Vietnamese laws.

[189] Ordinance on Organization of Criminal Investigations , Article 5

# CHAPTER IV
# COMPARING THE RIGHT TO COUNSEL IN CRIMINAL CASES BETWEEN INTERNATIONAL STANDARDS WITH THE LAWS AND PRACTICE IN VIETNAM

## 1. The right to access counsel of choice

### 1.1 International standards

The accused shall have the right to access counsel of choice (limited where provided under legal aid) at all stages of the proceedings.

### 1.2 Vietnamese laws

The Constitution of Vietnam provides that 'The defendant's right to plead his case is guaranteed. He may plead his case himself or ask for someone to plead for him. A jurist organization is to be formed to assist defendants and other persons concerned in defending their legal rights and interests and to contribute to the defence of socialist legislation'.[190]

To execute the Constitution, the Criminal Procedure Code also provides that the accused shall be entitled 'To defend by themselves or ask other persons to defend them'[191] and defence counsel shall participate in the procedure from the time the arrest orders are made.[192] It further provides that, 'Defence counsel shall be selected by arrestees, accused or their legal representatives'.[193]

### 1.3 Vietnamese practices

*a. Investigation stage*

Compared to other countries studied in this Report, the defense counsel in those countries are facilitated their practice in the investigation stage. The defense counsel have accessed to their clients without mornitoring. Even in China, the new provisions of the Chinese Criminal Procedure Code (amendments) in March 2012 has also allowed defense counsel to meet with clients during investigation stage without monitoring[194].

The results of the survey of lawyers show that investigation bodies do not create conditions for counsel to access their clients during the investigation stage. Thirty five percent (35%) of counsel said that investigation bodies 'never' 'provided the directory of lawyers in order to arrestees, accused to contact'. Thirty percent (30%) of

[190] Constitution, Article 132.
[191] CPC, Article 11, Article 49, Article 50.
[192] CPC, Article 58.
[193] CPC, Article 57 (Clause 1)
[194] Chinese Criminal Procedure Code (Amendment), 12 March 2012, Article 37

counsel reflected that investigation bodies 'rarely' supported arrestees or accused 'to communicate with relatives to seek for a defence counsel' (see Table 1).

According to these survey results, investigation bodies mainly created favorable conditions for arrestees or accused to access to defence counsel under the form of 'propagandizing them about the right to counsel in compliance with the law', but the frequency of 'sometimes' made up the highest proportion (thirty seven percent (37%). Put another way, the 'propaganda about the right to counsel in compliance with the law' is a compulsory task of judicial bodies, therefore, the frequency of 'usually' should be high. However, approximately seventy percent (70%) of counsel thought that the requirement for this task was not satisfactory. Thus this issue needs to be improved significantly to ensure the enforcement of the law, as well as protecting the rights and interests of arrestees and defendants.

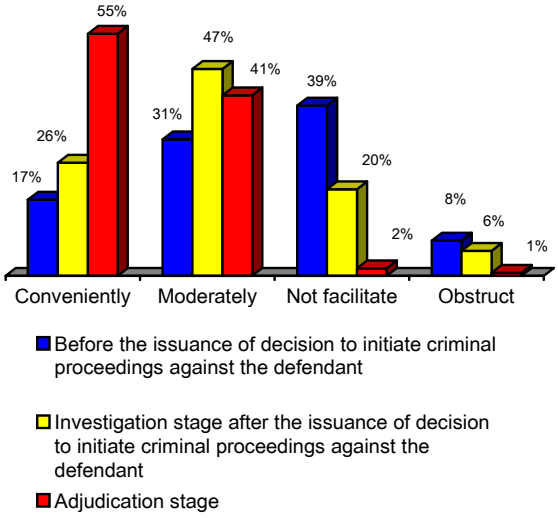
**Table 1: Frequency of creating favorable conditions for arrestees/accused to access defence counsel by investigation bodies**

*(% according to the answers)*

| | Investigation bodies | | | |
|---|---|---|---|---|
| | ***Usually*** | ***Sometimes*** | ***Rarely*** | ***Never*** |
| Propagandizing them about the right to have defence counsel in compliance with the law | 32 | 37 | 12 | 10 |
| Supporting them to contact with relatives to seek for a defence counsel | 6 | 28 | 30 | 18 |
| Providing the list and information of the defence counsel to arrestees, accused to communicate | 6 | 14 | 19 | 35 |
| Requesting the Bar Association to appoint a defence counsel for them | 30 | 35 | 10 | 6 |
| Requesting legal aid bodies to defend them | 12 | 33 | 16 | 16 |

Direct interviews with lawyers also reflected that 'Investigation stage is the most difficult stage for them to perform their defence right' (27/45 counsel had this opinion), 'Investigation bodies only inform the accused that they have the right to ask other person to defend them' (21/45 counsel raised this opinion), 'There is no support from investigation bodies' (14/45 counsel had this opinion), 'Investigation bodies only create favorable conditions in mandatory cases' (5/45 counsel held this opinion).

**Figure 1: Facilitation made by litigation authority for the access to defense counsel**



In two seminars for the research outline and the questionnaire, criminal counsel and criminal experts suggested that in the survey it was better to divide the investigation stage into two sub-stages: (i) Investigation stage before the issuance of decision to institute criminal cases and initiate criminal proceedings against the defendant; and (ii) Investigation stage after the issuance of decision to institute criminal cases and initiate criminal proceedings against the defendant.

*(i) Investigation stage before the issuance of decision to institute criminal cases and initiate criminal proceedings against the defendant*

All interviewed lawyers (45/45) said that they had never been granted a certificate of defence counsel at the investigation stage before the issuance of a decision to institute the criminal case and initiate criminal proceedings against the defendant. When they could meet 'arrestees' this was only the result of 'their personal relationship' and 'the trust of investigation bodies in counsel'. Two counsel complained about investigation bodies because they 'did not create conditions for counsel to meet arrestees'. A lawyer complained against 'illegal custody'. Some counsel revealed that they did not complain because 'their clients wanted to stay away from complication'.

Consider the example, when a person comes to an investigation body under an 'invitation', not a summons, for a cooperative meeting. When meeting the investigation officers, he has to answer questions that have an accusatory tone. He was very nervous. Then he requested access to counsel. Investigation officers refused, saying that this meeting was not a part of criminal proceedings. The officer asked him to cooperate suggesting he might have 'advantages' from this cooperation rather than 'cooperating with counsel'.

Investigators, via interviews, said that they created favorable conditions for counsel to participate if requested. However, investigators also emphasized that this was only 'pure investigation activities' rather than

**Box 1: 15 year-old girl was forced into interrogation then got into a stage of panic**

In March 2007, Huynh Ngoc Tram-a pupil at grade 5 of An Hiep 2 primary school – An Hiep Commune – Chau Thanh District was arrested by her teacher and given to communal police because she was suspected to take 47,800 VND from her class fund. She was forced to confess by the communal police. She was so panicked that she did not dare to go to school after that.

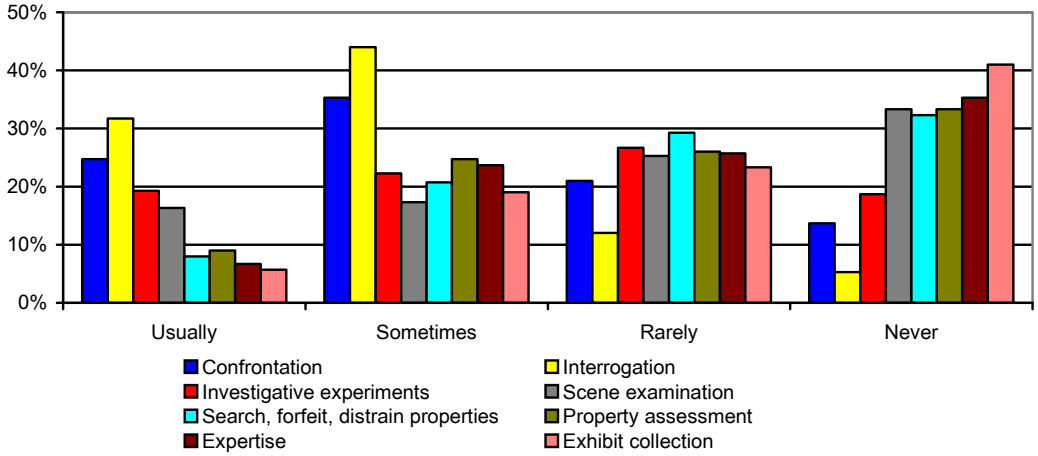
Communal police and some representatives of the communal authorities had investigated and made minutes on the issue with Tram but without her guardian or lawyer as witness.

Tram consistently said that she did not take such an amount of money. But before the pressure of 'the board', Tram 'declared' that she kept 47,800 VND, but 18,800 VND of which she left in her notebook and lost. And regarding the remaining 29,000 VND, she promised to submit to the school.

Leaving the commune police office, Tram was so panic that she had to undergo treatment. Communal police and communal authorities had to compensate Tram 25 million

'proceedings activities' so that lawyers (defence counsel) should not have to participate.

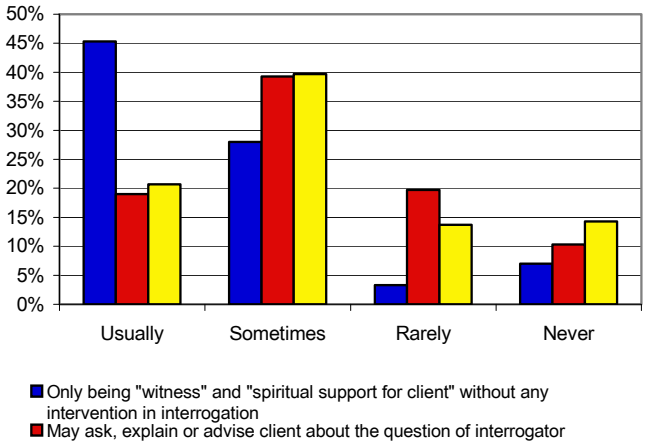
**Figure 2: Investigation bodies create conditions for the defender to participate in investigation activities**




However, the situation that investigation bodies 'abused' the mechanism of 'inviting to work' to 'interrogate' the suspect was considered 'popular' and 'the main method' by twelve (12) out of forty five (45) counsel.[195] As has been publicly mentioned recently, this mechanism has caused the situation of arbitrary arrest, interrogation, or even physical abuse by some investigation (see Annex 1: Statistics of criminal cases). According to some lawyers and jurists, such infringement has most violated citizens' legitimate rights and the presumption of innocence principle.[196] This issue needs to be studied and adjusted in the timely manner by the leaders of judicial bodies.

*(ii) Investigation stage after the issuance of decision to institute criminal cases and initiate criminal proceedings against the defendant*

**Figure 3: The role of defense counsel when participating in interrogation, taking testimonies**




In the investigation stage, after the issuance of a decision to initiate criminal proceedings, the rate of 'investigation bodies creating favorable conditions' is still very restricted compared to that in the trial stage (see Figure 1). Lawyers interviews revealed that

[195] In-depth interview with 12 lawyers and 2 criminal experts had this opinion. This opinion was also raised in the workshop on 'Criminal Procedure Code – Issues need to be amended and supplemented' held by Ha Noi Bar Association on 08 October 2009 in Ha Noi.

[196] Opinions raised at the Seminar '*Right to counsel in Vietnamese Criminal procedures'*, co-organized by Vietnam Lawyer Federation and UNDP in Ho Chi Minh City on 02-03/12/2010, including: Asso. Prof., Ph.D., Lawyer Pham Hong Hai; Ph.D., Lawyer Phan Trung Hoai; and lawyer Bui Quang Nghiem.

investigation bodies at this stage might grant the Certificate of defence counsel to a lawyer, but normally it was granted too late (see Figure 9) and so difficult to defend fully because various procedures had to be done (see Section 2 of Chapter III below). One judge revealed that in order to make difficulties to the defence counsel, the litigation authorities can request a lawyer to have invitations or contract with hand signatures of the defendant or the accused who is being held in custody camp when he/she wants to get a certificate of defence counsel. Without the certificate of defence counsel, the lawyer cannot meet his/her client in the custody camp and obtain the signature.[197]

Counsel who were directly interviewed said that, although they were granted with a Certificate of defence counsel, they still could not directly meet their clients to perform their defence role. Defence counsel was only entitled to meet the defendant in the presence of investigators. If investigators were busy, defence counsel could not access their clients.

At the Seminar 'Right to counsel in Vietnamese Criminal procedures', co-organized by Vietnam Lawyer Federation and the UNDP in Ho Chi Minh City on 02-03/12/2010, some lawyers and judges said that 'lawyers face much difficulty' when conducting their right to defend their clients in the investigation stage. Lawyers, judges, and also prosecutors at the seminar believed that the role of lawyers in the investigation stage is very useful, since it helps to improve the quality of investigation work.[198]

However, compared to other investigation activities such as confrontation, investigative experiments, search, detaining property, expertise, etc., 'interrogating' was the activity that the defence counsel could most easily be allowed to participate in the most easily by investigation bodies (see Figure 2), said by counsel.

Among eight (8) investigation activities surveyed, counsel mainly participated in 'interrogation' and 'confrontation'. However, counsel who were directly interviewed, said that they were only allowed to participate in 'the final interrogation' (the last interrogation to take the last testimonies of all matters which were already declared). At the 'final interrogation', counsel were not allowed to raise questions or advise the defendant, but only witness the defendant re-declare incidents which had already been asked by the investigators. Counsel mainly 'played the role of witnesses and offered spiritual support, without any intervention to the interrogation process'. Some counsel said that they could 'ask, explain or give advice to their clients regarding questions raised by investigators' (see Figure 3). However, if they want to do so they must be allowed by investigators under the provisions of the laws. Many

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[197] Speech made by Judge Pham Cong Hung of the SPC at the Seminar '*Right to counsel in Vietnamese Criminal procedures'*, co-organized by Vietnam Lawyer Federation and UNDP in Ho Chi Minh City on 02-03/12/2010.

[198] They are opinions of Judge Pham Cong Hung of the SPC; Judge Vu Cong Long; Asso. Prof.,Ph.D., Lawyer Pham Hong Hai; Ph.D., Lawyer Phan Trung Hoai, lawyers including Mr. Bui Quang Nghiem, Mr. Tran Cong Ly Tao, Ms. Tran My Thoa, Mr. Ha Duc Lenh, Mr. Pham Quoc Hung, at the Seminar '*Right to counsel in Vietnamese Criminal procedures'*, co-organized by Vietnam Lawyer Federation and UNDP in Ho Chi Minh City on 02-03/12/2010.

counsel revealed that in the majority of cases, they only met their clients in the 'final interrogation'. Thus, the meeting was not much value for their clients. Moreover, the two parties were not allowed to discuss issues with each other before the 'final interrogation'. The proportion of counsel who 'requested investigators to adjust the attitude or content of the question when seeing any 'inappropriateness' was low (twenty one percent (21%) with *'usually'* frequency of and forty percent (40%) with *'sometimes'* frequency) (see Figure 3).

Under the CPC, defence counsel must request investigation bodies to give them notice in advance of the 'time' and 'place' for interrogating the defendant.[199] According to a lawyer, therefore, investigation bodies do not have the responsibility to inform the defence counsel of interrogation if no request has been made. If the notice was sent via post, it was likely that the defence counsel did not receive the notice or it was received after the interrogation had taken place. On the other hand, this provision only requires investigation bodies to advise of the schedule for 'interrogating', rather than about other procedural activities[200]

Counsel are also entitled to participate in 'investigation experiments' but this is very limited. In direct interviews, counsel said that they were only allowed to participate in 'investigative experiments' if they defended cases of a serious nature (normally, in those cases, appointing counsel was obligatory under Article 57 of the CPC).

However, counsel and criminal experts in the two seminars and three counsel in direct interviews said that counsel could not promote their role in investigation activities well. They explained their challenge; '…they could not meet the defendant to understand the case comprehensively according to the viewpoints and testimonies of the defendant – the client who they defended'.

There were five (5) counsel who said that they actively participated in 'collecting exhibits' and 'investigative experiments' of the case as a defence counsel while procedures for granting the Certificate of defence counsel had not been completed. A lawyer thought that 'collecting exhibits' and 'investigative experiments' were very important to avoid the omission of exhibits by the investigation bodies and to gain a further understanding of the nature of the case. When finding relevant exhibits, counsel all sent them to investigation bodies, procuracies or courts. Counsel also affirmed that to undertake these investigations, they and arrestees needed contact with each other.

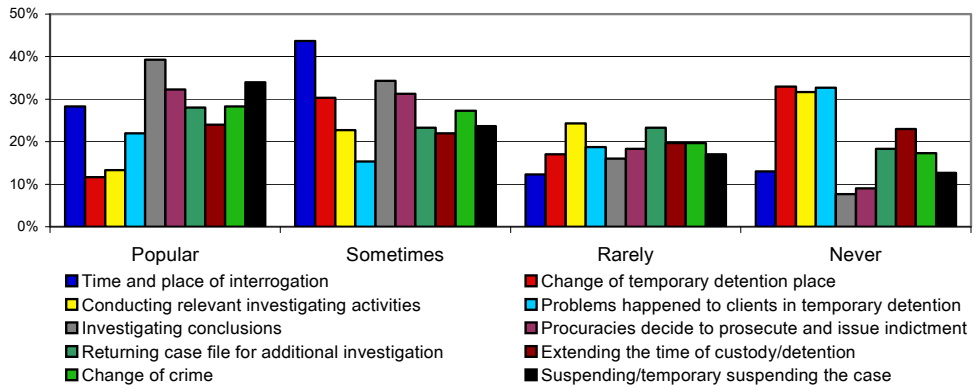
Counsel in group discussions and at the Seminar '*Right to Counsel in Vietnamese Criminal procedures'*, co-organized by Vietnam Lawyer Federation and the UNDP in Ho Chi Minh City on 02-03/12/2010 agreed that the quality of defence would be improved if counsel were given information on the process of investigation, including information on the time of interrogation, change of temporary detention

[199] CPC, Article 58 (2.b)

[200] Speech of Lawyer Vu Cong Dzung – Bao Hien Law Office in the workshop on 'Criminal Procedure Code – Issues need to be amended and supplemented' held by Ha Noi Bar Association on 08 October 2009 in Ha Noi

place, problems that might occur to the clients at temporary detention place, investigating conclusions, and so on (see Figure 4).

**Figure 4: Active notices about the proceedings to defenders by investigating bodies**




An investigation showed that annually Vietnam had about 100,000 criminal cases of all kinds, while there are only about 5,000 lawyers and their practices in various legal areas. Thus, the number of lawyers is not sufficient to participate in all investigation activities. As a result, counsel only participate in important sessions of taking testimonies or important investigation activities.[201] According to a prosecutor, the quantity of specialist criminal lawyers is very few. Thus, when participating in such investigation activities as autopsy, injury examination, etc., some lawyers have neither experience nor fundamental knowledge of these issues. As a result, they cannot constructively participate and do not have good cooperation with the investigation body. Consequently, investigation bodies or procuracies do not continue to invite lawyers to attend such activities.

*b. Prosecuting stage*

Generally, it appears that an accused, or an arrestee, is better able to access counsel during the procuracy stage of proceedings (see Figure 1).

In the two seminars and in some workshops of counsel in relation to criminal procedure,[202] counsel revealed that investigation bodies were in charge of 'case handling' (including investigating, taking testimonies, preparing proofs, etc.) and that they 'worried' when counsel participated in the investigation processes.

[201] Opinion raised by Mr. Dinh Van Hiep, an investigator of the Department of Investigation police on economic management and position crimes – Ministry of Public Security at the workshop on 'Criminal Procedure Code – Issues need to be amended and supplemented' held by Ha Noi Bar Association on 08 October 2009 in Ha Noi. In reality, by 31 December 2009, there were 5,714 lawyers; 2,771 probationary lawyers; 2,420 law-practising organizations, 206 branches of law-practising organizations and 27 lawyers practising as individuals nationwide (source: Ministry of Justice).

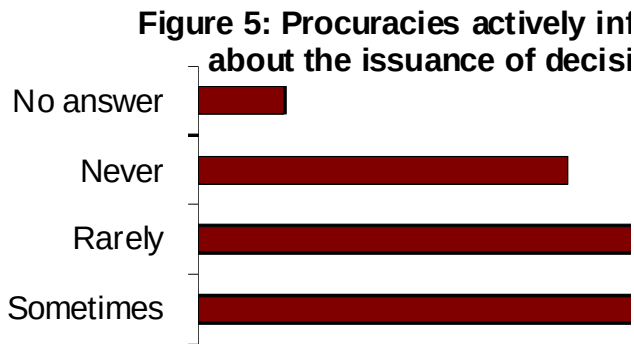
[202] This opinion was also raised in the workshop on 'Criminal Procedure Code – Issues need to be amended and supplemented' held by Ha Noi Bar Association on 08 October 2009 in Ha Noi, the meeting between the Prime Minister Nguyen Tan Dzung and lawyers at the seminar on '*the role of Vietnamese lawyers in judicial reform, building a rule-of-law state, economic development and international integration*' held by Vietnam Bar Federation dated 08 December 2009 in Ha Noi.

Procuracies and courts were responsible for checking and adjudicating so that they 'did not fear for the participation of counsel'. Prosecutors and judges attending the seminars affirmed that they needed counsel to detect violations of case files and of the investigation process. Thus, these two bodies created more favorable conditions for counsel to participate in the proceedings.

**Table 2: Favorable conditions created by procuracies for the accused to access defence counsel** *(% according to the answers)*

| | Procuracies | | | |
|---|---|---|---|---|
| | *Usually* | *Some times* | *Rarely* | *Never* |
| Propagandizing them about the right to have defence counsel in compliance with the law | 29 | 37 | 9 | 11 |
| Supporting them to contact with relatives to seek for a defence counsel | 8 | 27 | 26 | 20 |
| Providing the list and information of the defence counsel to arrestees, accused to communicate | 4 | 18 | 21 | 25 |
| Requesting the Bar Association to appoint a defence counsel for them | 23 | 33 | 15 | 5 |
| Requesting legal aid bodies to defend them | 11 | 31 | 17 | 12 |

However, the survey result in Table 1 and Table 2 shows that procuracies created less favorable conditions for the accused than investigation bodies did, represented by the frequency of 'usually' for five activities listed in the two tables. (See Table 1 and Table 2).




A number of lawyers indicated that the procuracy did the 'propaganda of the right to access counsel under the law' even worse than investigation bodies and courts (see Table 1, Table 2 and Table 3). As mentioned before, this task is compulsory but procuracies do not 'usually' do it. This problem needs to be considered seriously and measures must be set out to guarantee the right to access counsel in accordance with the law.

Lawyers negatively evaluated the activeness of the procuracies in informing defence counsel on the issuance of decision to prosecute (see Figure 5). More than seventy three percent (73%) of counsel indicated that procuracies did not actively inform to counsel of their prosecution decisions. The lateness or inactiveness in performing this task restricted 'the right to counsel' of the defendant once procuracies had decided the defendant was 'guilty'.

Lawyers mentioned in workshops and seminars that they paid a great deal of attention to the Procuracy's Indictments (the decisions by the procuracy to indict) as well as the investigating conclusions of investigation bodies in order to formulate pleadings on behalf of their client. However, only thirty nine percent (39%) of the

questionnaire respondents indicated that the 'investigating conclusions' are 'popularly' given to defence counsel (see Figure 4) and only 22% of respondents said that the 'prosecution decision' is 'popularly' given to defence counsel (see Figure 5).

From our in-depth interviews, 2 investigators said that the investigation body did not have the responsibility to send investigation conclusion to defence counsel, but only to the defendant/accused in accordance with Article 49 of the Criminal Procedure Code. They also admitted that it would be hard for the defendant to pass on the investigation conclusion.

*c. Trial stage*

Courts created *'favorable conditions'* for defence counsel, much more so than other bodies (see Figure 1 above).

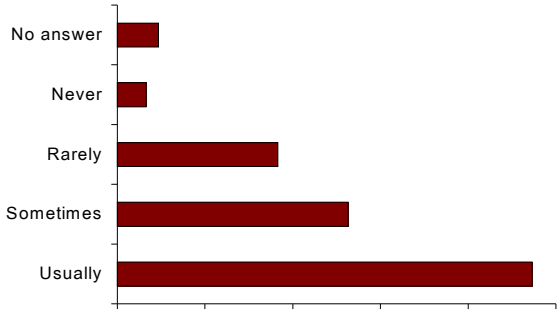
However, court assistance seems most evident in directing an accused to legal aid or the Bar association, rather than directly linking the accused to invited counsel.

**Table 3: Favorable conditions created by courts for Arrestees/defendant/the accused to access counsel**
*(% according to the answers)*

| | **Courts** | | | |
|---|---|---|---|---|
| | ***Usually*** | ***Sometimes*** | ***Rarely*** | ***Never*** |
| Propagandizing them about the right to have defence counsel in compliance with the law | 51 | 26 | 5 | 5 |
| Supporting them to contact with relatives to seek for a defence counsel | 15 | 27 | 14 | 18 |
| Providing the list and information of the defence counsel to arrestees, accused to communicate | 8 | 17 | 17 | 25 |
| Requesting the Bar Association to appoint a defence counsel for them | 44 | 28 | 6 | 3 |
| Requesting legal aid bodies to defend them | 24 | 31 | 10 | 9 |

According to comments made in the interviews, judges would request the Bar Association to appoint a defence counsel regarding cases where the appointment of a counsel was obligatory. This was the case even if the accused already had 'a written refusal' of counsel in the case file. Without this procedure, the case, with no counsel, would be cancelled in compliance with legal provisions. Although courts more often 'usually' followed this procedure, as judged by surveyed counsel, the relevant rate was only 44%.

**Figure 6: People's courts actively inform the defender about the issuance of decision to bring the case to trial**




Similar to the survey result with investigation bodies and procuracies, the proportion of

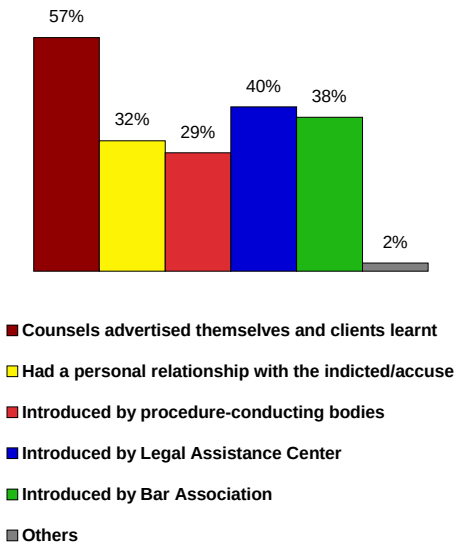
counsel who found that the courts' 'propaganda about the right to access counsel under provision of the law' was 'usually given' was only fifty one percent (51%). Though this is higher than that for the procuracies and investigation bodies, it remains relatively low.

Counsel also indicated that there was low judicial support regarding the 'provision of the list and information on defence counsel for the accused to contact'. Less than ten percent (10%) said it was 'usual'. According to the observations of the Research Team in twenty (20) courts across eight (8) provinces (six (6) courts in Ha Noi particularly), no court had a directory of practicing counsel within the province posted on its bulletin board at the court house. Further, there was no information on the address of the provincial bar association. But most has posted the address of the Legal Aid Centre. Twelve (12) courts studied at this time had basic information on the rights of the defendants to 'invite a counsel'.

In a district court in Ha Noi, the administrative staff know the head office of Ha Noi Bar Association and also had information about some counsel who specialize in criminal law. This person is willing to introduce lawyers to those in need. The administrative staff member in a district court of Ho Chi Minh City knew the head office of Ho Chi Minh City Bar Association, but he refuses to introduce any particular lawyer. The court staff member in Lang Son does not know the head office of the bar association because 'the bar association did not inform them', but she was able to refer people to the Provincial Legal Aid Centre, and had contact phone numbers of some local lawyers.

All surveyed bar associations shared that they had never asked the local provincial court to publish the list of local lawyers. But the management board of all of the 8 bar associations had already sent the directory of their lawyers to the provincial court.

**Figure 7: The accused knows about the defense counsel**




Only 47% of counsel were 'usually' told of a decision to go to trial. This is a very simple procedure to help counsel actively to conduct their defending work. Two judges said that courts usually delivered the decision to bring the case to trial to the defendant or his/her family. Another judge thought that his court usually sent such decisions to counsel, but they may be 'lost' by the post office. Two other judges sent such decisions to counsel through the local bar association.

### 1.4 Sub-conclusions

Provisions of Vietnamese laws do not contain many limits on 'the right to counsel' generally and 'the right to access counsel of choice' particularly.

However, in reality each judicial body has its own interpretation and applies this principle in different ways. Consequently, there is evident 'inconsistency' in action by various judicial bodies. The variations depend, at least, on the stage of the proceeding and which body is responsible. Such inconsistency may result in the failure to guarantee the rights of the people.

As mentioned above, there is insufficient action in propagandizing citizens' right to counsel. This must be seriously considered and proper measures should be taken by judicial bodies to ensure this right of citizens. The dissemination work also needs to take into account the ability of the recipient of this information to act on it.

The right to counsel needs to be ensured at all stages of proceedings. As with the other countries analysed here, the investigation stage is still the most difficulty stage for people to have effective access to counsel. This requires a certain reform in the working manner of investigation bodies, procuracies, management boards of temporary detention or detention camps. These organizations need to balance the interests of state bodies and of citizens and counsel. In addition, sanctions are recommended to obligate investigation bodies and procuracies to comply with the provisions of law on respecting 'the right to a fair trial' of citizens.

To minimize these limitations, the litigation authorities and judicial support bodies need to act practically to inform the community of the role of counsel in protecting citizens' legitimate rights and interests, especially in criminal cases.

## 2. Right to adequate time to prepare for trial, including to consult with counsel

### 2.1 International standards

- Each individual shall have the right to adequate time to prepare for trial, including consulting with counsel.
- The concept of 'adequate time' depends on what the particular case requires in order for counsel to fully communicate with the accused.
- The counsel shall have the right to adjourn the trial to guarantee full communication with the accused.

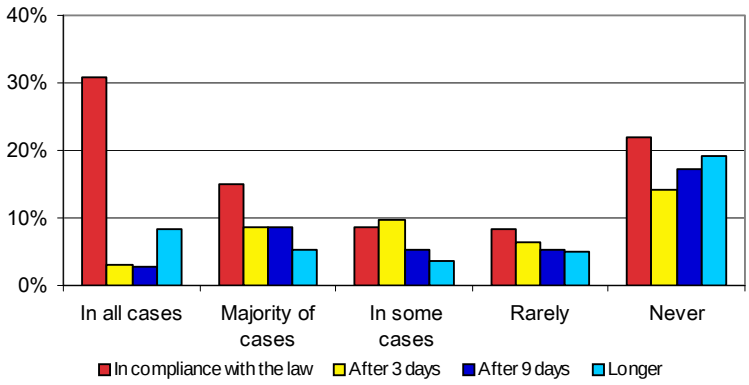
### 2.2 Vietnamese laws

Article 56 of CPC provides that:

- Within three days from the date of receiving the request of the defence counsel enclosed with the papers relating to the defence, the investigation bodies, procuracies and courts must consider and grant the defence counsel's certificate

so that they can carry out the defence. If such bodies refuse to do so, they must specify the reasons.

**Figure 8: The grant of the Certificate of Defender in cases that the prosecuting decision has not been issued**



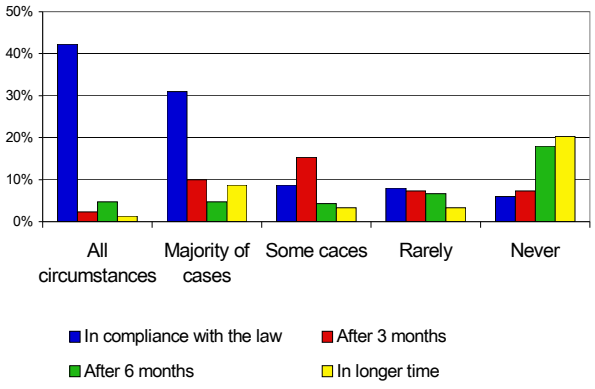

- In case of keeping arrestees, within twenty four (24) hours from the time of receiving the requests of the defence counsel enclosed with the papers relating to the defence, the investigation bodies must consider and grant them the defence counsel's certificates so that they can perform the defence. If refusing to grant such certificates, they must clearly state the reasons.[203]

Article 22 of the Decree No. 89/1998/ND-CP of the Government dated 07 November 1998 promulgating the regulations on temporary custody and detention provides that:

- Arrestees may see their relatives, counsel or other defence counsel, which shall be decided by the body(ies) taking their cases. Heads of temporary custody houses and supervisors of detention houses shall decide the duration of meetings which shall not exceed one hour for each time of seeing. Temporary custody and detention houses shall arrange visiting rooms in the area of their control for arrestees and detainees to see their relatives, if they are so permitted. Counsel or other defence counsel shall see persons in temporary custody or detention as prescribed by law in office rooms of the temporary custody or detention houses.[204]

## 2.3 Vietnamese practices

**Figure 9: The grant of the Certificate of defender after the issuance of the decision on initiating the case**




Vietnamese law does not mention a time-limit for litigation authorities to set for meetings between the accused and his/her counsel. As mentioned above, provisions of the laws only set out the period within which litigation authorities have

[203] CPC, Article 56.
[204] Decree No. 89/1998/ND-CP of the Government dated 07 November 1998 promulgating the regulations on temporary custody and detention, Article 22.

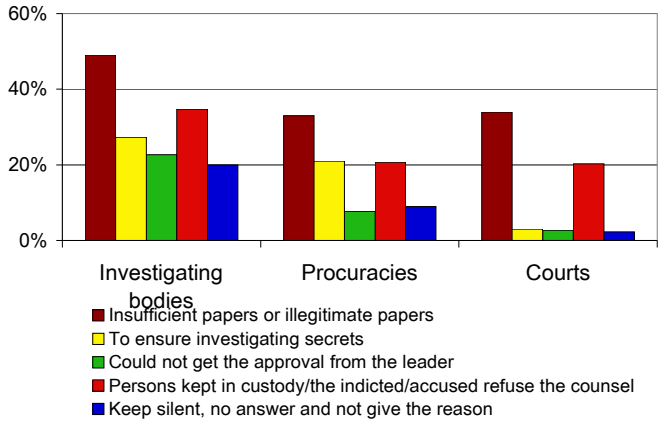
to grant the Certificate of defence counsel. This results in two scenarios: (i) litigation authorities create conditions for arrestees and defendants to communicate with lawyers to choose their defence counsel and the Certificate of defence counsel shall be granted within the statutory time-limit; (ii) litigation authorities do not create conditions for arrestees or accused to communicate with counsel even where such bodies do not violate the procedural provisions as the Certificate of defence counsel is granted within the statutory time-limit.

In the first scenario, as already noted, the litigation authorities do not facilitate communication between arrestees or defendant and lawyers, as analyzed in Part 1 of this Chapter.

In the second scenario, and as already noted, Vietnamese laws do not stipulate a time-limit for interview between counsel and his/her client after he/she is granted a Certificate of defence counsel. The laws do not oblige litigation authorities to create conditions for counsel to communicate with clients after the grant of the Certificate of defence counsel.

Counsel and criminal experts in the two seminars setting up the outline of research and questionnaire revealed that litigation authorities did not refuse the participation of the counsel publicly. The refusal, which is contrary to the law, may lead to the cancellation of the whole proceedings by the subsequent judicial level or through an appeal.

**Figure 10: Reasons why procedure-conducting bodies refuse to grant the Certificate of defense counsel**




When the Criminal Procedure Code was promulgated in 2003, numerous counsel reflected that litigation authorities caused difficulties in the grant of the Certificate of defence counsel.[205] However, by the time this survey was conducted, it seemed that the grant of the Certificate of defence counsel was no longer a 'crucial problem' as in the past; but it was still a matter of complaint by counsel.[206] Forty two percent (42%) of counsel

[205] Opinions of various Ha Noi lawyers raised in the workshop on *'Lawyers' activities in the process of handling criminal cases'* of Ha Noi Bar Association dated 06 October 2007.

[206] Opinions of various Ha Noi lawyers raised in the workshop on 'Criminal Procedure Code – Issues to be amended and supplemented' held by Ha Noi Bar Association on 08/10/2009 in Ha Noi; the meeting between Prime Minister Nguyen Tan Dzung with lawyers at the workshop*'The role of Vietnamese lawyers in judicial reform, construction of the rule-of-law state, economic development and international integration'* chaired by Vietnam Lawyer Federation on 08/12/2009 in Ha Noi; and the Seminar *'Right to counsel in Vietnamese criminal procedures'*, co-organized by by Vietnam Lawyer Federation and UNDP in Ho Chi Minh City on 02-03/12/2010.

said that they were granted a Certificate of defence counsel in accordance with the law in 'all cases' and thirty one percent (31%) were granted with such a certificate for a 'majority of cases'. Thus, up to seventy three percent (73%) of counsel thought that they were granted with the certificate of defence counsel 'in compliance with the law'.

While the total cases which were 'not in compliance with provisions of the law' were still significant (all cases: 8.3%, majority cases: 23.4%, some cases: 22.9% and rarely: 17.3%, see Figure 9), the proportion of counsel who said that they were granted a Certificate of defence counsel in accordance with 'provisions of the law' made up the highest proportion in all cases. Regarding cases where a decision to initiate the prosecution was already issued (Figure 9), thirty five percent (35%) of counsel revealed that they were granted with a Certificate of defence counsel within three months and more than twenty percent (20%) of counsel said that they were granted a Certificate of defence counsel within six months, while seventeen percent (17%) of counsel thought that it took them longer to be granted a Certificate of defence counsel. Regarding arrestees detained while the decision whether to initiate a prosecution was determined, twenty eight percent (28%) of counsel said that they were granted with the Certificate of defence counsel after three days and twenty two percent (22%) were only granted with a Certificate of defence counsel after nine days, while twenty two percent (22%) were granted a Certificate over a longer period (see Figure 8).

Those interviewed said that judicial personnel had numerous ways to restrict the participation of counsel . The two main strategies were (i) prolonging the procedure for granting the Certificate of defence counsel; and (ii) advising the arrestees not to employ counsel or to refuse counsel.

*(i) Prolonging the procedure for granting the Certificate of defence counsel*

As mentioned in practice, and in the analysis in Part 1 of Chapter III, the defence counsel who want to participate in proceedings must be granted with a Certificate of defence counsel. All counsel interviewed (45) and those who attended the seminars said that obtaining a Certificate of defence counsel was most difficult in the investigation stage. This issue was also confirmed by survey results (see Figure 10). Litigation authorities raised many reasons for lengthening the time for granting or refusing a Certificate of defence counsel, such as: necessity of protecting the investigation as secret, lacking proper documents in the application dossier for the grant of the Certificate of defence, disapproval by the 'head' of such litigation body, or the arrestees/the accused refusing counsel.

The majority of counsel thought that litigation authorities relied upon 'insufficient… documents or illegitimate documents' to refuse the grant of a Certificate of defence counsel or to temporarily delay the grant of the Certificate of defence. The second most common reason for delaying or refusing a Certificate of defense counsel was that 'arrestees/the accused refused counsel' (see Figure 10). The third most common reason for not granting a Certificate was risking the secrecy of the investigation.

Interviewed counsel and those who took part in the seminars indicated that reliance being placed on ' insufficient papers or illegitimate papers' was popular because the provisions on 'relevant papers'[207] were not clear and coherent. Under the Law on Lawyers, counsel must present at least three (3) papers: their lawyer card; a written request by the future client for a lawyer and a letter of introduction from a law-practicing organization or bar association or the agency or organization where the lawyer practices law.[208] In accordance with the Law on Legal Aid, if a counsel is appointed by the legal aid centre, that centre is also required to produce the decision on appointment of the lawyer of the legal aid centre.[209] However, the CPC stipulates that counsel in mandatory cases must be appointed by the association or introduced by the Fatherland Front[210].

Some litigation authorities required these papers in different ways. For example, some stipulated the need to present a legal service contract while others accepted a written request for a lawyer. Some bodies requested more papers, such as financial documents, to prove that the client had employed counsel. In particular, many investigation bodies requested counsel to present a written request for a lawyer made by the arrestees or detainees, as mentioned above. Concurrently, counsel were not allowed to directly meet their client in temporary detention houses.

These technical conditions have restricted the possibility of communication between the counsel and their clients. This undermines the guarantee of a right to counsel of citizens. Tables 4 and 5 present what paperwork counsel have discovered is required for the grant of a Certificate of defence counsel.

**Table 4: Required papers to be submitted for the grant of the Certificate of defence counsel in normal cases** *(% according to the answers)*

| | Original | | | | Copy | | | |
|---|---|---|---|---|---|---|---|---|
| | ***Usually*** | ***Some times*** | ***Rarely*** | ***Never*** | ***Usually*** | ***Some-times*** | ***Rarely*** | ***Never*** |
| Lawyer's card | 37 | 11 | 4 | 8 | 64 | 8 | 3 | |
| Introduction paper of the bar association | 25 | 15 | 3 | 10 | 21 | 6 | 2 | 12 |
| Introduction paper of the law-practicing organization | 54 | 6 | 2 | 2 | 29 | 7 | 3 | 8 |
| Written request for a defence counsel of arrestees/defendant/the accused or their family | 62 | 8 | 3 | 1 | 27 | 8 | 4 | 7 |
| Legal service contract | 16 | 19 | 9 | 14 | 10 | 23 | 3 | 14 |

[207] CPC, Article 56, Clause 2.
[208] Law on Lawyers, Article 27, Clause 2.
[209] Inter-circular of Ministry of Justice – Ministry of Public Security – Ministry of National Defence– Ministry of Finance – Supreme People's Procuracy – Supreme People's Court No. 10/2007/TTLT-BTP-BCA-BQP-VKSNDTC-TANDTC dated 28 December 2007 guiding the application of a number of provisions on legal aid in legal proceedings.
[210] CPC, Article 57, Clause 2.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Vouchers of payment of service fee under the legal service contract | 5 | 10 | 10 | 22 | 3 | 13 | 7 | 19 |
| Law practice certificate | 24 | 19 | 7 | 7 | 41 | 12 | 2 | 2 |

**Table 5: Required papers to be submitted for the grant of the Certificate of defence counsel in mandatory cases** *(% according to the answers)*

| | **Original** | | | | **Copy** | | | |
|---|---|---|---|---|---|---|---|---|
| | ***Usually*** | ***Somet imes*** | ***Rarely*** | ***Never*** | ***Usually*** | ***Somet imes*** | ***Rarely*** | ***Never*** |
| Lawyer's card | 32 | 13 | 5 | 7 | 62 | 4 | 1 | |
| Introduction paper of the bar association | 36 | 8 | 4 | 8 | 24 | 6 | 3 | 12 |
| Confirmation document for the appointment of defence counsel | 43 | 13 | 3 | 5 | 31 | 7 | 4 | 4 |
| Introduction letter of the Fatherland Front for people's advocate | 17 | 6 | 6 | 6 | 11 | 6 | 3 | 7 |
| Law practice certificate | 20 | 10 | 7 | 8 | 45 | 9 | 4 | 2 |

the lack of definition of 'relevant papers'[211], means some litigation authorities prolong the time for granting a Certificate of defence counsel or refuse to grant such a certificate, giving the reason 'insufficient papers or illegitimate papers' as indicated by the interviewed counsel and those who took part in the seminars.

*(ii) Advising arrestees, and the accused, not to employ counsel or refuse counsel:*

As mentioned above, some investigation bodies request that counsel have 'the written request for a lawyer' from arrestees, and also from an accused. Failing the provision of such a request, litigation authorities delay the participation of counsel. According to some counsel, litigation authorised officers normally informed counsel that they would support them. More particularly they offered to assist to take the written request for a lawyer from those detained when they had an interrogating session at the temporary detention camp. But the response of arrestees was normally 'refusing the counsel'. In the two seminars with counsel, during the field interviews, and in some workshops related to lawyers' problems in criminal proceedings,[212] the Research Team learnt from counsel that it was often suggested to arrestees and the accused that they should not 'use a lawyer'. Futher, it was suggested that arrestees were told that 'if they use counsel, the crime might be more serious because this is the expression of insincerity'' (see Table 6). In the case of 'Prostitution with pupils in Ha Giang Province'' investigators 'advised' arrestees not to use counsel because

[211] See footnote 187.

[212] Opinions of Ha Noi lawyers in the workshop 'Criminal Procedure Code – issues to be amended and supplemented' held by Ha Noi Bar Association on 08/10/2009, in Ha Noi; the meeting between Prime Minister Nguyen Tan Dzung with lawyers at the seminar *'the role of Vietnamese lawyers in judicial reform, construction of the rule-of-law state, economic development and international integration'* held by Vietnam Bar Federation on 08/12/2009, Ha Noi; the workshop *'The right to counsel in Vietnamese criminal procedures'*, co-organized by Vietnam Bar Federation and UNDP in Ho Chi Minh City on 02-03/12/2010

counsel only aimed to 'polish…their prestige' and 'the more testimonies they declared to their hired counsel, the more serious their crime was'.[213] Twenty four percent (24%) of counsel admitted that the reason detained persons refused counsel and wanted to represent themselves was due to a 'third person' suggesting they not use. If this is a popular occurence or at least 'regular, it seriously threatens the right to counsel of the citizens.

It was most common for investigation bodies at the district level to prevent detained persons (whether charged or not) from seeking support of the counsel. The investigation bodies at provincial level were the next least likely to support use of counsel. Investigation bodies at central level were the most likely to enable use of counsel, although the rate remains low (see Table 6).

As mentioned above, some counsel said that the main current concern for counsel was how to communicate with their client when they had a Certificate of defence counsel. This depended heavily on investigators, the interrogating schedule and so on.

[213] *'Mac du CSDT co tinh bung bit, luat su van kien quyet loi nhung ke doi bai o Ha Giang ra anh sang' (although the investigating bodies intentionally suppressed the case, lawyers were still determined to pull out the depraved in Ha Giang Province to the light),* Bao Nguoi Cao Tuoi (Newspaper for the old aged), 27/07/2010, *http://www.baomoi.com/Home/PhapLuat/nguoicaotuoi.org.vn/Mac-du-CSDT-co-tinh-bung-bit-luat-su-van-kien-quyet-loi-nhung-ke-doi-bai-o-Ha-Giang-ra-anh-sang/4614699.epi; 'Uan khuc nu sinh vu hieu truong mua dam tu choi luat su' (Mystery of the refusal of counsel by the female pupil in the case: the principal prostituted with his female pupils)*, VTV News, *http://vtc.vn/2-253594/xa-hoi/uan-khuc-nu-sinh-vu-hieu-truong-mua-dam-tu-choi-luat-su.htm*

**Table 6: Some popular preventative measures used by investigation bodies against seeking for the support of counsel by arrestees/defendant/the accused**

*(% according to the answers)*

| | **Investigation bodies at district level** | | | | **Investigation bodies at provincial level** | | | | **Investigation bodies at central level** | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | *Usually* | *Sometimes* | *Rarely* | *Never* | *Usually* | *Sometimes* | *Rarely* | *Never* | *Usually* | *Sometimes* | *Rarely* | *Never* |
| Carrying out the search/interrogation immediately without asking/explaining arrestees/defendant/the accused about the right to use a defence counsel. | **42** | 27 | 15 | 7 | **27** | 37 | 16 | *6* | **23** | 25 | 15 | 12 |
| When arrestees/defendant/the accused requested a defence counsel, they were advised 'no need' or 'should not'. | **42** | 28 | 7 | 13 | **35** | 29 | 14 | 10 | **26** | 21 | 11 | 13 |
| Arrestees/defendant/the accused requested support in seeking for a defence counsel but being refused publicly. | **33** | 29 | 10 | 11 | **25** | 31 | 14 | 12 | **0** | 19 | 15 | 14 |

**<u>Box 2:</u> Only allowed to meet arrestees, detention for one hour.**

Interviewed counsel and those who participated in the two seminars also noted that meetings with arrestees or temporary detainees in the detention camp or the custody camp of *only one hour* was too short. They noted it was insufficient time for counsel to thoroughly study the case with their clients. Temporary detention houses were normally far away from residential areas, so it was difficult for counsel to go back and forth to see arrestees or temporary detainees. Furthermore, each 'time of seeing' must be 'agreed' by the 'heads' of the detention houses in compliance with provisions of the law.[214] This mechanism depended on the subjective will of 'the managing officers of detention houses' and also meant that managing officers of detention houses had to be present in order to gain access.

### 2.4. Sub-conclusions

As in China and Japan, provisions of Vietnamese laws do not mention a time-limit or guarantee of time that defence counsel can have with their clients. This needs thorough study to ensure that the rights of the defendant/accused are not

[214] Decree No. 89/1998/ND-CP of the Government dated 07 November 1998 promulgating the regulations on temporary custody and detention, Article 22.

compromised, to ensure that objectiveness in the investigation work and to assist with preventing and fighting against crime. There needs to be visitation time guaranteed. Further, the law needs to provide that a grant of the Certificate of defence counsel is made sufficiently in advance of the trial to prepare for the defence. Current practices suggests that the law needs to be clear, specific and impose sanctions on those intentionally obstructing the communication of arrestees, the defendant/accused with their counsel.

However, the procedures and time-limit for granting a Certificate of defence counsel remains as matters which need to be improved to create favorable conditions for counsel to carry out their defence.

**3. Right to confidential communication with counsel**

**3.1 International standards**

As noted above international law requires:

- Confidential communication between the counsel and client should be conducted 'within the condition of absolute respect for the confidentiality of their exchange'.[215]

**3.2 Vietnamese laws**

In compliance with provisions of the Criminal Procedure Code, the defence counsel shall have the following rights:

- To be present when testimonies are taken from the arrestees or when the defendant is interrogated, and to ask questions to the arrestees or the defendant if so consented by investigators; and to be present in other investigation activities; to read the minutes of the proceedings in which they have participated and procedural decisions related to the persons whom they defend;[216]

- To request investigation bodies to inform them in advance of the time and places of interrogation so as to be present when the defendant is interrogated;[217]

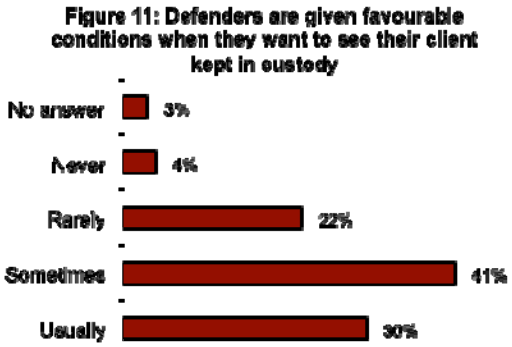
- To meet the arrestees, the defendant or accused being under temporary detention.[218]

Thus, we see that Vietnamese laws do not stipulate clearly that counsel have the right to personally communicate with arrestees or the accused.

[215] Ditto, paragraph 34.
[216] Article 58 Clause 2, paragraph a, CPC
[217] Article 58 Clause 2, paragraph b, CPC
[218] Article 58 Clause 2, paragraph e, CPC

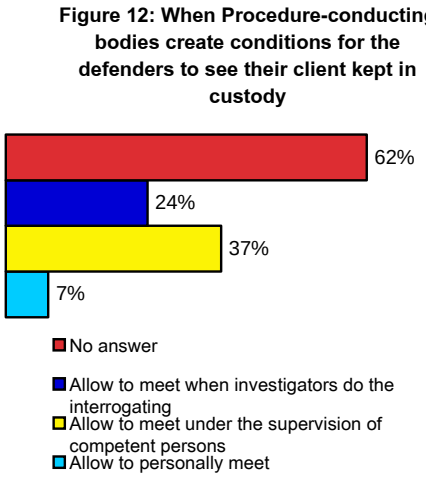
Unless it is agreed by clients in writing or otherwise provided for by law, counsel may not disclose information on cases, affairs or clients they know in the course of professional practice. Counsel may not use information on cases, affairs or clients they know in professional practice for the purpose of infringing upon the State's interests, public interests or legitimate rights and interests of agencies, organizations or individuals.[219]

Organizations and individuals who conduct legal aid are banned from 'disclosing information, secrets about the case under legal aid or about the person receiving legal aid, unless otherwise agreed by the person receiving legal aid in writing or unless otherwise provided for by laws.'[220] Persons receiving legal aid have the right to request confidentiality.[221]




### 3.3 Vietnamese practices

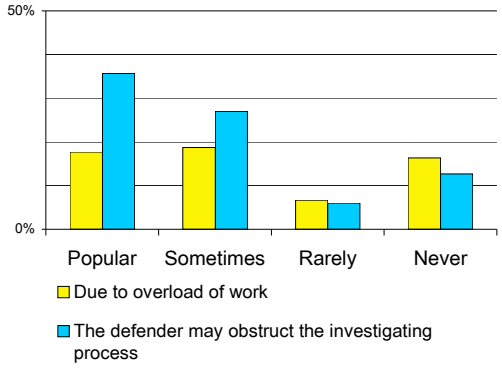
As mentioned above, forty one percent (41%) of the counsel surveyed indicated that they were only 'sometimes' allowed to meet their clients in detention camps. 30 % of counsel also noted that they usually received favourable conditions when they wanted to meet their clients (see Figure 11).




Some of the interviewed counsel revealed that they normally had to use a 'personal relationship' to meet their clients. Twelve out of the forty five (12/45) counsel interviewed indicated that they were only allowed to meet their clients when the investigation activities ended and case files were transferred to the procuracies. During the investigation stage, due to the restrictive interpretation of the laws mentioned above, some counsel did not want to meet their client. According to these counsel, meeting clients in this stage did not help their client, except in cases where their client or client's family wanted the counsel to meet. Some counsel even reflected that some investigators usually 'took advantages of' the presence of counsel to 'request counsel to sign up for some testimonies' or 're-interrogated the defendant in the presence of counsel' to consolidate the investigation file.

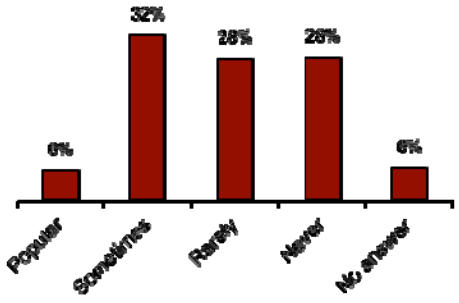
[219] Law on Lawyers, Article 25.
[220] Law on Legal Aid, Article 9.
[221] Law on Legal Aid, Article 11.

**Figure 13: Reasons why procedure-conducting bodies do not create conditions for defenders to see their client kept in custody**




Some counsel reported not only was it hard to meet the client, private meetings were harder to achieve. Sixty two percent (62%) of counsel did not answer the additional question 'how do litigation authorities create favorable conditions for counsel to meet their client?' Twenty two percent (22%) of counsel indicated that they were only allowed to meet when the 'investigators carry out the interrogation' and thirty seven percent (37%) of them were only allowed to meet 'under the supervision of competent persons'. Only seven percent (7%) of counsel said that they were allowed to have a private meeting with the defendant/accused in temporary detention camp (Figure 12). Counsel indicated that judicial persons (investigators, prosecutors, judges) gave various reasons to refuse counsel a meeting with clients, together with judicial agencies in the 'interrogation sessions'. Their two main reasons were 'overload of work' (precluding going to the detention houses together with counsel) and 'counsel may obstruct the investigation process' (see Figure 13). During in-depth interviews, lawyers advised the Research team that, litigation authorised officers thought they may obstruct the investigation process by seeing the accused, including: 'collusion, transfer of criminal information outside, disclosure of investigating secrets, advising the accused not to cooperate with investigation bodies, changing testimonies, bringing illegal items inside/outside the detention house'.

**Figure 14: Procedure-conducting bodies request counsel to provide information about the client and the case**




When the case files were transferred to procuracies or courts, it might be easier for counsel to meet the accused than it was at the investigation stage, but normally under the supervision of the staff of detention camps; no private meeting was permitted. Detention camp staff suggested some reasons why they needed to supervise meetings between counsel and client, including: they were afraid the accused may attack counsel; and counsel may give the accused items which were not allowed in detention camps. In addition, the detention camp staff advised that the physical facilities of the detention camps currently do not ensure counsel's safety.

In seminars with counsel when formulating the Research outline and Questionnaires, some reflected that in practice, some counsel were requested by investigation bodies to 'cooperate' or 'support' the investigation. Some others said that some litigation

authorised officers considered counsel as either a relevant witness or a person there 'to support their client spiritually, without a role to protect the client during the process of interrogation' (these opinions are surveyed, see Figure 3). Lawyers in interviews advised that, when counsel is granted permission by the investigation body to meet his/her client in the camps, he/she may only 'ask the client to explain, or advise the client on the questions posed by the interrogators'. The lawyers interviewed also emphasized that they could only 'request investigators to adjust their attitude or the content of their questions where they were not appropriate'. It should be noted that the number of answers from the in-depth interviews where counsel said they could assist in this way was low because often counsel could not privately meet or discuss issues with his/her client.

From in-depth interviews, some lawyers exposed that investigation bodies will create favourable conditions for the counsel who 'cooperate' or 'share other interests' with the investigators in order to meet their client. These circumstances were not considered 'popular' but for 'sometimes' with high responses (see Figure 13). If summarizing three frequencies of *'rarely'*, *'sometimes'* and *'popular'*, the total can be seen that sixty six percent (66%) of responses have ever met these circumstances.

**3.4 Sub-conclusions**

Provisions of substantive law and proceedings in practice have not currently guaranteed the right to private (confidential) communication with counsel. Meanwhile, in countries with developed legal system such as Germany and Australia, this right is respected. This issue needs further study with a view to supplementing Vietnamese criminal procedure regulations in this respect.

To ensure the right to private/confidential communication between the defence counsel and the accused/detained in detention camps, it is necessary to develop the applicable measures, such as changes of regulations against this right, disseminating understanding of such a right and improve facilities for detention camps so counsel can meet safely and easily their clients.

**4. The right to counsel funded by legal aid**

**4.1. International standards**

The right to counsel funded by legal aid exists at international law when (i) the accused is poor; and (ii) the participation of the counsel is required in the interest of justice in the event of a serious crime being alleged, a complicated crime being alleged or where an accused may be deprived of the right to freedom .

Where counsel are appointed, that counsel will be provided by legal aid, but those persons do not have an absolute right to choose counsel.

**4.2 Vietnamese laws**

International standards require the provision of counsel for an accused in two circumstances (poor or facing such a serious charge that justice will be risked if the defendant does not have counsel). In Vietnam we see that there is also the intention to supply lawyers to those who cannot afford them

(i) Where persons are arrested or charged under Article 57 clause 2 of the CPC,[222] litigation authorities must 'request bar associations to assign counsel's offices to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organizations to appoint defence counsel for their organizations' members'.[223] Litigation authorities shall cover the fee for the counsel in this case. The person receiving the defence does not have to pay any further fees and does not have to undertake any administrative procedures to have counsel. The accused or detained person has the right to refuse and change the appointed counsel.

(ii) In the event that the person in need of counsel does not belong to the aforementioned subjects but is 'poor, a person who had contributed to the revolution, a lonely elderly person, handicapped and homeless children and or an ethnic minority who has a permanent residence in areas with exceptionally difficult socio-economic conditions'[224] legal aid bodies shall assign and pay fees for the counsel.

The laws enable legal aid consultants/legal aid collaborating lawyers to perform all rights and obligations of counsel, including acting as a representative, and as the protector of legitimate rights and interests in criminal cases when participating in the proceedings.[225]

The Law on Legal Aid stipulates that persons entitled to legal aid have the right to choose their legal aid person; and to request to change the legal aid person when the person falls into one of the following cases:[226]

- 'The person who performed or has been performing legal aid for person's entitled to legal aid is a party with a contradictory interest in the same case,

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[222] CPC, Article 57 (2) stipulates: 'In the following cases, if the accused, defendants or their lawful representatives do not seek the assistance of defence counsel, the investigating bodies, procuracies or courts must request bar associations to assign law offices to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organizations to appoint defence counsel for their organizations' members:

- The indicted or accused charged with offenses punishable by death as the highest penalty as prescribed by the Penal Code;
- The indicted or accused being minors or persons with physical or mental defects.'

[223] CPC, Article 57 (1).

[224] Article 10, Law on Legal Aid

[225] Article 29, Law on Legal Aid, Part III (c), Joint circular of the Ministry of Justice, Ministry of Public Security, Ministry of National Denfence, Ministry of Finance, Supreme People's Procuracy and Supreme People's Court No. 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC dated 28 December 2007 guiding the application of a number of provisions on Legal Aid in the proceedings.

[226] Law on Legal Aid, Article 11

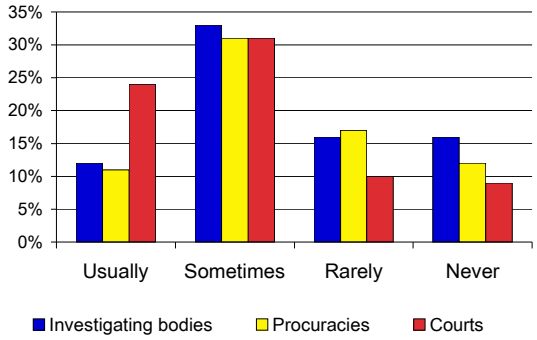
except where that prior involvement was for the provision of mediation services and or legal consultant services;

- This person has legitimate rights and interests or has relatives involved in the case;
- This person has previously been involved in the case;
- There are other grounds that such person may be not be objective in performing legal aid.[227]

### 4.3. Vietnamese practices

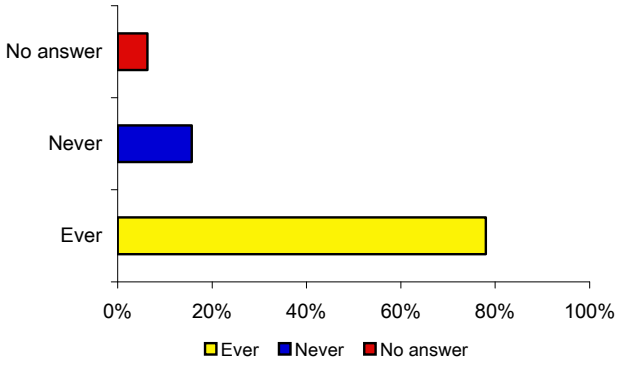
The questionnaire survey showed an encouraging result in as much as the detained or accused knew about counsel: 'thanks to counsel's self advertisement (main cause) and the introduction of legal aid centres'. (Figure 7). This result suggests one of two things; either (i) the operation of legal aid centres has provoked people's trust; or (ii) many counsel have participated in legal aid activities.

**Figure 15: Procedure-conducting bodies create favourable conditions to have a defender via legal aid**




According to Table 1, Table 2 and Table 3, litigation authorities created more favorable conditions for arrestees, the defendant or accused to have counsel when they were invited via legal aid bodies, even though such facilitation was still at a low level. Courts remained the body which created the most favorable condition for legal aid lawyers when compared with investigation bodies and procuracies (see Figure 15).

**Figure 16: Number of lawyers participating in legal aid in criminal cases**




Criminal lawyers are more often involved in legal aid activities than the others (see Figure 7 and Figure 16) for several reasons, such as: 'to access to clients', 'to make or reinforce the personal relationship with judicial persons', 'to acquire more practical experience', 'to acquire

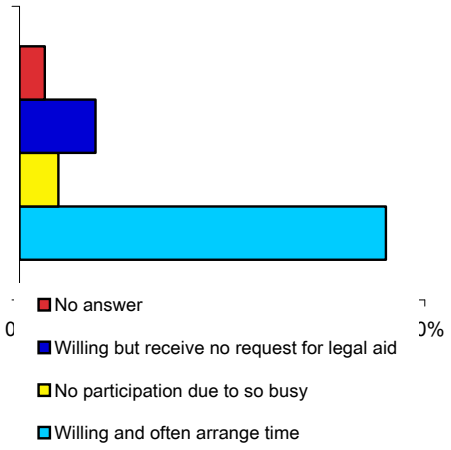
[227] Law on Legal Aid, Article 45(2).

experience in defence of big cases and cases which draw much public attention' or 'to show their professional skills.[228]

According to statistics of the Department of Legal Aid (Cuc Tro giup phap ly) – Ministry of Justice by the end of 2009, there were 63 legal aid centres nationwide with 117 branches of those centres, 365 legal aid teams and 4,005 legal aid clubs. There were 746 staff working for those legal aid centres, in which 206 staff were appointed to be legal aid consultants by the Provincial People's Committees. There were more than 150 law offices nationwide and 60 out of 85 legal consultancy centres registered to participate in legal aid activities.[229] However, as an analysis of the Legal Aid Department, the legal aid activities for criminal cases is still modest in comparison to other legal aid activities.[230]

In contrast to the Legal Aid Department's analysis, the survey (see Figure 17) shows that almost 80% of lawyers said they were willing to support legal aid activities in criminal cases. This information raises several questions: if lawyers are "ready" to support legal aid work, why is the participation in legal aid in criminal cases modest? Is the low participation rate because conditions for getting legal aid are too difficult for people or because the people did not know about legal aid activities?

**Figure 17: Willingness of counsel to participate in legal aid in criminal cases**




Studying the legislation on legal aid to answer these questions found that there were not many people entitled to legal aid[231] and conditions for people accessing legal aid services are still complicated. To obtain legal aid, people have to submit one of the following papers:

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[228] Those reasons were collected from the in-depth interviews in different localities, some lawyers noted in the questionnaires and see further the Report on '*Appointed counsel in criminal laws and practices in Vietnam*', Vietnam Lawyers' Association – UNDP. The Research Team is also assigned to do the research on '*Appointed counsel in criminal laws and practices in Vietnam*'. This Research is in forth coming.

[229] '*Nam 2009: He thong tro giup phap ly ca nuoc tiep tuc duoc cung co, kien toan' (in 2009: legal support system continued to be consolidated and strengthened nationwide),* Bao dien tu Dang cong san Viet Nam (Communist Party of Vietnam Online Newspaper) dated 29 December 2009, *http://cpv.org.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30089&cn_id=380132#WQu4UEWZXHtd*

[230] According to statistics of the Department of Legal Aid – Ministry of Justice, up to 30/11/2009, legal aid centers in the whole country have provided legal aid for 101,913 cases, increased by 9.4 in comparison with 2008; among which, they provided advice in 87,447 cases, represented their clients in 1.005 cases, defended in 4,484 cases (accounting for 4,4%), provided non-proceeding representation in 1,190 cases, and other form in 823 cases.

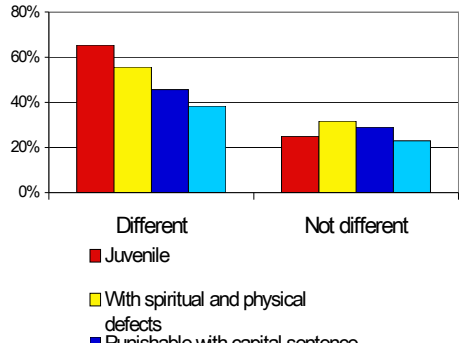
[231] Subjects entitled to receive legal aid are stipulated in Article 10 of the Law on Legal Aid, including: (i) the poor, (ii) person who had contributions to the revolution, (iii) lonely elderly, handicraps and homeless children, (iv) ethnic minorities who have permament residence in areas with exceptionally difficult socio-economic conditions. Decision of the Government No. 07/2007/ND-CP dated 12 January 2007 providing in details and guiding the implementation of a number of articles of the Law on Legal Aid explaining clearly the scope of the above mentioned subjects and adding more subjects entitled to

(i) custody decisions; decisions to initiate criminal proceedings against the defendant; summonses to take testimonies; conclusions of the investigation; indictment; decision to bring the case for trial; judgment, decision of the court which does not come into effect or other papers proving the case being handled by litigation authorities in which it was shown that the person seeking aid was kept in custody, accused, a victim, a civil plaintiff, a civil defendant or a person with related rights and obligations in that criminal case[232]; and

(ii) papers to prove that the person in need of legal aid falls into the category of subjects entitled to legal aid, for example, the poor must have original or copy of the Book of poor household.[233]

Theoretically it is difficult for arrestees to have counsel via legal aid from the beginning, for example from the interrogating session (in investigation stage). This is the case because some administrative procedures must be completed to acquire the necessary papers, mentioned above. Moreover, investigation bodies do not give these papers to the accused/detained person's family, but only to arrestees. Consequently their family and those detained cannot access legal aid centres to request their assistance.[234] According to an inter-ministerial guideline of the Ministry of Justice, Ministry of Public Security, Ministry of National Denfence, Ministry of Finance, SPP and SPC, arresting bodies are responsible for guiding the arrestee or their relatives to contact the legal aid centres, or branches of such centres in the area where the case is being handled. Arresting bodies are also supposed to assist with the necessary paperwork. Superintendence boards are also responsible for guiding those detained to the right people.[235]

**Figure 18: The grant of the Certificate of defense counsel in the following cases which differ from normal cases**




The law also stipulate that where arrestees, defendants or the accused are persons with physical or mental defects, minors or persons who are charged with offenses

receive legal aid in accordance with provisions in international treaties that Viet Nam is a signatory (Article 2).

[232] Circular of the Ministry of Justice No. 05/2008/TT-BTP dated 23 September 2008 guiding the legal aid operations and state management over legal aid, Article 3, Clause (a).

[233] Circular of the Ministry of Justice No. 05/2008/TT-BTP dated 23 September 2008 guiding the legal aid operations and state management over legal aid, Article 4.

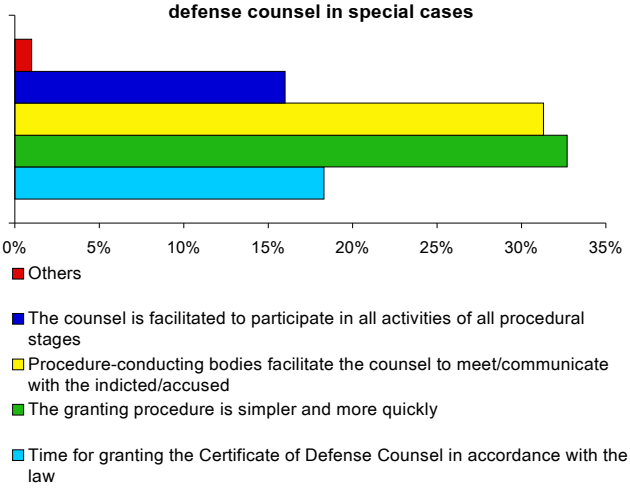
[234] According to criminal counsel, decisions on the arrest in relation to the cases were often read for the family or working place of the person kept in custody by investigators but without delivery of written version. The arrestees could see or receive such papers but when they were in the detention house.

[235] Joint circular of the Ministry of Justice, Ministry of Public Security, Ministry of National Denfence, Ministry of Finance, Supreme People's Procuracy and Supreme People's Court No. 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC dated 28 December 2007 guiding the application of a number of provisions on Legal Aid in the proceedings

punishable by death, litigation authorities must request the relevant bar association or the Fatherland Front Committee to appoint a defence counsel in compliance with provisions of the CPC[236] (these cases are normally referred to as *'Mandatory cases'*). The survey data suggest that for some counsel it was easier to obtain a Certificate of defence in mandatory cases than in others (see Figure 18); As mentioned in Item 3 above, and Figure 19, some lawyers indicated that litigation authorities did little to facilitate lawyers participating as appointed counsel or working for legal aid.

Lawyers also reported at the roundtable discussion to formulate the research outline that litigation authorities also often invited counsel to assist where the detainee was an international person. This was the case even though the CPC does not specifically mention treatment of international arrestees.

**Figure 19: Difference in the grant of the Certificate of defense counsel in special cases**




Vietnamese law requires counsel in mandatory cases. This requires litigation authorities to invite a lawyer to act as defence counsel, whose remuneration will be met by the state budget.[237] If there is no lawyer, the case may be 'cancelled' by the court. Further, procedural activities may have to be repeated. Some of the counsel interviewed said that they took defence work in mandatory cases due to 'heart', 'practicing morality' and also due to a 'requirement to act from the bar association'. Some counsel said they were sometimes 'recommended' by investigators to assist in the defence of mandatory cases to ensure that the precoedural requirements were met.

*A lawyer said that the pay for participating as defence counsel in an mandatory case was very low (120,000VND per day and 60,000VND per half day).[238]If the same lawyer defended at the request of a legal aid centre or a client, he could receive better remuneration. Further, courts rarely pay for lawyers' case file reading and preparation. Instead they only pay for their participation at trial. In constrast, legal aid centres usually pay a preparation fee. This results in counsel's unwillingness to spend time studying case files in mandatory cases, except when they are requested to assist by the accused's family. The mechanism for paying counsel also needs to be considered. Counsel, in mandatory cases, were paid by the litigation authorised officers. This affected the 'independence' of counsel in procedural activities.*

[236] Article 57 (2), CPC
[237] Joint circular of the Ministry of Finance – Ministry of Justice No. 66/2007/TTLT-BTC-BTP dated 19 June 2007 guiding the remuneration and fee payment for lawyers when lawyers participate in proceedings upon request of judicial bodies
[238] Joint circular of the Ministry of Finance – Ministry of Justice No. 66/2007/TTLT-BTC-BTP dated 19 June 2007 guiding the remuneration and fee payment for lawyers when lawyers participate in proceedings upon request of judicial bodies, II (1).

*Some lawyers also noted that on occasions investigation officials must seek the help of lawyers to assist with mandatory cases, as a result of the bar association delaying in the assignment of a lawyer or where no lawyer had agreed to defend in a mandatory case.*

The in-depth interviews revealed that the state budget spent on judicial support activities was very low. It is insufficient to pay for all the judicial support activities (including forensic examination, scene examination, investigative experiments, counsel's fee in mandatory cases and so on). This budget item is now disbursed as a fixed cost 'fixed norm'.[239] The problem is that the amount is fixed with reference to the actual amount spent in the previous year. This has restricted litigation authorities from using counsel in mandatory cases to avoid over-consumption and save the budget.[240]

Many lawyers responded that they accepted to defend in mandatory cases or legal aid cases not because of the pay, but for the reasons mentioned above. However, some lawyers and criminal researchers also noted that because the remuneration was not sufficient, a number of lawyers provided legal services in mandatory cases or legal aid cases only as a *'formality'*. This results in a situation where the quality of defence counsel is not high in mandatory cases.

In order to improve the quality of legal aid activities, the Ministry of Justice promulgated a Legal Aid Quality Assessment Toolkit[241] and cooperated with the Ministry of Public Security, the Ministry of National Defence, the Ministry of Finance, SPP and SPC to provide guidance for the application of a number of provisions on legal aid in legal proceedings.[242] This guidance stipulates that litigation authorities have to create conditions whereby arrestees or the accused are informed of their right to access counsel funded by legal aid organizations. This could be done by way of announcing the list of legal aid consultants or through a collaboration between the lawyers of the legal aid centres and branches in the localities ensuring their contact details were available to investigation bodies, procuracies, courts, detention houses, and custody houses. In addition, these groups might communicate via a bulletin the right to legal aid, etc. The Research Team also inspected several

[239] The measure of 'administrative norm in limiting spending' was first piloted in 1999 and decided to be piloted by the Prime Minister in Decision No. 248/1998/QD-TTg dated 24/12/1998 on the policy and measures for operating the socio-economic development plans and budget estimate of 1999. At the present, state bodies applied such measure as provided in Article 130/2005/ND-CP of the Government providing for the self-governance, self-responsibility in using the staff norn and administrative management budget for some state bodies and some other guiding documents

[240] The above opinions came from two investigators of a northern province, these two men said that each year, the budget for judicial support activities in investigation of the whole province was about 700,000,000VND. While expenditure for forensic examination for a corpse took at least 7,000,000VND. They also gave the illustration that only the number of traffic accidents with death aftermath in the province each year was more than 100, if all of these accidents must carry out forensic examination, there was no money left for criminal investigation, scene examination and defence counsel.

[241] Decision of the Minister of Justice No. 11/2008/QD-BTP dated 29 December 2008 promulgating the Toolkit for quality assessment of cases under legal aid.

[242] Joint circular of the Ministry of Justice, Ministry of Public Security, Ministry of National Denfence, Ministry of Finance, Supreme People's Procuracy and Supreme People's Court No. 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC dated 28 December 2007 guiding the application of a number of provisions on Legal Aid in the proceedings.

temporary detention camps and investigation body's detention houses but was only permitted to enter the area where the defendant/accused meets with counsel and was not permitted to access the detention area generally. It was found that the list of counsel was posted in some areas, as stipulated, but it remained unclear whether the defendant/accused could access the lists since they were usually only permitted to walk around the detention area. In addition, on reading some lists, we found that the names of new lawyers or updated addresses of practicing organizations were not included.

### 4.3. Sub-conclusions

Similar to the legal system of countries studied within this Report, Vietnamese laws have particular regulations on the right to counsel via legal aid in order to satisfy the objective of protecting *human right of a socialist state* and meeting Vietnamese commitments to international treaties on human rights .

However, according to lawyers, litigation authorities only facilitate defence work (via legal aid) in a limited manner. Yet, compared to investigation bodies and procuracies, courts create more favorable conditions for counsel.

The remuneration paid to counsel who defend in mandatory cases or in legal aid funded cases is very low. As a result, counsel are not encouraged to participate in the activity. Moreover, the complicated procedure for payment also discourages lawyers from this work and affects the quality of defence and the 'independence' of counsel.

## 5. Right to an adjournment to consult counsel where reasonable

### 5.1. International standards

The accused shall have the right to an adjournment to consult counsel regarding matters concerning their case.

### 5.2. Vietnamese laws

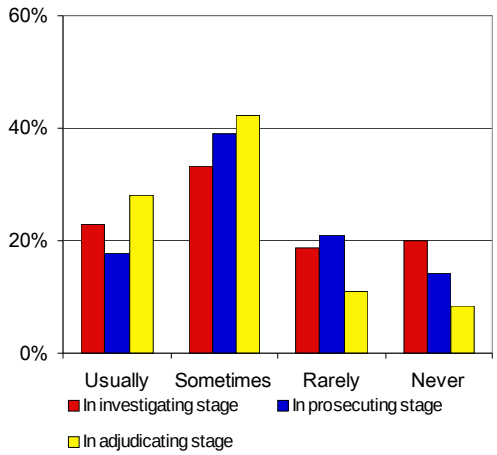
In accordance with the CPC, arrestees/accused do not have the right to request the adjournment of proceedings to consult counsel.[243] The CPC only has the following provisions:

- If the defence counsel is absent, courts still open the court session. Where defence counsel are compulsorily required under the provisions of Clause 2, Article 57 of the CPC,[244] but they are absent, the trial panels must postpone the court session.[245]

[243] CPC, Article 48, Article 49 and Article 50
[244] Clause 2 Article 57 of the CPC stipulates cases which the defence counsel is compulsory (Mandatory cases). See footnote 87.
[245] CPC, Article 190

- Where a defendant has not yet been handed the indictment and the decision to bring the case for trial within the time limit, of at least ten days before the opening of court session, and if he/she requests, the trial panel must postpone the court session.[246]
- Defence counsel, counsel for the concerned parties' interest, appellants, persons with interests and obligations related to appeals or protests shall be summoned to attend the court session. If any of them is absent for plausible reasons, the trial panel may still proceed with the trial, but shall refrain from issuing judgment or a decision unfavorable to the absent defendant or involved party. Court sessions must be postponed in other cases.[247]
- The time-limit for postponing a court session shall not exceed thirty days, counting the date of issuance of the decision to postpone the court session.[248]

**Figure 20: The indicted/accused requests procedure-conducting bodies to adjourn proceedings to consult his/her counsel**




There is no procedural provision allowing litigation authorities to postpone the proceedings for arrestees/accused to consult their counsel.

### 5.3. Vietnamese practices

According to lawyers' responses, the proportion of the accused who requested the litigation authorities to adjourn proceedings was not high at any of the three procedural stages (see Figure 20). Eleven (11) lawyers, when asked whether adjournments were necessary, answered that in fact most accused needed adjournments. However, the accused who were kept in detention camps were generally informed that they did not have this right, so they did not request litigation authorities to adjourn the proceedings to access counsel.

Interviews with eighteen (18) convicted persons revealed that they did not remember whether, when their rights were read to them, the right to counsel was included Eleven out of eighteen (11/18) condemned persons affirmed that they had asked investigators immediately when they were interrogated or arrested about the right to invite counsel. Investigators all said that they had that right but it was not necessary to adjourn or suspend the procedure of arrest or interrogation until a lawyer was present. Investigators also explained that the law did not allow them to 'refuse the investigation activities' or that 'it was no use to have counsel', 'counsel were allowed

[246] CPC, Article 201.
[247] CPC, Article 245.
[248] CPC, Article 245.

to participate later' and so forth. This same group of people said that, in fact, they did not know whether they had a right to counsel. However, they also advised that propaganda of the right through cinema and press, had informed them that all arrestees had the right to request a lawyer before declaration and interrogation.

***The Research Team posed a question to a group of people who had completed their sentences or who had previously been kept in temporary detention camp, sometimes for very long periods. They were asked whether they were aware of the right to silence as shown at the cinema? They were also asked whether they kept silent and requested counsel?***

*Here are their answers: 'No, the investigators requested me to (answer their questions) immediately', 'in my opinion, I am obviously not allowed to keep silent because investigators have professional skills to force me to declare', 'no way, I am unable to keep silent when being asked questions by the police', 'my psychological characteristics at that time were very terrible because investigation bodies had various strong measures', 'you could not keep silent with investigators in any way', 'investigators would prove immediately that if I kept silent, I would suffer from aggravating circumstances or something like that', 'must cooperate and sincerely declare, then, you are allowed to meet your defence counsel'.*

According to investigators and prosecutors in the two seminars, if the law allowed 'the adjournment' or the 'the suspension' of legal proceedings to await counsel during the investigation and prosecution stages , the task of preventing and fighting against crime would be compromised. Given that investigation bodies and prosecutors were investigating about 100,000 criminal cases per year, they could not wait for the participation of counsel to carry out the interrogation. Moreover, in criminal investigations, some interrogations merely aimed to collect information for the next investigation activities, rather than charging a suspect. As a result, it was suggested, counsel were not needed.

Some judges interviewed in the two seminars believed that the adjournment of hearings cost too much for the adjudicating body (as the fee for escorting the accused, fee for summoning the trial and mission allowance, etc. were costly). Adjournment of the hearing also consumed the judicial body's time and effort (time to prepare the trial, travel time for judicial persons). At the same time, adjournment of hearings may also cause proceedings to be prolonged and breach the statutory time-limit. Judges also said that any time there was the application of the accused or the counsel of the accused to adjourn, they considered the reasonableness of the adjournment.

Most judges also indicated that if the accused indicated they wished to have counsel before them, but litigation authorities had not created conditions or promoted the right to counsel, then if the accused still wished to have counsel, the Trial Panel would adjourn the hearing and enable the accused to invite counsel. This avoided the situation where higher level courts declared the cancellation of a judgment as a result of a violation of procedure laws. However, a judge from a mountainous

district shared a different opinion. In his district, it was really difficult to have counsel defend the accused since lawyers mainly lived and practiced in urban areas, and they were unwilling to participate in defence work in mountainous areas. At his court, only 2-3 out of 40 criminal cases in 2008 had the participation of defence counsel .

According to counsel attending the seminars and in-depth interviews, it was necessary to have provisions allowing arrestees/accused to have the right to request the adjournment of proceedings to consult counsel. Litigation authorities had to agree and create conditions for counsel to participate in the legal proceedings. If so, the right to counsel would be guaranteed and the quality of legal proceedings would be improved.

### 5.4. Sub-conclusions

Vietnamese and international laws are not similar with respect to the right to an adjournment to consult counsel. In countries studied within this Report, such a right is not clearly indicated in legal normative system. Only in Germany and Australia, where the legal system respects 'the right to a fair trial', is such a ''right' practically recognized and applied.

It should be noted that the Criminal Procedure Code China recently amended, the Code has requested "the People's Procuracy when reviewing and approving an arrest application, may question witnesses and other participants in the legal proceedings and consider the opinion of the defence attorney; if the defence attorney requests to express his opinion, the opinion must be heard "[249].

The reality in Vietnam raises two matters: (i) if continuing to execute the applicable provisions, it seems that the State's convenience in judicial matters will take precedence over individual rights to an adjournment to seek counsel and (ii) if the right to adjournment of proceedings to consult counsel is enforced, the reality is a range of matters must also change to make the right enforceable. For example, physical facilities, availability of counsel and the preparedness to enable this provision must be entrenched with investigators, prosecutors, and judges.

## 6. Right of the accused to defend themselves

### 6.1. International standards

The accused shall have the right to self-representation/not to have counsel imposed. This is limited or unavailable in civil law jurisdictions where the accused is prosecuted with a serious crime.

### 6.2. Vietnamese laws

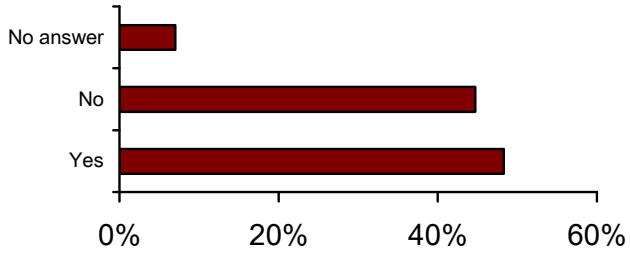
[249] Chinese Criminal Procedure Code (amendment) 14/03/2012, Article 65.

- The Constitution provides that 'the defendant's right to plead his case is guaranteed. He may plead his case himself or ask for someone to plead for him.'[250]

- The CPC stipulates 'Arrestees/accused shall have the right to defend themselves or ask other persons to defend them. Investigation bodies, procuracies and courts shall have the duty to ensure that arrestees/accused exercise their right to defence under the provisions of this Code.' [251] 'The accused shall have the right to present opinions, argue at court sessions.'[252] 'The accused has the right to supplement defence opinions.' [253]

- Investigation bodies, procuracies or courts must request bar associations to assign legal offices to appoint a defence where the accused is a person with a physical or mental defect, a minor, or a person charged with an offence carrying the death penalty. Further, if the defendant, accused or their legal representatives do not seek the assistance of defence counsel, the investigation bodies, procuracies or courts must request the local bar association to assign legal offices to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organizations to appoint defence counsel for their organizations' members.[254]

**Figure 21: The indicted/accused want to self represent**

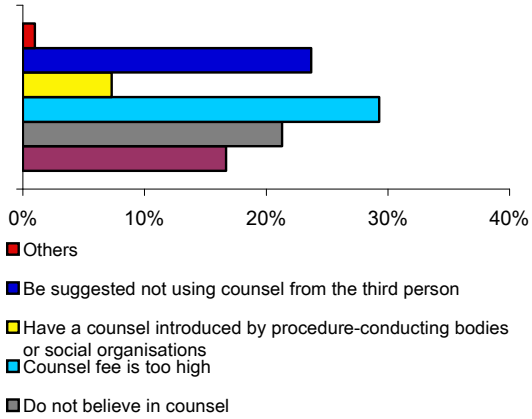



### 6.3. Vietnamese practices

According to the lawyers, about the same number of arrestees/accused 'wished to self represent' (45:48) (see Figure 21).

Some interviewed lawyers explained that people wished to self-represent for the following reasons: they thought they 'should not use counsel recommended by a third person', such as a recommendation by the officer of the litigation authorities; 'already had a counsel introduced by litigation authorities', 'lawyer's fee was too high';

**Figure 22: Reasons why the indicted/accused want to self represent**




[250] Constitution, Article 132.
[251] CPC, Article 11, Article 48, Article 49, Article 50.
[252] CPC, Article 50.
[253] CPC, Article 217.2.
[254] CPC, Article 57 (2).

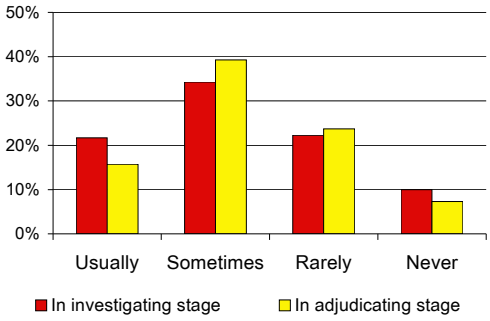
'did not believe in lawyers', 'counsel were not sufficiently qualified' (see Figure 22).

During the in-depth interviews, counsel also added more reasons why accused wanted to defend themselves, including:

- 'the accused were confident in their capacity to self-defend. They thought that only they could know their actions and motivations' (fifteen out of forty five (15/45) counsel);
- 'they had no money to employ a lawyer' (twelve out of forty five (12/45) counsel);
- 'they did not have knowledge, so that they could not evaluate the role of lawyer' (seven out of forty five (7/45) counsel );
- 'they thought that self-presentation may easily gain more sympathy' (six out of forty five (6/45) counsel );
- 'did not believe in counsel neutrality, were afraid that counsel had relationship with investigators' (two out of forty five (2/45) counsel).
- 'the accused had legal qualifications and was the person who knew most about the case' (two out of forty five (2/45) counsel);
- 'they wanted to keep some information secret and wanted to retract their words, they believed that this would be effective' (one out of forty five (1/45) counsel).

Those ten out of eighteen (10/18) who had served a sentence or had been kept in custody for investigation, said that investigation bodies also advised them to employ a lawyer after the investigation was finished. Two people revealed that the investigation bodies only said that 'they have the right to invite a lawyer' but did not help them to communicate with a lawyer. One person was allowed to communicate with lawyer via phone by the investigation bodies. However, five (5) revealed that investigators said 'counsel would not help them with anything', 'your crime was as clear as day, so how could a lawyer defend you?', 'could your family afford to hire a lawyer?' Out of eighteen (18) of those interviewed in-depth, twelve (12) hired a lawyer for the defence; three families (3) did not hire a lawyer because 'they could not afford one'; three (3) did not hire a lawyer because they thought that 'the lawyer could do nothing'. None of those who had served a sentence or had been kept in custody were provided with legal books for self study by the officers of custody houses, temporary detention houses or litigation authorized officers.

**Figure 23: The indicted and accused change their counsel appointed by procedure-conducting bodies**




In accordance with provisions of the CPC (as mentioned in Part 6.2), litigation authorities must arrange a lawyer for the accused in mandatory cases.

Forty percent (40%) of surveyed counsel said that the accused 'usually' changed the lawyer appointed by litigation authorities during the 'investigation stage' and 'trial stage' (see Figure 23).

*In-depth interviews with counsel, on the issue of whether defendants in mandatory cases could change their counsel, revealed that : 'no, they were not allowed to do so' (six out of forty five (6/45)); 'yes, they were allowed to change counsel, but counsel had never encountered this circumstance' (six out of forty five (6/45) ); 'yes, they were able to change counsel, but such a request must be appropriate and reasonable' (thirty out of forty five (30/45) ); 'in cases where the accused was a minor or a person with a mental defect, opinions of the guardian must be required if they wanted to change counsel' (four out of forty five (4/45)).*

At the two seminars, counsel also indicated that counsel appointed by litigation authorities or counsel assigned by legal aid centres were refused by the defendant in the following circumstances:

- The accused had already had counsel before being arrested, but litigation authorities still requested them to use counsel designed by litigation authorities;
- The accused worried about the fee paid to counsel.
- The accused believed that counsel were also 'public officers' or 'like birds of the same feather' or 'officers' of litigation authorities.
- The accused thought that counsel who were appointed did not fully grasp the case file or were not qualified or were only acting 'formally' (not fully committed to the case).
- Counsel may cause heavier sanctions to be imposed.

### 6.4. Sub-conclusions

The right to self-defence is a constitutional right under Vietnamese law and in accordance with international principles on the right to counsel. In countries studied within this report, this right is also recognized. Provisions on the right to counsel in Vietnamese laws are clear, which guarantee both the right to self-representation of the accused and the right to receive free counsel in cases in which the accused are charged with offenses punishable with life imprisonment to death or in cases where the accused are subjects entitled to appointed counsel under Vietnamese law.

However, there are still many matters for improvement in the execution of legal provisions, especially in relation to regulations specifically guiding the right to self-defence, such as the right to be provided with the relevant laws for self-study, such as the CPC and the CC, and self represent and the right to request termination of a defence counsel appointed by litigation authorities.

## 7. Right to counsel acting for the accused

### 7.1. International standards

Right to counsel means that counsel is acting for the accused and not the prosecuting authority.

### 7.2. Vietnamese laws

The Law on Lawyers stipulates five principles for the practice of law, namely: 'Observance of the Constitution and law', 'Observance of the rules on legal professional ethics and conduct', 'Independence, honesty and respect for objective truth', 'Use of lawful measures for the best protection of clients' legitimate rights and interests' and 'Accountability before law for law-practicing activities'[255].

The Law on Lawyers also prohibits lawyers from 'Establishing contacts or relations with litigation authorised officers or litigation participants or with cadres or civil servants to act in contravention of law in the settlement of cases or affairs'.[256]

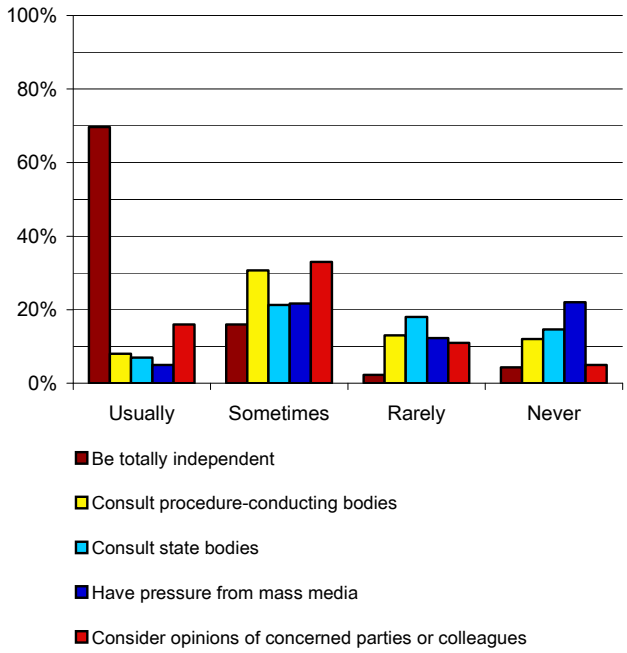
The Law on Legal Aid also provides a principle for legal aid: 'Use of measures in accordance with the law for the best protection of legitimate rights and interests of persons entitled to legal aid' .[257]

The right to a fair trial is provided for in the CPC, 'prosecutors, accused, defence counsel, victims, civil plaintiff, civil defendants, persons having related rights and obligations, their legitimate representatives, protectors of the involved parties' interests have equal rights in presenting evidence, materials, things; giving their requirements and making democratic arguments at the trial. The court is responsible to facilitate their performance of this right in order to clarify objective truth of the case'. [258]

### 7.3. Vietnamese practices

Seventy percent (70%) of surveyed counsel said that they were totally independent when participating in criminal cases (see Figure 24).The remaining thirty percent (30%) of counsel were 'sometimes', 'rarely' or 'never' independent. If counsel 'were not independent', how could they protect the rights and interests of the accused? Or vice

**Figure 24: Independence of the defender**




[255] Law on Lawyers, Article 5.
[256] Law on Lawyers, Article 9 (1.e).
[257] Law on Legal Aid, Article 4(3).
[258] CPC, Article 19.

versa, does 'the independence' of counsel guarantee the rights and interests of the accused? Does the lack of independence of lawyers mean that lawyers contribute to the process of accusation and prosecution of investigation bodies and procuracies?

The Research Team did not raise direct questions with counsel about the relationship between defence counsel and litigation authorities. This was thought to be a sensitive question. It was felt that if questions were asked directly, answers might be inaccurate. Therefore, the Research Team asked about 'the independence of counsel'.

In the two seminars, counsel, criminal experts and litigation authorised officers were also asked questions about the 'efficiency of the defence' and 'the independence of counsel'. This provoked a lot of argument. It was suggested that counsel faced various difficulties when practicing in criminal law, for example, the mechanism for granting the Certificate of defence counsel, challenges in communication with the accused in custody houses and detention houses, the inability of counsel to take the initiative in creating an adversarial hearing and so on. Counsel explained that they need a personal relationship with litigation authorities to resolve the abovementioned difficulties.

Participants in the seminars also mentioned that some counsel usually consulted litigation authorities about their cases so that counsel could give their opinions before the hearing or prepare defending arguments to express their capacity in arguing and anticipating the case. Some counsel used their relationship with specialized state bodies to consult seek opinions to impact litigation authorities. According to most counsel participating in the seminars, if counsel wanted to perform well they must have a 'good relationship' with litigation authorities.

Some counsel indicated that they did not wish to participate in the defence of very serious cases which may attract pressure from the public. A lawyer revealed that he faced a lot of pressure from litigation authorities when participating in the defence of such cases.[259]

There was more support in the two seminars for characterizing defence counsel as 'efficient' rather than 'independent.' The seminars' attendees implied "efficiency" to be a broad concept. It might produce a reduction in their clients' penalty or their release from a detention camp or the removal of a charge against their clients. These benefits might flow to their clients as a result of a "relationship" between lawyers and litigation officers or from professional works. The lawyers must use all their ability in terms of 'legal knowledge' as well as 'personal relationships' to protect their clients

[259] The situation that lawyers are put under pressure by judicial bodies, please see further the Research of Vietnam Bar Federation on 'Protection of legitimate rights and interests of lawyers', 2010. This Research was also conducted by NHQuang & Associates in late 2009 and early 2010. In addition, the fact that counsel face up with much 'pressure' from judicial bodies has also been raised in several workshops with NHQuang&Associates's participation to collect comments for this study, including the Seminar 'Criminal Procedure Code – issues to be amended and supplemented' held by Ha Noi Bar Association on 08/10/2009 in Ha Noi, and the workshop 'Right to counsel in Vietnamese criminal procedures' co-organized by Vietnam Bar Federation and UNDP in Ho Chi Minh City on 02-03/12/2010.

with 'efficiency'. Put another way, some noted that 'lawyers should not persist in their professional views' if they wish to effect fruitful results for their clients'.

Also when discussing 'the reasons why the accused wanted to self represent' (as mentioned in Part 6 above) at the two seminars, some indicated that 'the accused were afraid of using counsel because they thought that counsel were public cadres, like birds of the same feather with litigation authorities', or that 'counsel were introduced by litigation authorised officer, so they were no way independent', etc.

Another aspect when considering 'the right to counsel, is whether the principle exists to protect the interests of the defendant/accused. Put another way, perhaps the principle does not exist because of the problem of how fees are paid to lawyers in mandatory cases The Research Team also found that the payment mechanism of counsel fees in mandatory cases via litigation authorities also affected significantly 'the independence of counsel' since counsel received remuneration from litigation authorities. This mechanism is set out in a legal normative document.[260]

Responding to the question on 'the independence of counsel', interviewed lawyers revealed various opinions: 'totally independent in practicing' (seventeen out of forty five (17/45) ), 'the efficiency of legal practice was more important and that best met their client's needs' (twenty five out of forty five (25/45) counsel), 'did not understand why counsel needed to keep their independence (three out of forty five (3/45)), 'counsel were unable to keep their independence with current judicial mechanism' (one of forty five (1/45)), 'if litigation authorities could keep their independence, obviously counsel must keep their independence too' (two out of forty five (2/45) ) and 'this issue was too sensitive, unable to answer' (one of forty five (1/45) ).

Opinions of investigators, prosecutors and judges regarding the independence of counsel were as follows 'the independence of counsel was obligatory' (forty five out of one hundred and thirteen (45/113) ), 'the independence of lawyers was one of the integral parts of judicial independence' (four out of one hundred and thirteen (4/113) ), 'necessary to respect the independence of counsel' (fifteen out of forty five (15/45) ), 'the independence of counsel must comply with the legal framework' (fifteen out of forty five (15/45) ), 'the essence of judicial independence or the independence of counsel was that everybody must observe the law, law was on top priority' (one out of forty five (1/45) ), 'counsel must pay attention to the efficiency of their work for their clients' (three out of forty five (3/45)), 'no way for the independence of counsel' (two out of forty five (2/45)), 'in order to be independent, counsel must be qualified' (thirty one out of forty five (31/45) ).

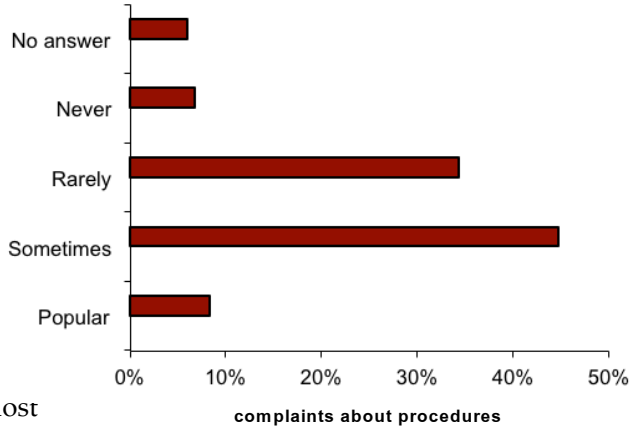
Several questions were added in the two seminars asking 'if counsel often retain a relationship with litigation authorities, whether counsel were 'requested to cooperate'

[260] Mechanism for remuneration payment to lawyers in Mandatory cases stipulated in Joint circular of Minitry of Justice, Ministry of Public Security, Ministry of National Denfence, Ministry of Finance, Supreme People's Procuracy and Supreme People's Court No. 10/2007/TTLT-BTP-BCA-BQP-BTC-VKSNDTC-TANDTC dated 28 December 2007 guiding the application of a number of provisions on legal aid in legal proceedings, Part II.

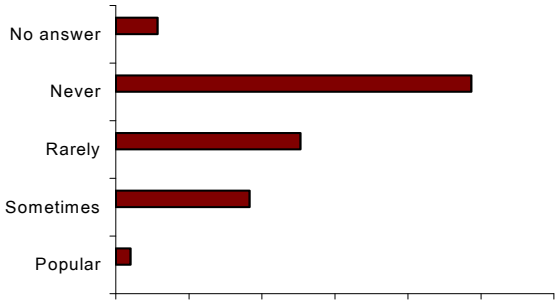
or 'requested to provide information' to help litigation authorities to complete the investigation, prosecution and adjudication'? Most counsel answered 'no' or that 'they had never been requested to provide information relevant to the prosecution against their clients'. But a minority of counsel were of the opinion (in the two seminars) that 'this in fact existed, but it happens in other law offices, which means other lawyers retain relationships with litigation authorities'. One respondent said that 'there was a counsel felt who unhappy with the accused in the hearing. He requested the Trial Panel give a more serious penalty to his client'; another response exposed that 'some counsel usually announce in the hearing that he/she totally agrees with the indictment for his/her client, he/she only suggests that the Trial Panel consider the family situation or the criminal record of his client'.

There was also an opinion that clients, it was necessary to eva litigation authorities. This was because violations of procedur instance the late grant of the C meet the accused, and or not survey result showed that or complaints by counsel were 'pc Figure 25).

**Figure 25: Defense counsels execise the right to complain in criminal proceedings when being interrupted their defense by procedure-conducting bodies**




The survey also asked whet procedural activities' may ca them pressure from litiga authorities? In response most counsel indicated that this was not a 'popular' matter (see Figure 26).




In-depth interviews with those who been imprisoned or who had been prosecuted, resulted in eleven out of eighteen (11/18) responding that 'they did not know whether the counsel was put under pressure or not?', two out of eighteen (2/18) thought that 'no one could force counsel because they were persons with high qualifications' but two (2) others said that 'counsel were put under various pressure', and three (3) remaining persons indicated that 'counsel often said that they were put under pressure and I (or my family) had to pay more money for them to solve such pressure'. However, one respondent told a story that, he had been entitled to have an appointed counsel parallel with other two invited counsel. He tried to refuse the appointed counsel because this counsel 'agreed with the indictment' that he was guilty while the other counsel sought to prove him 'innocent' in the hearing. But his refusal was not accepted by the Trial Panel.

### 7.4. Sub-conclusions

Vietnamese laws have sufficient provisions to support the right to counsel to act for the accused and not for state bodies. However, in practice two questions should be considered: (i) if counsel 'are not independent', can they protect rights and interests of the accused? (ii) does 'the independence' of counsel guarantee the rights and interests of the accused?

The Research Team realized that the following three factors were critical to the protection of the rights of the accused: 'the independence of counsel', 'the competence of counsel' and the 'efficiency of the legal practitioner'. These three factors were necessary to ensure that counsel acted for the accused and not the 'prosecuting authority'. If one factor was removed, the result was that the 'this right' would not be guaranteed. The 'efficiency of counsel', as noted above, is a reference to their relationship with authorities and while not strictly going to the independence of counsel is very directly linked to their capacity to assist an accused.

In order to give real meaning to the propaganda on the legal profession (which states that lawyers can assist to protect defendants' rights), the defence must be strengthened. Concurrently, the state should promulgate more legal provisions to guide the application of this right and introduce more sanctions for litigation authorities and persons to ensure strict observation and support of this right.

## 8. Right not to be forced to proceed with unqualified or insufficiently diligent counsel, where other counsel is available.

### 8.1. International standards

The accused shall have the right not to be forced to proceed with counsel who has shown incompetence or lack of diligence, where the accused has arranged other appropriate counsel.

### 8.2 Vietnamese laws

The CPC stipulates that 'Defence counsel shall be selected by arrestees, the defendant, the accused or their legal representatives'.[261]

### 8.3. Vietnamese practices

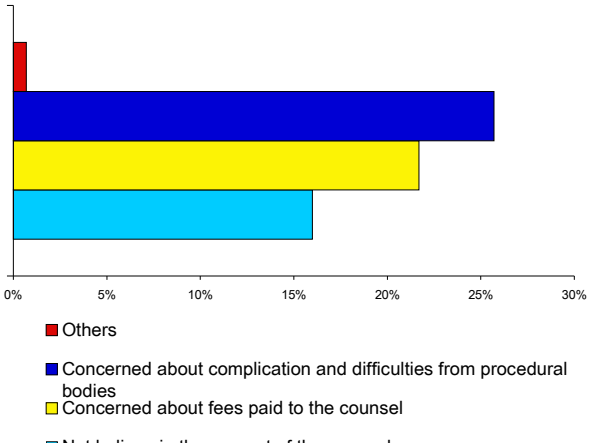
There are potentially four practical circumstances when an accused can arrange other counsel as follows:

- The accused finds that invited counsel shows incompetence or lack of diligence, so they request a change of counsel;

[261] CPC, Article 57 (1)

- The accused finds that the counsel requested by litigation authorities shows incompetence or lack of diligence, so they request a change of counsel;
- The accused has another counsel who better meets their requirements;
- The accused does not want to have trouble with the judicial body's officer, who is handling the case, and thus seeks new counsel.

**Figure 27: Reasons why persons kept in custody/indicted/accused refuse counsel**




The Survey results showed that only thirty six percent (36%) of counsel 'were refused' by arrestees/accused where their family requested a defence counsel for them (see Figure 23 above).

In counsel's opinion, the main reasons that arrestees/accused refused counsel, were: they were 'concerned about facing complications and difficulties from litigation authorities' or 'concerned about the fee paid for the defence counsel' (see Figure 27). The in-depth interviews revealed there were various reasons why arrestees/accused refused counsel. For example: 'because the accused's awareness of the role of counsel was very low' (twenty out of forty four (20/44) ); 'pessimistic, did not believe in justice' (two out of forty four (2/44) ); 'did not have economic condition to employ a counsel' (seven out of forty four (7/44)), 'because investigation bodies did not like the participation of a counsel, and the crime would be aggravated' (three out of forty four (3/44)); 'the accused believed that the counsel would cooperate with litigation authorities to push them into disadvantageous position' (one out of forty four (1/44) ), 'because the accused and the counsel did not reach an agreement on the viewpoint for defence' (one out of forty four (1/44)), 'since the accused determined that they committed crime so they did not need a counsel' (six out of forty four (6/44)); 'because the defendant/the accused were afraid that their family had to pay so they refused the counsel' (four out of forty four (4/44)) and 'because the accused wanted to use the counsel introduced by litigation authorized officer' (fourteen out of forty four (14/44)).

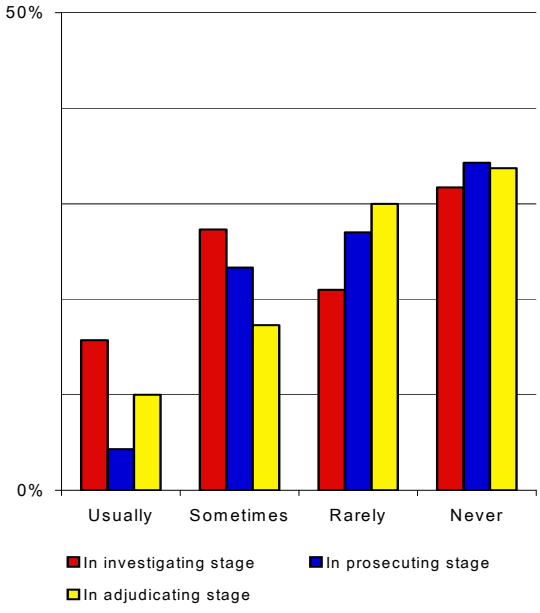
No counsel surveyed, or responding to questionnaires and in-depth interviews, indicated 'the accused did not want to proceed with counsel who has shown incompetence or lack of diligence, where accused has arranged other appropriate counsel'.

*According to judges, prosecutors and investigators who were directly interviewed, there were many reasons why arrestees/accused refused counsel, for instance: 'economic conditions of the people are still very restricted, so that they could not afford to pay for a counsel' (all of them (113/113) ), 'the accused still had limited awareness' (all of them (113/113)); 'there was no*

*counsel who agreed to defend them' (fourteen out of one hundred thirteen (14/113)); 'the number of counsel in the locality was too small' (twenty two out of one hundred thirteen (22/113) ); 'the criminal did not believe in counsel' (twenty one out of one hundred and thirteen (21/113) ); 'the criminal was not fully aware of their rights to counsel' (eleven out of one hundred and thirteen (11/113) ); 'due to the incompetence of counsel, so the criminal did not believe in counsel' (six out of one hundred and thirteen (6/113)), 'that was the need of the accused, we popularized the right to counsel to the accused and they said that they did not need counsel' (sixty out of one hundred and thirteen (16/113) ); 'litigation authorised officers were not enthusiastic, did not create conditions for them to have a counsel' (four out of one hundred and thirteen (4/113)), etc. A judge said that an expression of the respect of litigation authorities to the right to counsel of choice of the accused was that after the counsel of the accused argued at the hearing, the Trial Panel should ask the accused 'did the accused agree with the viewpoint of the counsel? Did the accused want to argue further?'*[262] *If the accused wanted to change the plea, the accused could present his arguments. At the workshop 'Right to counsel in Vietnamese criminal procedures' co-organized by the Vietnam Bars Federation and UNDP, a judge raised the possibility that in an adversarial trial it was possible for the accused's counsel 'to accuse his own client', making the accused and Trial Panel confused. This judge requested the Lawyers Federation to provide a clear legal practice ethic and to request 'lawyers not to cause disadvantages to their own client by protecting his/her interests.'*[263]

According to counsel who participated in the discussion, arrestees/accused often received advice from third parties that they *'should not use counsel '*. In fact, those suggestions mainly came from the litigation authorised officer or a person who shared the temporary detention room with arrestees/accused. It was because only those persons could communicate with the accused before the investigation ended.

**Figure 28: Persons kept in custody, the accused refuse the counsel because judicial bodies arrange an other counsel for them in different proceedings stages**




Only sixteen percent (16%) of lawyers who responded to the Survey said that arrestees/accused usually refused their counsel in the investigation stage in order to use the counsel arranged by litigation authorities (see Figure 28). Some interviewed lawyers asked: if the defence counsel was arranged by

[262] CPC, Article 217.
[263] Opinions of Judge Pham Cong Hung of the SPC at the seminar "the right to counsel in Vietnamese criminal procedures" co-organized by Vietnam Bar Federation and UNDP in Ho Chi Minh city on 02-03/12/2010.

litigation authorities (except for those mandatory cases), whether the litigation authorised officers or the litigation authorities were impartial and objective for such arrangements? And whether those arranged counsel was absolutely independent to protect rights and interests of the client?

The lack of lawyers practicing criminal cases in mountainous and rural areas adversely impacts the implementation of 'the right not to conduct proceedings with unqualified or imprudent counsel.' As mentioned, in the opinion of one judge from a mountainous district, litigation authorities and the accused in mountainous areas usually find it difficult locate counsel prepared to defend. Those seeking counsel cannot choose a lawyer if they do not have sufficient funds to pay.

In the in-depth interviews with those who have served a prison sentence or who have been prosecuted, interviewees refused to evaluate the competence and diligence of counsel. They thought that they were 'unable to realize whether counsel were qualified or not' when they communicated with the counsel before being heard. Two out of eighteen (2/18) indicated that they used two counsel; one their family employed via a contract and one introduced by investigators. One person had counsel from an earlier time (before being prosecuted) and he wanted to continue with that counsel. One person said that originally, he was concerned when his family invited a counsel to assist him. He feared his crime would be made more serious and so he had to refuse the counsel in investigation process. But after meeting counsel, he accepted counsel would undertake his defence. Furthermore, as mentioned in Part 7, a person who was appointed a counsel, indicated that he had refused the counsel at the hearing, but that request had not been considered.

### 8.3. Sub-conclusions

Vietnamese laws have provisions to enable the exercise of 'the right not to be forced to proceed with counsel who has shown incompetence or lack of diligence, where the accused has arranged other appropriate counsel'. However, in order to make this right exercisable, the following measures may be required:

- The accused must be informed and equipped to understand the role, work and arguments of their defence counsel.
- There needs to be an increase in lawyers in mountainous and rural areas, or the mechanism for paying remuneration and the level of pay should be reformed to encourage lawyers to participate in defence work in such areas.
- Relevant state bodies, the Vietnam Bar Federation perhaps, must supervise the ethics and competence of counsel to limit those who are not qualified, or practice unprofessionally, from working as lawyers.

## 9. Right to counsel at all stages of the proceedings where capital punishment involved

### 9.1 International standards

The accused shall have the right to counsel at all stages of the proceedings where the accused is prosecuted with an offence that carries capital punishment as a penalty.

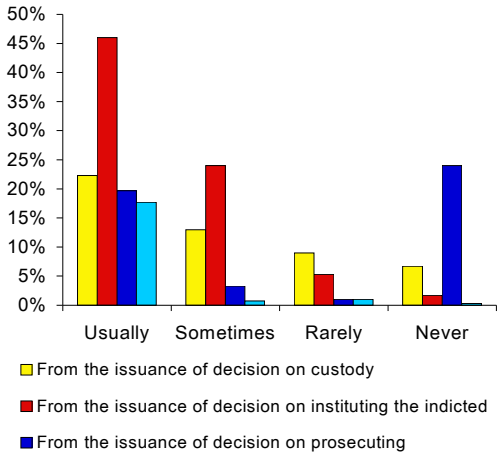
### 9.2 Vietnamese laws

Pursuant to the CPC, in cases where the accused is charged with offenses punishable by death under the Penal Code, if the accused or their legal representatives do not seek the assistance of defence counsel, the investigation bodies, procuracies or courts must request the local bar association to assign a legal office/firm to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organizations to appoint defence counsel for their organizations' members.[264]

### 9.3 Vietnamese practices

The CPC stipulates the obligation to defend capital punishment cases and also for cases involving minors, persons with physical or mental defects, and persons who are charged with offenses punishable by life (normally referred to as 'mandatory cases').

**Figure 29:The moment from which procedure-conducting bodies often appoint a counsel for those who are likely to be prosecuted with capital punishment**




All judges, prosecutors and investigators when interviewed in depth(one hundred thirteen over one hundred thirteen (113/113) (one hundred percent (100%)) said that they created conditions for counsel to participate in the defence of an accused facing a charge that carries a life sentence or the death penalty. The process of prosecuting and adjudicating those cases was very strict. If there is no counsel at any procedural stage, the case would be 'cancelled' to re-conduct procedures. Those accused who are sentenced to life imprisonment or capital punishment usually appeal to a superior court to revise the case under appellate procedures, or even seek causational review. After the adjudication stage by courts, the condemned or their relatives also usually submit a letter seeking clemency to the State President. Before responding to such letters, the State President's office usually requests the court to send them the case file to consider.

In addition, some interviewees also revealed that, from 2007, the head of the investigation body of the Ministry of Public Security had issued an official letter to remind local investigation bodies to strictly enforce the regulations of the CPC on

[264] CPC, Article 57(2).

ensuring the right to counsel of the defendant/accused, especially the right to counsel in mandatory cases[265]. After that, the SPC also issued an official letter No. 26/KHXX on 28/02/2007 to request local people's courts to implement the regulations of the CPC. Since then, the requirement for defence counsel in mandatory cases has been more diligently executed.

The results of the Survey showed that majority of lawyers believed that counsel could easily participate in cases with life-imprisonment or capital punishment from the issuance of decision to prosecute the case (see Figure 29). Figure 29 shows when lawyers believe they are allowed to participate in these cases. The Survey result shows that appointed counsel had an advantage to get the Certificate of defence counsel and to communicate with the defendant or arrestee early, although the advantage is only for formally approving the 'confession' and/or 'the final statements'.

The issue posed here is that whether counsel, when participating in cases with life-imprisonment or capital punishment, were given favorable conditions? Is the right to counsel in this case fully executed or not?

In direct interviews, lawyers indicated that investigation bodies created favorable conditions for them to do their cases very quickly (forty out of forty five (40/45)). Some lawyers said that litigation authorities even created favourable conditions for them immediately to go to the custody house or their working place to participate in the interviews, signing a confession, and so on. Lawyers who are agreed with litigation authorised officers' views said that litigation authorities sought to give effect to this right to guarantee that the case had met procedural requirements so that it could not be cancelled later.

The interviewed lawyers also reflected that they were not allowed to communicate with their clients personally (merely attend procedural hearings) for a lot of reasons, including: 'counsel should not meet clients because they were dangerous criminals'; 'it was necessary to keep investigations secret, so, the counsel should not meet'; 'counsel could not meet his/her client because the lititgation officer had to ask for permission from leaders'. Only four out of forty five (4/45) counsel were invited by investigation bodies to see 'the crime scene reconstruction'.

Judges, prosecutors and investigators said that the regulation that there must be a counsel in the investigation stage of mandatory cases did not specify from which investigation activity counsel should participate. There is no regulation forcing the investigation body to invite counsel to interviews or to the examination of the scene, to relevant investigation experiments or to the autopsy. Where the investigation body invites counsel, but does not facilitate his/her work, then counsel may lodge a complaint. Moreover, investigation activities do not cease to wait for the bar association to appoint a counsel (when the date of an appointment is unknown) since

[265] Official letter No. 45/C16(P6) dated 26/01/2007 of the Investigation body of the Ministry of Justicec sent to head of relevant departments.

the offender may escape, exhibits may be destroyed, lost, or distorted due to natural causes.

During the seminar held to agree the Research outline and Questionnaires, judges and criminal experts said that provisions of the CPC seriously restricted the right to counsel of the accused. For example, where investigation bodies and/or procuracies did not nominate counsel because the defendant was to be prosecuted with a crime which was not subject to capital punishment, but subsequently when the case was adjudicated the court found that acts of the accused must be subjected to capital punishment, 'what rights to counsel does the accused have?' If the trial panel sentenced the accused to the death penalty where it had not previously been anticipated, 'was the right to counsel of the accused violated?' 'Would the confessions or statements made prior to the sentence to death impact on the validity of the sentence?' This is a controversial issue and it has been handled differently by different courts. Some participants in the seminars indicated that Article 196 of the CPC allowed courts to sentence the accused differently from what was apparent from the indictment, even if this culminated in a charge for a more serious crime. If interpreting the CPC in that way, the entire procedural activities conducted before must be admitted lawfully. However, other participants have different opinions. They argued that the courts could not sentence in such circumstance. They suggested all litigation procedures must be conducted again.

Some people thought that Article 196, CPC (regulating limitation of adjudication) seriously affected the right to counsel of the accused, especially the right to counsel at all stages of the proceedings. The accused may be put into a very disadvantageous situation if the charge they face is changed to carry capital punishment, and yet they did not have the benefit of counsel during the investigation because at that time they were facing a lesser charge. Further, the courts, rather than the procuracy, charge the accused when a charge is changed. So, courts both charge and adjudicate at the same time. If that is allowed (and it is not clear which mechanism allows this), what legal rights to counsel does the accused/defendant have?

**9.4 Sub-conclusions**

Vietnamese laws and practice have tried to ensure the right to counsel of the accused at all stages of the proceedings where the accused are prosecuted with capital punishment. However, the reality is that this right it not absolutely protected. Further, study needs to take place to ensure the protection of the principle of right to counsel when ultimately facing the death penalty.

Legal provisions on the right to counsel in mandatory cases should be clearer and more specific to identify at which time and therefore what activities counsel must be present. The law also needs to be clear about the responsibilities of bar associations and lawyers once assigned to participate in mandatory case, and responsibilities of litigation authorities and individuals in facilitating lawyers participation in procedural activities.

Competent authorities should also have specific guidelines or re-consider regulations made under Article 196 of the CPC to ensure the right to counsel of the accused and the impact of changing jurisdiction of courts in the cases analyzed above.

## 10. Basic information about the survey.

**Figure 30: Lawyers' gender**

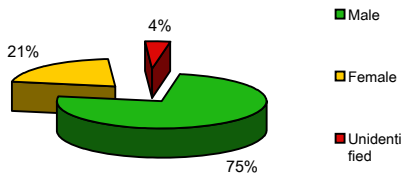



**Figure 31: Regions where lawyers work**

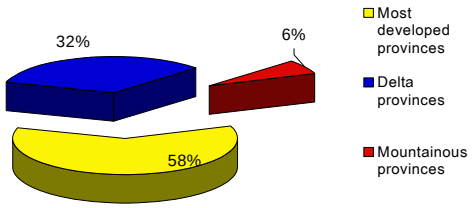
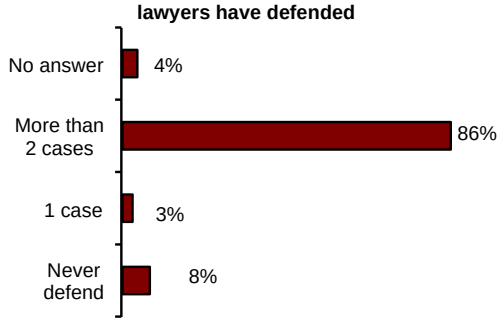



**Figure 32:Number of criminal cases lawyers have defended**

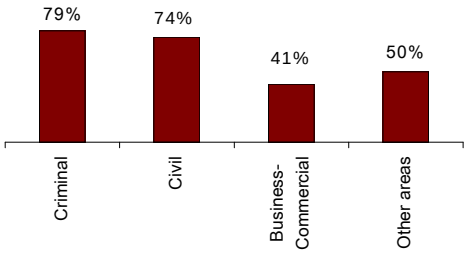



experience in criminal cases (86% of them took part in more than two cases). The majority of lawyers responding to the questionnaire were those practicing in criminal law (see Figure 33).

The Research Team organized 183 in-depth interviews in various provinces with the litigation authorities (procurators and 2, 000 questionnaires were sent (going to 40% of all Vietnamese lawyers ).[266] The total number of questionnaires collected was 300, of which 75% are from males and 21% from females (See Figure 30). Those under the age of 30 account for 13%, 49% are from the age of 30 to 45 and 27% above the age of 45. Nearly 11% did not answer the age question.

The questionnaires were distributed by provinces. However, the responses were mainly from the most developed provinces; Hanoi and Ho Chi Minh City accounted for 58%,[267] then Da Nang, Hue, Nam Dinh, Thanh Hoa, and Ba Ria Vung Tau.[268] Only six (6) percent of respondents are from the mountainous provinces, including Bac Giang, Binh Phuoc, Tay Ninh, Quang Tri and Lang Son (see Figure 31).[269] Figure 32 indicates that the questionnaires were mainly answered by those lawyers who had

**Figure 33: The main areas in which lawyers pratice law**




[266] According to the statistics from the Ministry of Justice, by March 2010, there are 5334 lawyers and 2000 trainee lawyers (http://www.dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30638&cn_id=376495#i5ybXyqmoTpF)

[267] The total number of practicing lawyers in Ha Noi and Ho Chi Minh City by 31/12/2009 is 3402 lawyers, 2298 trainee lawyers, 1616 practicing organizations.

[268] The total of practicing lawyers in Da Nang, Hue, Nam Dinh, Thanh Hoa, Ba Ria – Vung Tau, by 31/12/2009, is 1020 lawyers, 102 trainee lawyers, 106 practicing organizations.

[269] The total number of practicing lawyers in Bac Giang, Binh Phuoc, Tay Ninh, Quang Tri, Lang Son by 31/12/2009 is 133 lawyers, 41 trainee lawyers, 58 practicing organizations.

investigators) and judicial support bodies (See Table 7). Moreover, when developing the Research outline and questionnaires, the Research Team held discussions with lawyers and investigators in Hanoi. The Research Team also organized two focused conferences on the 'Right to counsel according to Vietnamese law', during the survey. One conference was held in Ha Noi and the other was in Ho Chi Minh city. Both of the conferences were attended by criminal lawyers, judges, court secretaries, investigators and prosecutors.

***Table 7: Number of in-depth interviews organized at surveyed local areas and agencies***

| | | **Ha Noi** | **Lang Son** | **Nam Dinh** | **Thanh Hoa** | **Quang Tri** | **HCM City** | **Tay Ninh** | **Da Nang** | **Total** |
|---|---|---|---|---|---|---|---|---|---|---|
| Supreme level | Judge | 1 | | | | | 1 | | | **2** |
| | Prosecutor | 2 | | | | | 1 | | | **3** |
| Provincial level | Judge | 4 | 1 | 1 | 1 | 1 | 3 | 1 | 2 | **14** |
| | Prosecutor | 4 | 1 | 1 | 1 | 1 | 2 | 1 | 3 | **14** |
| | Investigator | 5 | 1 | 1 | 1 | 1 | 1 | 2 | 3 | **15** |
| | Assistant | 2 | 1 | 1 | 1 | 1 | 3 | 1 | 2 | **12** |
| District level | Judge | 5 | 2 | 2 | 2 | 2 | 2 | 2 | 3 | **20** |
| | Prosecutor | 5 | 2 | 2 | 2 | 2 | 5 | 2 | 1 | **21** |
| | Investigator | 2 | 2 | 1 | 1 | 1 | 3 | 1 | 1 | **12** |
| Lawyers | | 20 | 2 | 2 | 2 | 2 | 12 | 2 | 2 | **44** |
| Sentenced people | | 4 | 3 | 2 | | 2 | 3 | | 4 | **18** |
| Criminal specialist | | 6 | | | | | 2 | | | **8** |
| Total | | **60** | **15** | **13** | **11** | **13** | **38** | **12** | **21** | **183** |

# CHAPTER VI

# CONCLUSION AND RECOMMENDATIONS

It is necessary to re-emphasize that the right to counsel is the *jus cogens* norm of a right to a fair trial, protected by international human rights law, international customs and Vietnamese laws.

The ambit of the study included analysis of nine (9) constituent rights fundamental to the Right to counsel in international human right laws and international customs. In addition the law and practice of three (3) civil law countries, with broadly similar legal systems to that of Vietnam, including China, Japan, and Germany were also studied. In addition, a common law system, Australia, was considered to compare the theory and practice of the right to counsel in Vietnam. These comparisons were included to assist with debates in Vietnam on reforming justice and perfecting the Criminal Procedure Code (amended). During the process of survey and analysis, the Research Team made the following findings:

- The substantive laws of Vietnam regarding the right to counsel are similar to the substantive laws of some studied countries including China, Japan, Germany, and Australia. However, the practice of executing the right to counsel in Japan, Germany and Australia seems to be better. In addition to factors that impact the control of Vietnamese state power, working culture, and judicial culture, the principle of ensuring 'the right to a fair trial' has helped to better ensure the enforcement of 'the right to counsel' in other jurisdictions.

- Vietnamese laws have introduced advanced provisions protecting the right to counsel; however, in their application, bodies have interpreted them in several different ways. This has culminated in 'arbitrary' acts of litigation authorities in which the legal rights of people have not been protected.

- An infringement to 'the right to counsel', and 'the rights of citizen' in general, stems from the negligence of litigation authorities in their 'dissemination of the right to counsel to the arrestees and the accused'. This must be seriously considered by different levels of the judicial system with a view to implementing more active measures to ensure the right is well known and understood.

- The right to have counsel of one's choosing must also be ensured in all stages of proceedings. At this time, the investigation stage remains the stage where this right is most difficult to realize and where there is the most obstruction facing people seeking to exercise this right. This requires reform of sanctions and the introduction of measures to force investigation bodies and the people's procuracy to seriously give effect to the relevant laws on the

principle of respecting the rights of citizen. More particularly, litigation authorities need to ensure adequate time for the counsel to communicate with their clients and ensure their freedom of practice to enable the right to private and confidential communication between lawyers and clients.

- Facilities at detention camps and custody centres should be upgraded so that counsel can communicate with their clients in privacy and safety.

- It is necessary to improve pay and the system for payment to litigation authorities and legal aid bodies, payments to counsel for work in designated cases or legal aid cases. The low rate of pay and the complicated payment process adversely impacts the quality and the 'independence' of counsel.

- It is necessary to supplement existing provisions on adjournments and procedural rules in order to create opportunities for the accused to have access to counsel. If this could be done, the role of lawyers in criminal procedure activities would be improved. However, this mechanism needs thorough study to ensure objective and fair investigation work, prevention of crime and the fight against crime.

- State bodies need to support and ensure the right of the accused to self-defend, for instance, by providing specific guidelines on such a right. More particularly, there needs to be provisions within the Criminal Procedure Code and Criminal Code enabling a arrestee, the defendant and the accused to study and self-defend. They should also ensure the right of the accused to request the termination of work by the counsel requested by the litigation authority.

  To exercise of the right to counsel, which is 'the act of protecting the accused's rights; not a principle introduced with the objective of assisting the public procuracy' three values need to be guaranteed: 'independence', 'professionalism' and 'efficiency' of the defence.

- Vietnamese laws and practice have tried hard to ensure the right to counsel of the accused in procedural matters where the defendants are prosecuted with offences that carry capital punishment. However, this right must be enforced comprehensively in practice to avoid it mere formal compliance. As a result, legal provisions on the right to counsel in mandatory cases should be clearer and more specific to identify the moment within procedural activities where counsel must be involved and to clarify the responsibilities of bar associations and also lawyers once assigned to participate in mandatory cases. Litigation authorities and their employees must take responsibility for enabling lawyers to participate in procedural activities.

- State bodies and the Vietnam Bar Federation should also implement measures to encourage the development of lawyers in order to meet the increasing demand of people to exercise their right to counsel. Particularly, lawyers' fees must be increased in mountainous and rural areas, and the mechanism for paying fees must be reformed to encourage lawyers to participate in defence work in such areas.

- Local Bar Associations and the Vietnam Bar Association should cooperate with bodies undertaking proceedings in temporary detention camps and custody centres, to introduce lawyers' functions and their role in procedural activities, especially in criminal procedures. The Vietnam Bar Association is the most appropriate body to request central judicial bodies to set up coordination between judicial agencies and local lawyers.

- Relevant state bodies, in particular the Vietnam Bar Association and local Bar Associations, need to supervise the morality and professionalism of lawyers in order to restrict the number of unqualified, imprudent, or unprofessional lawyers. Concurrently, the Vietnam Bar Association should promulgate a set of principles regarding lawyers' morality and professional proficiency. It also needs to sanction lawyers who fail to abide by the regulations of laws and ethical principles to ensure the people's right to counsel.

**APPENDIX 1:**

**STATISTICS OF SOME TYPICAL CASES AND PRESS REFLECTIONS RELATED TO THE FORCING AND LURING TO CONFESSION BY LITIGATION AUTHORITIES FROM DEFENDANT AND ACCUSED**

***(In the period from 2003 to June 2010)***

***

***Statistician: NHQuang&Associates***

| No. | Content of cases | Time of case | Result of settling | Resource |
|---|---|---|---|---|
| 1 | **'The Case of Cashew nut Garden'; an expensive lesson:** With two first instance trials and two appellate trials, the murder case which happened in Mr. Hai Hoang's cashew nut garden, located at hamlet 2, Tan Minh Commune, Ham Tan District, Binh Thuan Province, became a 'hot spot' in judicial activities in Vietnam for 7 years (1998-2005).<br>The litigation authorities made several mistakes during the process of investigation and adjudication of the case.<br>Investigation seems to not have been objective and even seriously violated provisions on investigation, for example: investigators let the addicted listen and watch cassettes and videos to make statements 'compliant with' documents collected by the investigation bodies. Statements of witnesses were also taken perfunctorily and the objectiveness of the statements was not analyzed. Most of the witnesses were indirect ones who were only told | 3/2005 | SPP issued a decision to suspend investigation of the case and to cease investigation of the accused because the case happened such a long time ago, the investigation body applied several investigation measures but the documents and evidence collected could not prove that the accused had committed the offence. | http://ca.cand.com.vn/vi-vn/khoahochinhsu/vuanvietlai/2005/12/67697.cand?Page=3 |

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| | about the case, not random witnesses who voluntarily declared the truth. | | | |
| 2 | **'The case of one ton of heroin '**<br>This was a particularly serious case with the quantity of heroin up to one ton. The drug ring was detected by Phu Tho Police in mid November 2003. The case was heard by Phu Tho People's Court from 18th to 27th of July, 2005. At the court sessions, the accused presented that they had been prompted and forced to make statements. | 7/2005 | With firm evidence, and arguments, the Trial Panel made the accused admit their offences. | http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=90806&ChannelID=6 |
| 3 | **'Dak Lak Province: Torturing to take testimonies, three policemen were charged'**<br>For several continuous hours, Huynh Thanh Son and Le Quang Gia, two policemen in Ea Toh Commune, Krong Nang District, Dak Lak Povince, tortured Tran Van Vi for taking testimonies in the witness of Pham The Tan – the chief of the Communal Police. Only when Vi dropped on the floor did Son and Gia stop forcing him to sign into the minutes of taking testimonies. | 8/2005 | The Investigation body charged Pham The Han, Huynh Thanh Son, and Le Quang Gia with the crime of intentionally causing injuries. | http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=164292&ChannelID=6 |
| 4 | **'The case of harboring prostitutes at 'Tien Quan''**<br>At the court session, all of the accused including Tien, Son, and Ha denounced that the cadres threatened them and even beat them until they were injured to force them to declare. All testimonies and review of the accused were written beforehand or dictated, therefore, they fit together | 10/2005 | The Trial Panel decided to postpone the court session and return the case file for additional investigation because of unclear grounds for the charge. | http://dantri.com.vn/c25/s170-81955/co-quan-dieu-tra-ep-cung-can-pham.htm |

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| | very well. The Trial Panel rejected such denouncement because there was no ground.<br><br>However the defence counsel presented several doubtful circumstances in the case and the contradiction in testimonies at the court session. | | | |
| 5 | **'The case of stealing the Buddha statue in Bac Giang Province'**<br>On 12 January, 2006 Bac Giang People's Court brought the person stealing antiquities to the first-instance trial. Based on the result of evidence and arguments in the hearing, Bac Giang People's Court had to return the case file to Bac Giang People's Procuracy to clarify many details which mainly related to the matter of extorting confession from the accused, corporal punishments and alibi provided by some accused.<br><br>But at the court session on 19 June 2006, such requirements of the Court were still not implemented seriously by the Procuracy and investigation bodies. Statements of witnesses were dishonestly quoted in additional investigation conclusion; therefore, they were denounced by the witnesses at the trial.<br><br>The accused Nguyen Quy Doan still kept his unchanged opinions from previous sessions and denounced that | 6/2006 | On 28 June, 2006, after 5 days of argument and 2 days of deliberation for judgments, Bac Giang People's Court decided to return the case file to the Procuracy; requested the Investigation bodies for additional investigation and decided to change deterrent measures to the accused into bail form. | http://www.dantri.com.vn/Sukien/2006/6/126499.vip |

| | | | | |
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| | investigators had prompted and forced him to take testimonies which led to the appearance of a series of other accused.<br><br>The accused presented that investigators including Ha Van Quang, Chu Ba Huy, Than Van Tuc, Nguyen Ngoc Oanh, etc. had written statements beforehand and then forced them to copy or sign in.<br><br>The investigators took subjective statements by using sticks and canes to lash the accused's heads and faces, to poke into their throats; handcuffing them and hanging them on the ceiling upside down from night to the later morning. At the trial, the accused including Trung and Thuong presented that they were even stripped naked and their genitals were tortured. Further, one of the accused, Phan Huu Huong, died and according to what the lawyer said, there were many abnormal details in the conclusions of the cause of the accused's death. | | | |
| 6 | **'The case of trafficking 25 heroin cakes in Tay Ninh Province'**<br>One of the pieces of evidence which Tay Ninh People's Court relied on to impose death penalty on Nguyen Minh Hung for his act of trafficking 25 heroin cakes was the red shirt collected by the police.<br>At the second appellate court session at the Supreme | 12/2006 | The appellate Trial Panel decided to postpone the court session for collecting more evidence. | http://w13.vnexpress.net/HN/Phap-luat/2006/12/3B9F15BB/ |

| | | | | |
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| | People 's Court in Ho Chi Minh City, the accused Thu admitted that the provincial police had given Thu this shirt and had asked her to write down her statement/admissions in order to have an exhibit to accuse Hung. | | | |
| 7 | **'The case of soliciting 'quota' at the Ministry of Trade'** At the court session, the accused Mai Van Dau asserted that his confession to receiving 6,000US$ of bribe was because he had been prompted and forced by investigators. He only thought that if he confessed, he would have been on bail due to his bad health. | 3/2007 | The Trial Panel judged that there were grounds for Mai Van Dau's receipt of a bribe of 6,000 USD. He had not made a rash confession, as he had been placed on bail. | http://www6.vnmedia.vn/newsdetail.asp?NewsId=84483&Catid=22<br><br>http://www6.vnmedia.vn/newsdetail.asp?NewsId=85462&Catid=22 |
| 8 | **'The case where a 5th form female pupil was forced to confess until she got panic in Chau Thanh, Dong Thap':** Huynh Ngoc Tram - a pupil at grade 5 of An Hiep 2 primary school – An Hiep Commune – Chau Thanh District, Dong Thap Province was forced to confess until she panicked, by four persons, namely Luu Van Ca, Le Van Xem – Principal and Head of the Pioneer Teenager Team of the primary school An Hiep 2, Le Van Thanh and Vo Thanh Phuong – Director and Vice Director of Police Office of An Hiep Commune because she was suspected to take 47,800 VND of her class fund. | 4/2007 | Luu Van Ca was dismissed from the Principal position, Le Van Xem was warned, and both of them were moved to work at another place.<br>Le Van Thanh was dismissed from the Head of communal police, and Vo Thanh Phuong was warned, both of them had to move to other work which was not under the police profession.<br>Four individuals agreed to execute the liability to compensate the victim 25 million dongs. | http://www.laodong.com.vn/Home/Nu-sinh-bi-ep-cung-den-hoang-loan-duoc-boi-thuong-25-trieu-dong/200711/64653.laodong<br><br>http://www.vnexpress.net/GL/Xa-hoi/2007/04/3B9F5441/ |

| | | | | |
|---|---|---|---|---|
| 9 | **'The case of getting self-interest from insurance in PJICO':**<br>In the first instance hearing at Ha Noi People's Court, the accused Phan Hong Thu denounced that investigators had forced her and 'threatened' to bring her husband to the prison, she had to admit all wrongdoings of her fault because she was afraid that no one would bring up her children. | 4/2007 | No information was confirmed about the authenticity of the forced confession. However, the accused Phan Hong Thu was identified as the conspirator of the case on taking self-interest from insurance, and she was sentenced to 12 years imprisonment for fraud and appropriation of assets | http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=195931&ChannelID=6 |
| 10 | **'The case of 'raping against children' in Vinh Long':**<br>After four hearings, the case still cannot be finished yet because the accused claimed innocence, did not confess the crime and denounced investigation bodies for their forcing and luring.<br><br>At the appellate trial of SPC in Ho Chi Minh City on 23/7/2007, the accused claimed innocence and said that the police of Long Ho District used corporal punishment, extorted confession, and forced the accused to declare contents they had not done or had not known so it was shown in the case file that they were guilty.<br>Even the person with related rights and interests, Do Chi Thong, said that he declared wrongly since he was intimidated by investigation bodies.<br>Lawyer Nguyen Duong Tien, the defence counsel for the accused Thanh, reflected that investigators even forced his client to confess when he was present in the interviews. | 7/2007 | The Trial Panel adjourned the trial because it was impossible to evaluate and draw the exact conclusions about the contents of the case | http://www.tand.hochiminhcity.gov.vn/DetailNews.asp?ID=740 |

| | | | | |
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| | He protested and requested to take minutes but it was refused. At the first instance trial, lawyer Tien also requested to write down such content into the hearing minutes but it was still refused. | | | |
| 11 | **Ha Noi: A student was assaulted by ward police:**<br>Student Nong Van Khanh, Politics Class K25, Academy of Journalism and Communication, was tortured and forced to admit to the crime of stealing a mobile phone in the dormitory of the Academy by police of Dich Vong Hau Ward | 10/2007 | Mr. Ho Thanh Ha, Deputy Director of the Police Station of Cau Giay district, said that the Station is investigating the case. | http://dantri.com.vn/c20/s20-202646/mot-sinh-vien-bi-cong-an-phuong-hanh-hung.htm<br><br>http://dantri.com.vn/c20/s20-202800/vi-sao-lai-co-ban-to-cao-sai-su-that.htm |
| 12 | **The case in Can Giuoc District, Long An:**<br>Mr. To Van Roi declared that he was forced and lured to confess by the police of Can Giuoc District and he was also put in solitary confinement in order confess the crime of 'illegally arresting persons and extorting properties'. | 11/2007 | The People's Procuracy of Can Giuoc District apologized to Mr. Roi publicly for their wrong doing. | http://www.vnexpress.net/GL/Phap-luat/2007/11/3B9FCA55/ |
| 13 | **The case of trading 11,000 tons of cigarettes in Thien Loi Hoa Limited Liability Company (Lao Cai)**:<br>At the first instance hearing, all of the accused counter-defended and said that they were forced and lured to confess.<br><br>The accused Nguyen Thi Ngoc Lien said that 'she was forced and lured to confess', she declared that she had to | 2/2008 | The result is still unclear | http://vietnamnet.vn/xahoi/2008/02/771129/ |

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| | sign the records in the presence of investigation bodies because they had shown her a fake order, and threatened that if she had changed her testimonies she would not have received the clemencies and her brother, her children, etc. would be arrested.<br><br>The accused Nguyen Huy Tan said that he had to declare the crime and signed since he had been forced to confess.<br>The accused Pham Huu Thom also declared that he had been forced and lured to confess. He 'had been arrested for 2 months without any contact with those outside prison, consequently, he felt so oppressed that he confessed and signed rashly'. | | | |
| 14 | **The case of Fraud Corporate Nguyen Lam Thai:**<br>Nguyen Lam Thai declared that he admitted guilty in the indictment because he had been forced to confess and had been beaten until his eyes became swollen and red by roommates under investigators' witness. Therefore, he had to admit for his comfort. | 4/2008 | Unclear result | http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=252114&ChannelID=6<br><br>http://www.laodong.com.vn/Home/Nguyen-Lam-Thai-phan-cung-to-cao-co-quan-tien-hanh-to-tung/20084/84244.laodong |
| 15 | **The case of stealing 240 liters of Diesel**<br>At the first instance trial in the 'property embezzlement' case of 240 Diezel liters from locomotives, the accused, Nguyen Anh Dzung, declared that he felt really confused and was primed on what to say by the investigators. He | 7/2008 | Although the accused refused their statements in the investigation process and evidences were not clear, the Trial Panel still sentenced Dzung to 24 months imprisonment, | http://dantri.com.vn/c20/s20-242120/cac-bi-cao-phan-cung-vien-kiem-sat-duoi-ly.htm |

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| | stated, 'I wrote the testimonies but the investigator disagreed. He tore it away, punched me and forced me to write another.' In addition, this case also related to the death of the accused Nguyen Dinh Binh at the temporary detention house in Vu Ban District – Nam Dinh | | The to 12 months imprisonment, Cuong to 15 months imprisonment, and Tho to 9 months' probation for embezzlement crime.<br>The Trial Panel considered that the death of Nguyen Dinh Binh was not subject to scope of adjudication of this trial. | |
| 16 | **Ho Chi Minh City: Denouncement against the police's action of beating and forcing people to confess**<br>Mr. Cao Van Nhanh denounced the police of Binh Hung Hoa B Precinct, Binh Tan District for beating and forcing him to confess and compelling him to sign into the minutes saying that he had beaten the car driver. | 5/2009 | Unclear resolution result | http://phapluattp.vn/254871p1015c1074/tp-ho-chi-minh-to-cao-cong-an-danh-nguoi-ep-cung.htm |
| 17 | **The case of having sexual relations with juvenile and prostitution brokerage in Ha Giang Province – Sam Duc Suong**<br>At the appellate court session, the accused including Hang and Thuy asserted that all their declaration minutes were dictated and that they had to rewrite if such minutes were not in accordance with investigators' ideas. They had to sign into some blank minutes of statement without knowing any of the content of the statements. The two accused were even forced to write a paper to refuse counsel. The accused Hang denounced that before the appellate trial, a prosecutor and investigators came to | 9/2009 | The Appellate Trial Panel annulled the first-instance judgment and requested re-investigation. | http://www.tuoitre.com.vn/Tianyon/Index.aspx?ArticleID=360933&ChannelID=6 |

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| | meet them and told them that only declaring similarly to the indictment could be good for them and punishment could be reduced. | | | |
| 18 | **The case of 'Thanh Nhan drugs market'**<br>According to Vu Quang Ninh, the defence counsel for the accused Pham Dinh Tieng, there were many contradictions in the statement used to charge Tieng of Bui Trong Bay and Tran Thi Lan, and that this statement had the sign of collusion and priming. | 11/2009 | The result has not been clear | http://www.tienphong.vn/Phap-Luat/171618/Co-hoi-lam-ro-loi-keu-oan-cua-bi-cao-Tieng.html |
| 19 | **Chief Commune Police used torture in Tan Phuoc District, Tien Giang Province:**<br>Mr. To Van Tai – The Chief Communal Police, Mr. Huynh Hieu Lien – a Communal Police and another District Police were denounced by Nguyen Thanh Quoc's family, in My Truong Hamlet, Tan Phuoc District, Tien Giang Province for using corporal punishment to take his statements about a fight between two youth groups. They forced Quoc to stand on a chair, handcuffed his left hand to the window iron frame, then pushed the chair and let Quoc hang over. | 1/2010 | The Standing members of communal party committee directed Mr. Tai to make a clear report on this case. | http://phapluattp.vn/20100123110847960p1015c1073/truong-cong-an-xa-bi-to-cao-dung-nhuc-hinh.htm |
| 20 | **The case in Ninh Binh Province:**<br>Mr. Tong Van An, living in Bac Son Street, Nho Quan Town, Ninh Binh Province submitted a Letter denouncing cadres of Nho Quan Investigation Police body for priming | 1/2010 | The Provincial Investigation Police verified and concluded that the Mr. An's denunciation had no basis. | http://ca.cand.com.vn/vi-vn/bandocvaCAND/thutoasoan/2010/1/157332.cand |

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| | and forcing confession and for making incorrect documents in investigating a case of intentional injury. | | | |
| 21 | **The case of Project 112**<br>At the hearing, the accused stated that their statements at the Investigation Bodies were wrong because they had been forced and primed to declare.<br><br>The Accused Luong Cao Phi said: 'Statements at the hearing are correct, those declared at T16 camp were incorrect because the investigator had enticed me to declare such to be on bail'. The accused, Phi, also affirmed that 'my statements were forced and primed by investigators. When I was released, my lawyer already submitted a Letter of Denunciation on this issue'.<br><br>Another accused said that Investigation Bodies even filled in Minutes of Declaration themselves. Besides, the accused Ha denounced that the investigator forced him to sign into the minute of refusing counsel when he was prosecuted with the highest penalty – death sentence. After that, the investigator did not explain him that with this penalty, the accused would have the right to designated counsel. | 1/2010 | The prosecutors affirmed that the accused was not forced to confess and gave evidences to prove such. | http://www.tuoitre.com.vn/tianyon/Index.aspx?ArticleID=358519&ChannelID=6<br>http://phapluattp.vn/20100115114245951p1063c1016/phien-xu-vu-de-an-112-ong-loat-keu-oan.htm |
| 22 | **The case in Bac Giang Province:**<br>Mrs. Hoang Thi Lien and Mr. Chu Van Hung, living in Canh Nam Commune, Yen The District, Bac Giang | 1/2010 | Yen The District Police answered that they had not forced and used corporal punishment on the | http://ca.cand.com.vn/vi-VN/bandocvaCAND/thutoasoan/2010/1/157578.cand |

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| | Province, submitted a Letter of Denunciation against Yen The District Police for forcing and using corporal punishment on Mr. Chu Van Hung and requested the People's Procuracy at the senior level to re-investigate Mr. Chu Van Hung's case. | | accused Chu Van Hung. Some contents in the Letter of Denunciation of Mrs. Lien and Mr. Hung had no foundation. | |
| 23 | **The Drug case in Son La Province :**<br>Two accused, Nghiem Dinh Bong and Trinh Nguyen Thuy, denounced investigators from Phu Tho Police for hitting, forcing and priming them to confess. | 1/2010 | Statements of the accused were periphrastic and unpersuasive at the trial. | http://www.laodong.com.vn/Home/Xet-xu-vu-an-ma-tuy-o-Son-La-Cac-bi-cao-van-to-ra-het-suc-ngoan-co/20071/20254.laodong |
| 24 | **'Why my child died?':**<br>Hanoi Public Security was requested by Mr. Nguyen Quang Phuc to investigate why his child – Mr. Nguyen Quoc Bao had been 'invited' to Hai Ba Trung District Police but then died at this authority. There were many black and blue traces on his body. | 3/2010 | Investigation Police of Hanoi Public Security has been investigating and the result has not been clear so far | http://www.laodong.com.vn/Home/Tai-sao-con-toi-lai-chet/20103/177560.laodong |
| 25 | **The case of corruption in Go Mon Company:**<br>All key accused stated that they were primed to confess the act of taking bribes and corruption by investigators. Tran Kim Long stated that he was shown Hiep's statement, in which the accused Hiep declared he gave him money; and he also was shown a letter written by Hiep and Chau encouraging him to admit guilt. | 6/2010 | These statements of the accused were rejected by the records announced by the Presiding Judge Vu Phi Long and they were considered just to be the quibbling of the accused. | http://www.tienphong.vn/Phap-Luat/503090/Van-loanh-quanh-khong-nhan-toi-hoi-lo.html |

# APPENDIX 2
# REFERENCES

## I. International treaties


- Basic Principles on the Roles of Lawyers
- Beijing Statement of Principles of the Independence of Adjudication
- Convention on Children's Rights
- International Covenant on Civil and Political Rights
- Convention on Elimination of All Forms of Discrimination against Women
- International Covenant on Economic, Social and Cultural Rights
- International Convention on Elimination of All Forms of Racial Discrimination


## II. Vietnamese legislation


- Constitution 1946, 1959, 1980 and 1992
- Criminal Procedure Code 2003
- Ordinance on Investigation;
- Compensation for wrongfully judged people
- Law on Organization of the People's Court
- Law on Organization of the People's Procuracies
- Ordinance on Judges and People's Jurors
- Law on Legal aid
- Regulations on Legal Consultancy of Organizations and Unions


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