



## **The equal rights of the accused persons of the court and shall be judged by the independent court, no bias, public disclosure of law and practice in Vietnam**

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### **Abstract**

Human rights are one of the fundamental rights recognized by law in most countries around the world. In which, the equal right of accused before the Court and tried by an independent, impartial and open Court is one of the basic human rights recognized in the law in most countries. Countries in the world as well as expressed in international documents. The equal right of accused persons before the Court and to a trial by an independent, impartial and open Court is guaranteed by the obligations of the agency or person conducting the proceedings. Therefore, ensuring a trial by an independent, objective and legally established court is to ensure a fair trial for the accused.

**Keywords:** right to equal trial; accused; independent, objective and unbiased trial court

### **Introduction**

#### **1. An overview of the right to equality before the courts and to a trial by an independent, impartial and open Court**

The right to equality before the courts and the right to an independent, impartial and open trial are among the aspects of the right to a fair trial that have been recognized in many international legal documents as well as national laws of many countries. According to the provisions of international legal documents, the right to equality before the court and to be tried by an independent, impartial and open court is expressed through the following two basic contents:

One is: equality is expressed in the equality of rights between the parties in the proceedings. The accusing parties and the denunciation party have the same right to present evidence, opinions and requests are the first requirements of fairness in the trial. This is also a requirement of Article 7 of the 1948 Universal Declaration of Human Rights that "everyone is equal before the law and has the right to equal protection of the law" <sup>[1]</sup>. Second: Courts need to be independent and unbiased, which is also important to ensure fairness. A court is a body that has the authority to make a judgment on whether a person is guilty or not and the criminal responsibility that person has to bear. In the Basic Principles on the Independence of the Judiciary, adopted by the United Nations Conference on Crime Prevention and Punishment and adopted by the United Nations General Assembly. Approved in 1985, the independence of the Court has been concretized from many angles such as the need for state guarantees, constitutional guarantees, the Court is not affected by coercion, pressure, wrongful intervention... In addition to the independence of the Courts and Judges, the independence of the Police and the prosecutor also significantly affects the independence of the judicial system. The Guidelines on the Prosecutor's Role (adopted by the United Nations Conference in 1990) affirm the State's responsibility to ensure that Prosecutors perform their professional duties without intimidation, interference and interference (Clause 4) and the Public Prosecutor's Office must be completely separated from the judicial

function (Clause 10). In the Code of Ethics of Law Enforcement Officials (adopted by the United Nations General Assembly). 1979), some aspects related to independence such that law enforcement officials (exercise of police power) must not be corrupt (Article 7). Openness and transparency are essential requirements of fairness. A court of public hearing is a requirement of Article 14/1 ICCPR. However, public hearings may be restricted for reasons of national security or to protect the privacy of the parties. In the European Convention on Human Rights (ECHR), the publicity of the trial (Article 6) as well as the guarantee of the right to information of the public are emphasized (Article 10). Recently, the Council of Europe raised a recommendation regarding transparency and recommended that countries ensure the right of the public to receive information about the activities of the judiciary and police through various means. Media, and at the same time, reporters must be free to write and comment on the justice system. In 2005, the Consultative Council of European Judges also highlighted the relationship between the Court and the mass media.

#### **2. Vietnam with the issue of ensuring the equal rights of the accused before the Court and tried by an independent, impartial and open court**

Vietnam has been a member of the United Nations since 1977 and is a member of many important international conventions on human rights, including two 1966 international conventions on civil, political and economic rights. , culture and society (Vietnam has joined 7/9 of the United Nations Basic Conventions on Human Rights and a number of their protocols. Besides, Vietnam is also a party to many other international conventions with contents related to the recognition, promotion and protection of human rights.). Vietnam commits to comply with international treaties to which Vietnam is a member. This is clearly reflected in the Constitution, the Law on International Treaties and the Law on Promulgation of Legal Documents. In law-making work, the elaboration and promulgation of domestic legal documents must not hinder

the implementation of international treaties to which Vietnam is a contracting party (Article 5, Article 156 of the Law on Promulgation of Legal Documents). Legal Regulations). Trong trường hợp văn bản quy phạm pháp luật trong nước và điều ước quốc tế mà Việt Nam là thành viên có quy định khác nhau về cùng một vấn đề thì áp dụng quy định của điều ước quốc tế đó, trừ Hiến pháp (Điều 6 Luật Điều ước quốc tế). In case a domestic legal document and an international treaty to which Vietnam is a contracting party have different provisions on the same issue, the provisions of that international treaty shall apply, except for the Constitution (Article 6). Law of international treaties).

Human rights in general, including the right to be equal before the courts and to be tried by independent, open and impartial courts are always enshrined in the Constitutions, documents with high legal effect. In the system of legal documents of Vietnam. On the basis of the provisions of the Constitution, the legal documents of Vietnam are promptly amended, supplemented, and perfected the content of equal rights of accused before the Court and tried by the Court. Independent, unbiased and public judgments in accordance with the spirit of international legal documents to which Vietnam is a member. Specifically: The 2013 Constitution of Vietnam in Article 16 stipulates: Everyone is equal before the law. No one shall be discriminated against in political, civil, economic, cultural or social life. Equal rights are also recognized in Article 26 of the 2013 Constitution, which states: "Male and female citizens are equal in all respects. The State has policies to ensure equal rights and opportunities for gender. The State, society and family create conditions for women to develop comprehensively and promote their roles in society. It is strictly forbidden to discriminate on the basis of gender" [2]. On the basis that the content of equal rights recognized in the 2013 Constitution has been concretized in important laws of Vietnam, especially the Criminal Procedure Code 2015 Criminal Procedure Code 2015 in Article 9 on ensuring the principle of equality before the law has affirmed: Criminal proceedings are conducted on the principle that everyone is equal before the law, regardless of ethnicity or gender, beliefs, religion, caste and social status. Anyone who commits a crime will be dealt with according to the law. In criminal procedure activities, Article 26 stipulates: "During the course of prosecution, investigation, prosecution, trial, investigators, procurators, other persons competent to conduct procedures, accused persons Criminals, defense counsels and other procedure participants all have equal rights in giving evidence, evaluating evidence, and making requests to clarify the objective truth of the case". [3] The right to a trial by an independent, impartial court in international treaties on human rights is reflected in Article 23 of the Vietnamese Criminal Procedure Code: Judges and jurors are independent and only obey the law. This right is also recognized in the Civil Code of Vietnam in Article 12: Judges and people's jurors hear civil cases, judges settle civil matters independently and only obey the law. Article 16 stipulates: Chief Justices of Courts, Judges, People's Assessors, Verifiers, Court Clerks, Procurators, Procurators, Inspectors, Interpreters, Experts, Members Members of the Valuation Council may not conduct or participate in proceedings if there is a good reason to believe that they may not be impartial and objective while performing their duties and powers. To ensure equal rights and to be tried by an independent, fair and unbiased court, the Vietnamese

court has issued a Code of Ethics and Conduct for Judges. Whereby:

In terms of independence: In the course of settling the case, the Judge makes his own decisions on the basis of his assessment of the facts of the case and evidences and only obeys the law; preserve professional courage to not be affected by any interference; The judge must be independent from the members of the Trial Panel; independent from other proceedings; independent from internal and external influences of the Court; Judges must not interfere in the procedural activities of members of the Trial Panel and other procedure-conducting persons.

Regarding impartiality and objectivity: Judges must be impartial and objective; perform the duties properly, not for personal gain, without favoring any party in the case; Judges must base themselves on documents and evidences that have been publicly examined at the court hearing, the results of the litigation at the trial, the provisions of law, custom, similarity of law, and basic principles of law. law, case law, fairness to resolve all issues of the case.; The judge must not make any statement or comment at the court hearing, session, in public or in the media that affects the impartial and objective resolution of the case. Regarding fairness and equality: Judges have the responsibility to ensure fairness and equality for procedure participants to fully exercise their rights and obligations in the process of settling cases at Court; In the course of settling the case, the Judge must not and shall not permit acts of inequality, discriminating against ethnicity, gender, belief, religion, social class, education level, occupation, social status, form of ownership and economic composition of individuals and legal entities.

In summary, the basic content of the equal rights of the accused before the Court and tried by an independent, open, and impartial Court is expressed through the legal system of Vietnam as follows: First, the accused has an equal right to present evidence, documents, objects, demands and democratic arguments in court. Second, the accused has an equal right to evaluate evidence, make requests for clarification of already collected evidence, and request the collection of new evidence. Third, accused persons have equal rights to present their testimony and opinions, not be forced to testify against themselves or be forced to admit that they have the right to argue in court. Fourthly, accused persons have equal rights to request the presiding judge to ask questions or to ask the court participants themselves if the presiding judge agrees. Fifth, when there are grounds to show that the procedure-conducting person is not impartial and objective in settling the case, the accused person has the right to request the change of the procedure-conducting person.

### **3. Limitations in ensuring the equal rights of accused persons before the Court and to be tried by an independent, public and impartial Court in Vietnam today**

Be able to assert the equal rights of accused persons before a Court and to be tried by an independent, public and impartial Court as provided for in important international treaties on human rights that have been approved by the government. Vietnam is fully embodied in its legal system through the Constitution and important laws. However, the legal provisions on this right in the legal system of Vietnam and the practice of the Court's adjudication still have certain limitations. Specifically:

First, about the organization of courts in Vietnam In Vietnam, the court system is organized according to administrative (territorial) levels, so the fact that the independence of the courts is affected is not small, but specifically here is under the influence of the local government. Besides, the court's lack of financial independence is also one of the factors that govern the independence of the courts today in Vietnam. Second, about the provisions of the law Firstly: Although the 2015 Criminal Procedure Code has added many provisions to ensure the equal rights of accused persons in the trial of criminal cases (Article 9, Article 26, Article 42, Article 257). However, the power of those conducting the proceedings is still more important than that of the defense (Articles 307, 309); the deliberation time of the trial panel has not been specified (Article 326); have not yet ensured equal rights between the accused and other subjects (accused persons may be escorted in case of intentional absence, or failure to come to work at the request of persons with procedural authority without not due to force majeure or no objective obstacles (point a, clause 3, Article 60; point a, clause 3, Article 61; point a, clause 4, Article 62 of the 2015 Criminal Procedure Code), while other subjects such as civil defendants, persons with related obligations, witnesses, etc., if they are absent at the request of the procedure-conducting person, they will not be affected by any sanctions). Second: The exercise of the accused's right to access legal services contributes to the exercise of equal rights at the trial. Accordingly, the 2015 Criminal Procedure Code stipulates that defense counsels have many rights from meeting the accused; be present in confrontation, recognition, speech recognition, and investigative operations; see minutes of procedural activities with their participation, procedural decisions related to the person they are defending... (Clause 1, Article 73). However, the above provisions do not really make sense for the defense and the accused. Because, Clause 2, Article 87 of the Criminal Procedure Code 2015 stipulates: "What is real but not collected according to the order and procedures prescribed by this Code has no legal value and cannot be used as a basis for solve the case". Thirdly: The law stipulates that the accused party's lawyer has the right to collect documents and evidences related to the exercise of the right to defense, but the receipt, examination and evaluation of documents and evidence is done by the defendant's attorney. Decision-Making agency (Clause 4, Article 88 of the 2015 Criminal Procedure Code). This shows that the lawyer, the defense counsel for the accused party is not really equal to the accuser. Fourthly: According to the provisions of the 2015 Criminal Procedure Code, only commercial legal entities that commit the crimes specified in Article 76 of this Code shall bear penal liability. Meanwhile, the concept of legal entity is very broad. An organization becomes a legal entity when it meets the conditions specified in Article 74 of the Civil Code 2015. Thus, the provisions of the 2015 Criminal Code on criminal liability for commercial legal entities are compared with legal entities. Non-commercial also just based on "commercial" purposes to handle the criminal liability of legal entities is not satisfactory. Fifth: The 2015 Criminal Procedure Code does not provide for measures to apply liability to cases where prosecutors fail to fulfill the obligation to respond at court sessions to clarify the objective truth of the case, which has not yet ensured the principle of equality. in criminal proceedings.

Sixth is: Clause 6, Article 183 of the Criminal Procedure Code 2015 stipulates that "The interrogation of the accused at the detention facility or at the headquarters of the investigating agency or the agency tasked with conducting a number of investigative activities must be recorded. or record video with sound. The interrogation of the accused at another location shall be recorded or recorded with sound at the request of the accused or by agencies or persons competent to conduct proceedings. However, this means is still presided over by the prosecution agency and when there is no camera lens, it is difficult to ensure that there is no disadvantage for the person in custody, investigation, in this case, the recording, , recording is not meaningful) <sup>[4]</sup>. Seven is: Clause 1, Article 70 of the 2015 Criminal Code stipulates that "Interpreter, translator is a person capable of interpreting or translating at the request of a competent procedure-conducting agency in case a legal participant cannot use Vietnamese, or have documents that do not appear in Vietnamese". However, the practical application of this provision shows that there are people accused of using Vietnamese, but it is more limited than other subjects participating in the proceedings. If the law does not provide more specific guidance on the level of "using Vietnamese" of the participants in the proceedings to serve as a basis for appointing interpreters and translators, the equal rights of the subjects in the legal proceedings cannot be guaranteed. That is the right of the accused. Secondly, on the implementation of responsibilities of the subjects conducting the proceedings One is: When interrogating, there are cases where the procurator still has prejudice against the accused, considers them criminals, has not fully grasped the principle of presumption of innocence; there are cases where the procurator is not active or proactive in questioning but considers interrogation as the main task of the presiding judge of the trial. Second: When expressing opinions about the trial, there is a case where the prosecutor does not base on the results of the interrogation but on the indictment that prosecuted the accused, even though the results of the interrogation at the court session had already been established. Many contents are not consistent with the indictment. Thirdly: In some cases, the Trial Panel did not manage the argumentation process well between the parties; did not really pay attention to the new details and evidence of the case, so the contradictions in the evidence and testimony have not been clarified. Although the 2015 Criminal Procedure Code stipulates that when adjudicating judges and people's jurors, judges and people's assessors are independent and only obey the law, there are cases where judges and people's co-operatives psychologically rely on the presiding judge, not listen to the argument between the accuser and the exoneration. Important circumstances and exculpatory evidence presented by the defense are often considered and accepted by the jury and are rarely mentioned in the judgment. There was a case where the prosecutor, because he was not well prepared to argue at the trial, could not predict some situations, so when the defendant and the defense had new evidence, the prosecutor became passive and confused, avoiding avoid issues raised by the denunciation party that are contrary to the opinion of the KSV, or answer that does not go straight to the heart of the matter under discussion. Fourthly: Article 257 of the 2015 Criminal Procedure Code stipulates that "Lawyers have an equal position with prosecutors at the trial", but in fact, in many court hearings of criminal cases, the opinions

of lawyers are mostly still not binding on the trial panel <sup>[6]</sup>. In many cases, the trial panel gave priority to the prosecutor, limiting the defense counsel's right to argue for the accused. The defendant's right to defense is a means and a tool for the accused to protect his or her rights, but in practice has not been really respected. In fact, there are many cases where "attorneys are slow to receive notices of registration of defense registration and protection of legitimate rights and interests even though the law has quite detailed provisions on the time limit for settling defense registration procedures at Clause 4, Article 78 of the Criminal Procedure Code 2015. This notice is often overdue for various reasons from the procedural authority, contributing to difficulties for lawyers" <sup>[5]</sup>. Fifth: When deliberation and sentencing: there is a case that the first-instance trial panel did not consider applying extenuating circumstances to the punishment frame for the accused, wrongly applied the crime, or there are cases where there are sufficient grounds to declare a defendant innocent, but the Court does not declare innocence but returns additional investigation files to stop the investigation, affecting the interests of the unjust victim; there was a case that the first-instance trial panel overemphasized the seriousness and danger of the offence, thus punishing the accused with too strict a sentence that did not guarantee the equal rights of the accused; some cases have not performed well in the deliberations and sentencing sections; There is a case that "the minutes of the trial and the minutes of the deliberation are sketchy, incongruent with the decisive part of the judgment, when the deliberation fails to discuss and vote on the terms applicable to the sanctioning of the accused. , court fees, civil liability, material handling"<sup>[6]</sup>. In fact, "in some cases, the deliberation activities of the trial panel were interfered with, contrary to the provisions of the Criminal Procedure Code, affecting and infringing on the rights and interests of the accused and related parties. There are cases where the chief judge asked the judge to stop the sentencing, which actually interfered with the operation of the trial panel <sup>[7]</sup>.

#### **4. A number of solutions to ensure the equal rights of the person accused of me being forced before the court and being tried by an independent, public, and impartial court in Vietnam today**

From the above situation, the author believes that, in order to ensure the equal rights of the convicted before the court and to be tried by an independent, open and impartial court in Vietnam, it is necessary to implement a the following number of solutions: Firstly, amending and supplementing regulations on performance of obligations to be present under summons of competent procedure-conducting agencies of other procedure participants such as civil defendants, persons with related obligations. Officials, witnesses in the Criminal Code 2015. Specifically, it is necessary to add point a, clause 3 of Articles 64, 65, and 67 of the Criminal Procedure Code 2015 with the content "In case of intentional absence without reason of force majeure or objective obstacles and the If their absence interferes with the settlement of criminal information, prosecution, investigation, prosecution, and trial, they may be subject to expulsion". The Supreme People's Court should issue a document guiding the implementation of regulations on the right to use speech and writing in the criminal procedure to ensure the equal rights of the accused at the trial. Specifically, there should be clearer guidance on the level of

Vietnamese language use of the court participants in Articles 23, 70, and 263 of the 2015 Criminal Code. Secondly, issue guiding documents to ensure the uniform implementation of a number of provisions of the 2015 Criminal Procedure Code such as: regulations on questioning order (Article 309); specifying the responsibilities of the trial panel, the procurator and the defense counsel (Articles 320; Article 322), the time and supervision of the deliberation activities of the trial panel (Article 326), and requirements for the content of the deliberation minutes to operate. The deliberative judgment reflects the correct order and content of the panel's discussion when deliberating. Third, implement measures to enforce regulations prohibiting other agencies and entities from interfering with the adjudication activities of judges and jurors; ensuring the principle that judges and jurors conduct their trials independently and only obey the law (Article 23 of the Criminal Procedure Code 2015). Fourthly, improve the responsibilities of the presiding judge of the trial in administering the trial in the direction of litigation to ensure fairness, democracy and objectivity; promote the role of the defense counsel in ensuring the equal rights of the accused at the trial. Fifth, amend and supplement regulations on criteria and conditions for selection and appointment of judges in the Law on Organization of People's Courts 2014. Specifically, in addition to the general standards for judges (Article 67), conditions for appointment of Primary Judges, Intermediate Judges, Senior Judges (Article 68), Judges of the Supreme People's Court (Article 69), the appointment of Judges requires assessment of work capacity and the results of the Judge's practical activities. Before appointing or re-appointing judges, it is necessary to conduct a professional examination for trial, or once every 5 years to conduct a test for the team of judges to screen for judges who are weak in professional qualifications. Subjects and professions. The examination must be conducted objectively, openly and fairly through the handling of specific situations that the Judge has to deal with during the adjudication process.

Sixth, improve the quality of training and retraining for prosecutors on questioning and litigation skills, and uphold the responsibility of prosecutors for ensuring the equal rights of the accused at the trial. The Procuracy and relevant agencies need to pay more attention to the remuneration for the prosecutor to perform his duties at the trial of criminal cases of the People's Court so that the prosecutor can feel secure in doing his duty, ensuring his impartiality objective. Seventh, strengthen the activities of fostering lawyers in professional skills and practice skills to create a new change in the quality of the team of lawyers; focus on training lawyers to participate in litigation, raising the awareness and responsibility of lawyers in ensuring the equal rights of accused persons at the trial of criminal cases in accordance with the spirit of Article 103 of the Constitution. Law 2013 and contents of the Criminal Procedure Code 2015.

#### **References**

1. Universal Declaration of Human Rights 1948
2. Vietnam's 2013 Constitution
3. Criminal Procedure Code of Vietnam 2015
4. <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210646>.
5. Le Minh Duc (2020), Implementation of the law on the rights and obligations of lawyers in criminal

- proceedings in Vietnam today, PhD thesis in jurisprudence, Ho Chi Minh National Academy of Politics Minh, Hanoi, p.109.
6. Standing Committee of the National Assembly Report on monitoring results on “The situation of injustice and wrongdoing in the application of the criminal law, criminal procedure and the compensation for damage to the unjust and wrong in the criminal proceedings in accordance with the law” of the XIII National Assembly, 2015, 14.
  7. Vo Quoc Tuan, Ensuring the rights of the accused in the first-instance trial of criminal cases of the provincial People's Courts in Vietnam today, Doctoral thesis in jurisprudence, National Academy of Politics Ho Chi Minh City, Hanoi, 2017, 97.