

The Presence of the Defense Lawyer in Vietnam's Criminal Justice System: Substantive or Cosmetic?

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Abstract: Defense lawyers play an important role in protecting the rights and interests of the accused, contributing to upholding justice and reducing the number of wrongful convictions. In Vietnam, in accordance with the current Criminal Procedure Code of 2015, defense lawyers have been given more and more rights to perform legal defense activities. However, defense lawyers are still considered to be passive participants in criminal proceedings, classified under the "judicial complementary" group. The right of lawyers to collect evidence is restricted. Furthermore, other rights have not been fully implemented. The number of lawyers compared to the entire population remains low, and there are very few criminal cases that include the participation of defense lawyers. These circumstances beg the question of whether the presence of defense lawyers in Vietnam's criminal justice system is substantive or merely a cosmetic façade intended to improve Vietnam's global image. This paper seeks to answer this question by analyzing the results of surveys conducted with Vietnamese lawyers. Moreover, it provides some recommendations to strengthen the role of defense lawyers in the criminal justice system of Vietnam.

Keywords: Criminal Law; Criminal Justice; Defense Lawyers; Vietnam

1. Introduction

Together with independent, impartial judges and prosecutors, lawyers are the third pillar necessary to uphold the rule-of-law and provide for effective protection of human rights in a democratic society.¹ In criminal justice systems worldwide, the presence of defense counsel is required to assist the accused in gathering exonerating evidence and to defend him or her from potential violations of their rights during the criminal process.² Defense lawyers have a key role in realizing the right of the accused to a defense.³ Especially with the promulgation of the Criminal Procedure Code (CPC) in 2015, which took effect on January 1st, 2018, Vietnam has also recognized the fundamental aspects of criminal justice and human rights mentioned above.

¹ United Nations. Office of the High Commissioner for Human Rights, and International Bar Association. *Human Rights in the Administration of Justice: A Manual On Human Rights For Judges, Prosecutors And Lawyers*. No. 9. New York and Geneva: United Nations, 2003, accessed August 13, 2022, <https://www.ohchr.org/sites/default/files/Documents/Publications/training9Titleen.pdf>

² Arguedas, Cristina C. "Duties of a criminal defense lawyer." *Loyola of Los Angeles Law Review* 30, no. 1 (1996): 7-12.

³ Uphoff, Rodney J., "The criminal defense lawyer as effective negotiator: A systemic approach." *Clinical Law Review* 2 (1995): 73.

Concurrent with this change, Vietnam has also witnessed an increase in the number as well as the role of lawyers. The number of lawyers⁴ has indeed been growing in recent years: there were only 5,821 lawyers in 2010, but by 2015, this number had grown to 9,436. According to the most recent statistics, on September 30th, 2021, there were 16,134 lawyers, comprising 63 bar associations and hailing from 63 provinces and centrally-managed cities in Vietnam.⁵ Within 11 years from 2010 to 2021, the number of lawyers nearly tripled, increasing by 10,313.

The role of lawyers has been substantially strengthened since the issuance of the 2015 CPC, which gave more rights to the defense counsel compared to the previous CPC promulgated in 2003. The 2015 CPC provided, for the first time, the principle of assurance of adversarial procedure in adjudication (Article 26), proving that Vietnam has been more and more open to integrating adversarial elements into its criminal procedure, which has otherwise followed an inquisitorial model. The 2015 CPC officially recognizes the principle of presumption of innocence (Article 13). Prior to this, some aspects of this principle were stipulated. However, such stipulations were incomplete, and the principle had not been officially recognized. The 2015 CPC also stipulates, for the first time, the principle of assurance of the right of the accused to a defense, as well as the protection of the legal rights and interests of the victim and the litigant (Article 16), devoting a whole chapter to such provisions (Chapter 5).⁶

However, do defense lawyers themselves fully understand the rights that the law has just granted them? Are they satisfied with these new rights and are they able to completely exercise them? Do they face barriers to the exercise of their rights when providing legal defense in practice? And last but not least, are defense lawyers present in most criminal cases or are most cases conducted without the benefit of defense counsel? These are important questions to help identify the actual role of defense attorneys in criminal proceedings.

⁴ There is no distinctions between litigation lawyers and consulting lawyers in Vietnam, conducting legal defense in criminal proceedings as a litigation lawyer is one of the legal services that lawyers provide. The principles, conditions, scope, and form of practice of lawyers and the management of legal practice are prescribed by the Law on Lawyers in 2006 (amended and supplemented in 2012), while the rights and duties of lawyers when participating as the defense counsel in criminal proceedings is prescribed by the 2015 CPC. The rights of defense lawyers mentioned in this paper are in accordance with the provisions of the 2015 CPC.

⁵ The authors synthesize data from the organizational and operational reports of the Vietnam Bar Federation from 2010 to 2021.

⁶ The authors have compared the provisions on the rights of the defense counsel in the 2015 CPC with those of the 2003 CPC and identified three new rights that are prescribed for the first time (the right to be present when the person conducting the criminal procedure takes the testimony of the arrested; the right to request for the change or cancellation of deterrent or coercive measures; the right to collect evidence, examine, evaluate, and give opinions on relevant evidence, documents, and objects and request the person competent to conduct criminal procedure to examine and evaluate), two rights that were amended and supplemented (the right to question the arrested, the temporarily detained, the accused after their statements have been taken without the consent of the procedure-conducting person; the right to be notified in advance the time and place for taking statements and interrogation, and the time and place for other investigation activities without having to make a request).

This paper surveys lawyers practicing in Vietnam to determine their role in the criminal justice process after the 2015 CPC, looking especially at the question of whether their presence in the courtroom is cosmetic or substantive. The survey results, together with relevant statistics from the Vietnam Bar Association and judicial agencies in Vietnam, are analyzed to answer the above research questions. The paper is structured into two main parts: firstly, the *Results and Discussion* section presents findings from surveys of lawyers and analyzes these findings. Secondly, the *Conclusion* section dives deeper into the data obtained during our research, with evaluation of the results, limitations, and causes, thereby proposing some policy implications to promote a more substantive role for defense lawyers in the criminal justice system of Vietnam.

2. The Defense Lawyer in Vietnam's Criminal Justice System: Previous Studies

In the traditional legal culture of Vietnam's feudal dynasties, since it was Confucian rulers' policy to restrict litigation, defense lawyers were not officially recognized, nor did they have any opportunities for career development.⁷ This legal profession was only recognized when the French brought their legal and criminal justice model to Vietnam in the early 20th century.⁸ However, in the second half of the 20th century, lawyers did not have any independence in their activities and were heavily under state control.⁹ Their role as well as the independence of their professional activities were only gradually recognized with the promulgation of the 1987 Ordinance on Lawyers, the 2001 Ordinance on Lawyers, and the 2006 Law on Lawyers (amended and supplemented in 2012). The process of judicial reform in Vietnam in the early 21st century, with the issuance of Resolution No. 08-NQ/TW, Resolution No. 48-NQ/TW, and Resolution No. 49-NQ/TW of the Politburo of the Communist Party of Vietnam on the promotion of legal and judicial reform, have marked progressive steps regarding the position and role of the judicial system and legal practitioners, including lawyers, to actualize the concepts of rule-of-law, judicial independence, and adversarial process.^{10,11,12} Some other research focuses on analyzing the socio-political context, the legal and judicial traditions of Vietnam, to study how this context influenced the role and position of lawyers in society. In particular, it is the context of a state apparatus that doesn't follow the principle of checks and balances,

⁷ Chi, Le Lan, "Does An Evasion of Criminal Procedure Exist in the Traditional Legal Culture of Vietnam?," accessed August 13, 2022, https://law.unimelb.edu.au/__data/assets/pdf_file/0009/3792393/Le-Lan-Chi.pdf

⁸ Phan, Trung Hoai, *Van de hoan thien phap luat ve luat su o Vietnam [Issues for completion of legislation on lawyers in Vietnam]* (Hanoi, Vietnam: Chinhtriquocgia-Suthat, 2004).

⁹ Van Thao, Nguyen. "Mot so van de can quan tam khi thi hanh Phap lenh Luat su [Several concerns when the Ordinance on Lawyers is implemented]." *Legal and Democratic Magazine* (2001): 26-37.

¹⁰ Quang, Nguyen Hung, and Kerstin Steiner, "Ideology and professionalism: the resurgence of the Vietnamese bar." *Asian Socialism and Legal Change* (2005): 191, <https://doi.org/10.22459/ASLC.08.2005.09>

¹¹ Quang, Nguyen Hung, "Lawyers and prosecutors under legal reform in Vietnam: The problem of equality." *Vietnam's New Order* (Palgrave Macmillan, New York, 2007), 162-177, https://doi.org/10.1057/9780230601970_10

¹² Gantz, David A., "Doi Moi, the VBTA and WTO Accession: The Role of Lawyers in Vietnam's No Longer Cautious Embrace of Globalization." *International Lawyer* 41 no. 3 (2007): 873-890.

but rather upholds the principles of collective decision-making¹³ and democratic centralism (*tap trung dan chu*). *Tap trung dan chu* guides the operations of courts and all other state agencies.¹⁴ Finally, Vietnam has upheld the leadership of the Communist Party, which has the role of controlling the direction of court decisions and court leadership generally.¹⁵ Looking at the bigger picture, we can see that the characteristics of Confucian politics still left an imprint on Asian communism.¹⁶ Just like China, Vietnam also values collectivism from Confucian to Marxist thoughts as part of its legal culture. Judicial authorities are more concerned about crime control rather than human rights in criminal proceedings. To effectively handle criminal cases and control crimes, these authorities often collaborate in prosecution or make decisions following public opinions to reduce social tension.¹⁷ Truth and justice are mainly sought after by one party, especially when state agencies stand together on one side of the fight against crime. Meanwhile, on the other side, stands the accused and his or her defense counsel, which have an inferior status. The voice of the defense counsel in court debate and litigation holds even less weight.¹⁸ In this context, remarks such as follows have been made: One scholar comment, “In many cases, hearings have been a kind of performance of a ‘play’ (*dien kich*), in which all knew the outcome before the final act.” Quang (2007) writes, “Lawyers have been regarded as of little help, and a waste of money”.¹⁹

However, after the promulgation of the 2003 CPC, and especially after the promulgation of the 2015 CPC, significant provisions on legal defense have been noticeably recognized, marking a fundamental shift in the legal culture.²⁰ The 2015 CPC clearly demonstrate that typical elements of the adversarial procedure model have been integrated into the inquisitorial procedure model of Vietnam, enhancing the role of lawyers. These changes in the law, with regard to the rights of the defense lawyers, are reflected in the fact that lawyers have been granted the right to collect evidence and other rights in the investigation, as well as the rights at the adjudication stage, which were not fully

¹³ Phan, Trung Hoai, *Van de hoan thien phap luat ve luat su o Vietnam [Issues for completion of legislation on lawyers in Vietnam]* (Hanoi, Vietnam: Chinhtriquocgia-Suthat, 2004).

¹⁴ Quang, Nguyen Hung, “*Lawyers and prosecutors under legal reform in Vietnam: The problem of equality.*” *Vietnam’s New Order* (Palgrave Macmillan, New York, 2007), 162-177, https://doi.org/10.1057/9780230601970_10

¹⁵ Penelope, Nicholson, “*Vietnamese Courts: Contemporary Interactions between Party-State and Law.*” Balme, S. and Sidel, M. *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (New York, Houndsmills: Palgrave Macmillan, 2007).

¹⁶ Peerenboom, Randall, *China's long march toward rule of law* (Cambridge University Press, 2002), <https://doi.org/10.1017/CBO9780511493737>

¹⁷ Jiang, Na, *Wrongful Convictions in China*. (Springer, 2016), <https://doi.org/10.1007/978-3-662-46084-9>

¹⁸ Chi, Le Lan, “*Does An Evasion of Criminal Procedure Exist in the Traditional Legal Culture of Vietnam?*,” accessed August 13, 2022, https://law.unimelb.edu.au/__data/assets/pdf_file/0009/3792393/Le-Lan-Chi.pdf

¹⁹ Quang, Nguyen Hung, “*Lawyers and prosecutors under legal reform in Vietnam: The problem of equality.*” *Vietnam’s New Order* (Palgrave Macmillan, New York, 2007), 162-177, https://doi.org/10.1057/9780230601970_10

²⁰ Phan, T. H., Bao chua, bao ve quyen va loi ich hop phap [Legal defense and protection of legitimate rights and interests]. In H. B. Nguyen (Ed.), *Nhung noi dung moi trong Bo luat To tung hinh su nam 2015* [New changes in the 2015 Criminal Procedure Code] (Hanoi, Vietnam: Chinhtriquocgia-Suthat, 2016), 179-205.

recognized in the previous CPC.²¹ However, the criminal procedure law in Vietnam does not classify actors into the accusing party and the defense party. Instead, actors are categorized into persons conducting criminal procedure (persons working for procedure-conducting agencies) such as the investigator (investigation agency), the procurator (procuracy), the judge (court), and procedural participants (including the defense counsel) (Article 55); thus, the defense counsel (lawyer) is only seen as a participant in criminal proceedings, rather than a principle party.²² Furthermore, in other policies and laws, lawyers are still identified as part of the ‘judicial complementary’ group²³ and are still officially considered to play only an insignificant and passive role as someone who is allowed to participate in criminal proceedings conducted by the investigator, the procurator, and the judge.

Besides studies that analyze the process of improving the law on the role of the defense lawyer in the contemporary legal history of Vietnam mentioned above, there are other studies that have focused more on defense counsels in terms of factors influencing their professional activities and role, pointing out those that influence the job satisfaction and performance of lawyers in Vietnam,²⁴ as well as their motivation,^{25,26} including the feeling of the personal role in work, work-life balance, income, working conditions, etc.

However, the single largest number of articles are written by lawyers working in Vietnam, who complain about inadequate legal provisions regarding their rights and obligations, or how their rights haven’t been guaranteed by criminal justice agencies, illustrated by specific cases, to advocate for changes in the policies and viewpoints of criminal justice agencies that create more favorable conditions for defense lawyers. Previous publications show that the role of the defense lawyer has been evaluated largely through historical, political and institutional lenses, through studying the criminal justice model as well as factors influencing the role of the defense lawyer in Vietnam’s criminal justice system. However, the role of the defense lawyer in Vietnam’s criminal justice system has not been evaluated through consideration of the voices of insiders, defense lawyers in this case, as well as practical statistics on their presence in criminal proceedings, especially since the current 2015 CPC took effect.

²¹ Trinh, T. V., and Tran, T. H. L., *Luật sư bào chữa trong phiên tòa hình sự sơ thẩm: một số vấn đề lý luận, thực tiễn và kiến nghị* [Defense Counsel in Criminal First-instance Trial: Some Theoretical & Practical Issues and Recommendations]. *Democracy and Law Journal* (2016): 117-131; Ngo, N. V., *Hoạt động bào chữa của luật sư trong giai đoạn xét xử sơ thẩm vụ án hình sự* [The representation of defense counsel in the phase of first-instance hearing of criminal action] (Doctoral dissertation, Hanoi Law University, 2016).

²² Le, M. D., *Thực hiện pháp luật về quyền, nghĩa vụ của luật sư trong hoạt động tố tụng hình sự ở Việt Nam hiện nay* [Implementation of law on the rights and obligations of lawyers in criminal justice activities in Vietnam today] (Doctoral dissertation, Hanoi Law University, 2020).

²³ See Resolution No. 49-NQ/TW dated 2/6/2005 of the Politburo on the Judicial Reform Strategy to 2020 and Decree No. 96/2017/NĐ-CP of the Government dated 16/08/2017 on the Functions, Mission, Competency, and Organizational Structure of the Ministry of Justice.

²⁴ Pham, Minh Tuyen, “Factors influencing job satisfaction and performance of the lawyers in Vietnam.” *Management Science Letters* 10, no. 9 (2020): 1981-1992.

²⁵ Truong, The Con, and Quang, Le Duc, “Factors affecting motivation and performance of lawyers in Vietnam.” *Management Science Letters* 10, no. 9 (2020): 1903-1914,

²⁶ Le, Hoang Nhu Nguyen, and Nguyen, Tran Huyen Tran, “Factors affecting the work motivation of lawyers at law offices in Quang Ngai province, Vietnam.” *European Journal of Social Sciences Studies* 6, no. 4 (2021): 321-329, <https://doi.org/10.46827/ejsss.v6i4.1089>

3. Method

We have identified lawyers as the subject of our surveys as they are the “insider”, who enjoy and exercise the rights of the defense counsel as prescribed in the CPC. The field research was conducted under the framework of the “Phase 2 of Supporting Adversarial Principles of Criminal Justice in Vietnam: Improve Criminal Adversarial Knowledge for Law Students Based on Assessment of Litigation after Coming into Effect of the Criminal Procedure Code 2015” Programme, following the collaboration agreement between the United Nations Development Programme in Vietnam (UNDP) and the School of Law - Vietnam National University, Hanoi. The subject of the field research are five bar associations from five localities in the North of Vietnam, including three provinces, which are Bac Ninh, Quang Ninh, Nghe An, and two cities, which are Hai Phong and Hanoi. Hanoi, Hai Phong and Quang Ninh are selected for being the three localities with the highest economic development and number of criminal cases in the north, while Bac Ninh and Nghe An were randomly selected among the other provinces in northern Vietnam. The field research was conducted in 2020 and 2021 with the combination of two methods.

The first method utilized the distribution of questionnaires to 181 lawyers from the five above-mentioned bar associations (20 lawyers from Bac Ninh, 18 lawyers from Quang Ninh, 73 lawyers from Nghe An, 47 lawyers from Hai Phong, and 23 lawyers in Hanoi) to study how lawyers evaluate themselves on their understanding of the rights of the defense counsel under the 2015 CPC, the level of satisfaction with the rights of the defense counsel under the 2015 CPC, their knowledge and skills to exercise their rights, and the difficulties and barriers that they face in legal defense.

The second method utilized focus-group discussions at workshops organized at each bar association to cross-evaluate data collected from the questionnaire and compare the inputs from lawyers of the five bar associations, after which, another focus-group discussion with representatives of all five bar associations was conducted to strengthen the basis of the statements made by lawyers. In addition, we have also employed secondary data analysis and have studied relevant materials, including summary operational reports and study reports of the Vietnam Bar Association, reports of the National Assembly’s Judicial Committee, policies and legal provisions of the Party and the State with regard to lawyers to provide supplementary evaluation and practical insight into the above-mentioned studies.

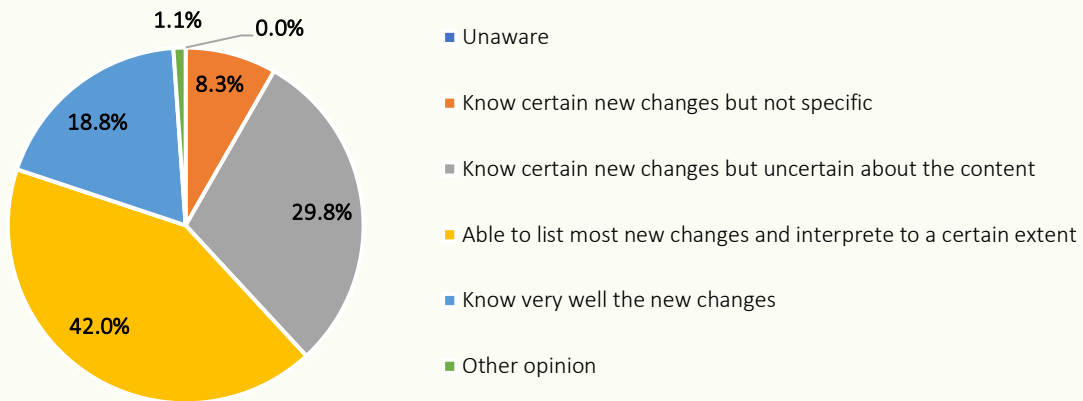
4. Results and Discussion

4.1. Lawyers’ understanding of the rights of the defense counsel under the 2015 Criminal Procedure Code

The 2015 CPC provides many new rights for the defense counsel. We aim to study the level of awareness of lawyers on these new rights in the 2015 CPC. The answers to the questionnaires show that only 34 of 181 of participating lawyers are truly confident about their knowledge of the new provisions related to the rights of the defense counsel in the 2015 CPC, accounting for 18.8%, while the majority of lawyers have only a basic understanding of the new provisions. In particular, 76 of 181 (42.0%) lawyers believe they could list most of the new provisions and interpret these provisions to a certain extent,

54 of 181 (29.8%) lawyers are aware of some new provisions but not confident about the specific details, and 15 of 181 (8.3%) lawyers only know of a handful of new provisions but not specific details (See Figure 1).

Figure 1. The understanding of defense lawyers on the new changes of the 2015 CPC



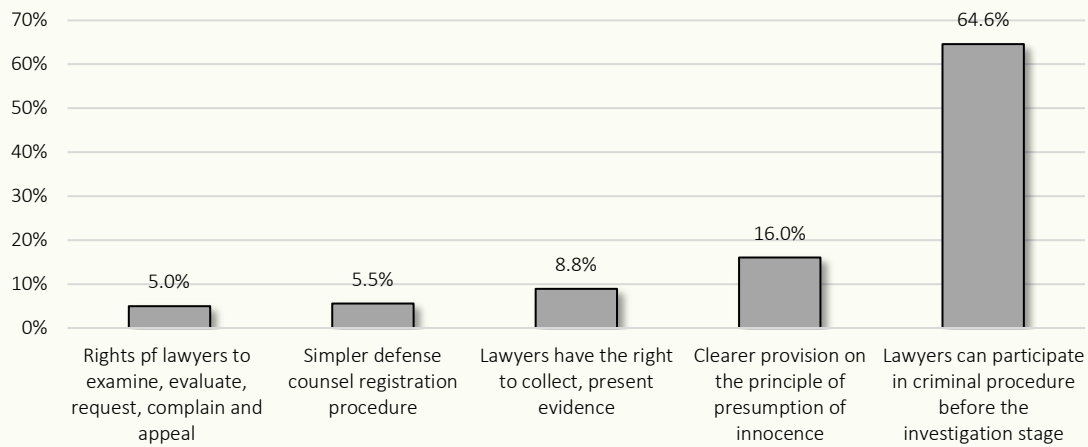
Based on the data, it is possible to say that in general, lawyers who participated in the survey found themselves to have some understanding of the new provisions of 2015 CPC regarding their rights. However, the data also reflects that lawyers are not thoroughly able to interpret all the new provisions. This is clearly a subjective obstacle from the lawyers themselves, who haven't been made fully aware of their rights as defense counsels.

4.2. Lawyers' satisfactory level regarding the rights of defense counsels under the 2015 Criminal Procedure Code

The satisfaction of lawyers regarding the rights of defense counsels under the 2015 CPC is assessed based on the survey results as follows:

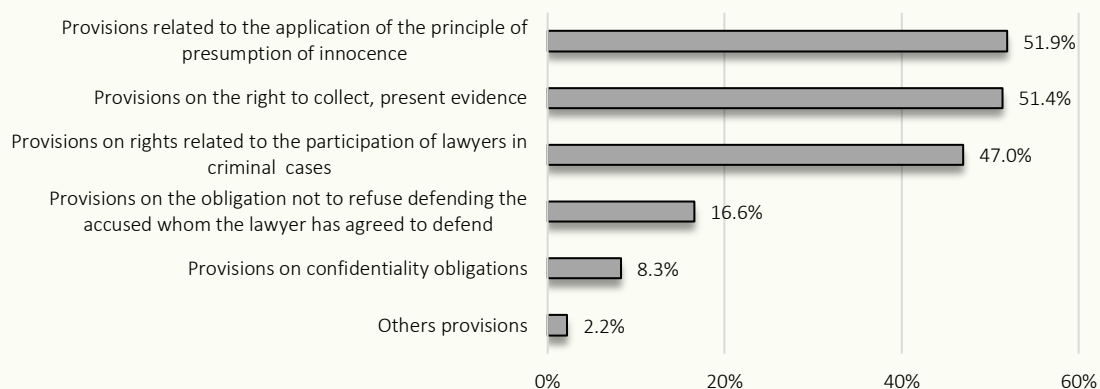
- (i) When asked to evaluate which new provision of the 2015 CPC helps lawyers protect the rights of their clients most effectively (with which they are most satisfied), 117 of 181 (64.6%) lawyers surveyed chose the provision that allows lawyers to participate in the case in the pre-investigation stage; 29 of 181 (16%) lawyers chose the fact that the principle of presumption of innocence is more clearly regulated; 16 of 181 (8.8%) lawyers chose the provision that lawyers have the right to collect and present evidence; 10 of 181 (5.5%) lawyers chose the less complicated defense counsel registration procedure; and 9 of 181 (5%) lawyers chose the right to examine, evaluate, request, complain, and appeal (See Figure 2).

Figure 2. Evaluation of lawyers on which new provision of the 2015 CPC helps lawyers protect the rights of their clients most effectively



(ii) For provisions of the 2015 CPC that lawyers think should be revised or further guided to facilitate legal defense activities, more than half of surveyed lawyers chose “Provisions related to the application of the principle of presumption of innocence” (94 of 181, accounting for 51.9%) and “Provisions on the right to collect and present evidence, information” (93 of 181, accounting for 51.4%). In addition, up to 85 of 181 (47%) lawyers think that provisions on the rights related to the participation of lawyers in criminal cases need to be revised or supplemented. Furthermore, about 16.6% (30 of 181) of lawyers chose “Provisions on the obligation not to refuse legal defense for the accused that previously agreed to carry out if not for force majeure or objective obstacles” and 8.3% (15 of 181) chose “Provisions on confidentiality obligations”. The survey results also acknowledge 2.2% (4 of 181) of lawyers think that there are some other provisions that need to be revised or supplemented, including provisions on receiving and processing complaints by procedure-conducting agencies (See Figure 3).

Figure 3: Evaluation of lawyers on provision or group of provisions of the 2015 CPC that should be revised or provide guidance for application to facilitate lawyers’ legal defense.



The CPC has opened the door for lawyers to participate more substantively in the investigation stage, reducing legal barriers for lawyers to participate in the case right from the beginning, including the replacement of the procedure to request a defense counsel certificate with the defense counsel registration procedure. Provisions allowing lawyers to participate when the arrested person arrives at the investigation agency, as well as attend the interrogation session and be informed of the time and place of interrogation, has greatly enhanced the role of lawyers. The presence of the lawyer during this stage also helps to prevent violations in the investigation process and promptly detects any wrongdoings from the procedure-conducting agency or person in the course of criminal procedure.²⁷ Because lawyers are able to participate in the case from the beginning, they can closely follow the investigation progress, its results, and be made aware of the evidence obtained by the investigation agency, thereby improve the effectiveness of legal defense, contribute to find the objective truth of the case.²⁸ Lawyers also highly appreciate that the CPC, for the first time, provides lawyers with the right to collect evidence. These rights help lawyers better perform the role of legal defense. The recognition of the presumption of innocence as a principle of the CPC is also considered by lawyers as an important progressive step in the law. However, the above provisions are still incomplete, especially the principle of presumption of innocence and the right to collect evidence.

In particular, about half of surveyed lawyers said that they often have difficulties in exercising the right to collect and present evidence (51.9%) and the right to request the competent authority to collect evidence (47.5%). This is one of the rights that lawyers often face the most difficulty when participating in criminal cases, only after the right to meet the accused. Many lawyers recommended that there should be clearer provisions on the order and procedures for collecting evidence, especially the procedure for submitting and presenting evidence as well as requesting the competent agency to collect evidence. There should also be an effective mechanism in place to ensure these rights of the defense counsel. More than half of the surveyed lawyers think that it is necessary to revise or provide specific guidance on “Provisions related to the application of the principle of presumption of innocence” (51.9%). The survey also received many recommendations from lawyers “to specify more clearly the principle of presumption of innocence”. It can be seen that the principle of presumption of innocence still requires specific guidance to clarify and resolve existing issues when applying this principle in criminal proceedings.²⁹

²⁷ Moore, Janet, Vicki L. Plano Clark, Lori A. Foote, and Jacinda K. Dariotis. "Attorney–client communication in public defense: a qualitative examination." *Criminal Justice Policy Review* 31, no. 6 (2020): 908-938. <https://doi.org/10.1177/0887403419861672>

²⁸ Bernstein, Anita. "Minding the gaps in lawyers' rules of professional conduct." *Oklahoma Law Review* 72, no. 1 (2019): 125-148.

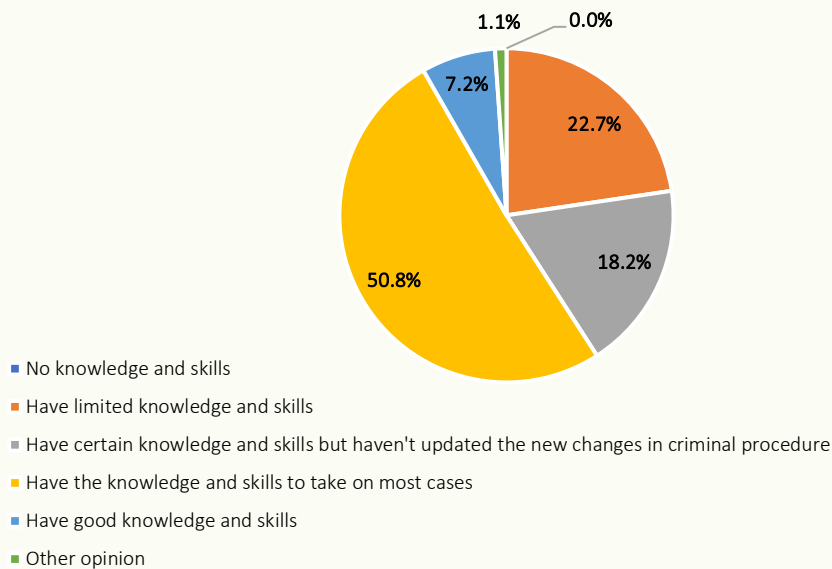
²⁹ The principle of presumption of innocence stipulates that “When there is insufficient grounds and it is not possible to clarify the grounds for accusation or defense according to the order and procedure prescribed by this law, the agency or person competent to conduct criminal procedure must conclude that the accused is not guilty” (Article 13 of the 2015 CPC 2015). However, if the Procuracy or the Court finds that there is a lack of important inculpatory evidence, or a serious violation of the order or procedure by the criminal justice agency at the previous procedural stage, they could “return the case file for additional investigation”, which means creating conditions for the criminal justice agency at the previous procedural

4.3. Lawyers' capacity to exercise the rights of defense counsels

We asked lawyers to self-evaluate their current knowledge and ability to exercise the rights of the defense counsel with three questions. The goal was for them to self-evaluate their level of litigation skills, their own shortcomings in litigation, and make suggestions for which skills they would like to receive training to improve the quality of legal defense.

- (i) Survey results show that only 7.2% (13 of 181) of participating lawyers are confident about their knowledge and skills. On the contrary, up to 40.9% (74 of 181) think that their knowledge and skills in criminal cases are still limited to a certain extent. Notably, there are some lawyers who think that they already have the knowledge and skills, but still haven't fully and promptly updated the new changes in criminal justice (33 of 181, accounting for 18.2%). This may limit their capacity when participating in litigation (See Figure 4).

Figure 4. Evaluation of lawyers on their knowledge and skills in criminal cases



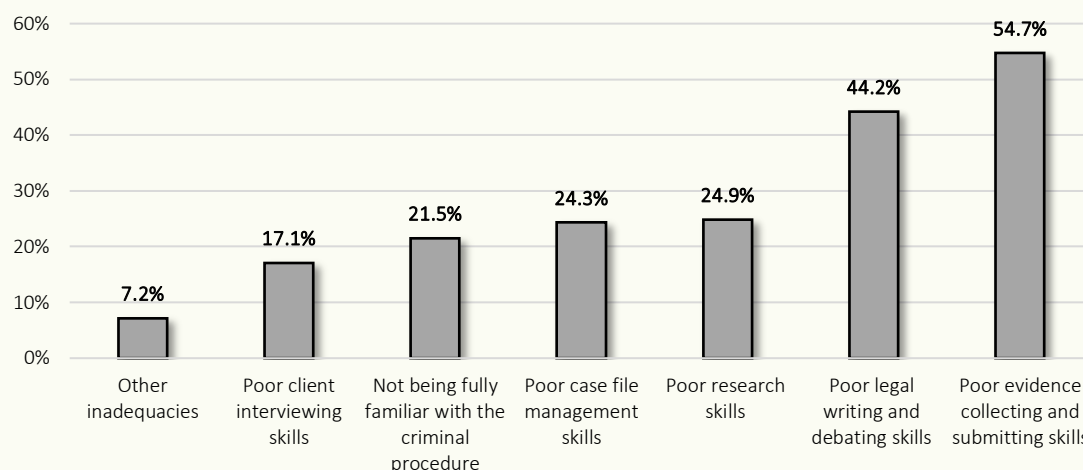
- (ii) When asked to evaluate the shortcomings in the skills that lawyers usually have when participating in criminal cases as the defense counsel, we received the following result: 99 of 181 (54.7%) of lawyers chose inadequate skills in collecting and submitting evidence; 80 of 181 (44.2%) chose inadequate legal writing and debating skills; 45 of 181 (24.9%) chose inadequate skills in researching; 44 of 181 (24.3%) chose inadequate skills in organizing and managing case files; 39 of 181 (21.5%) chose inadequate knowledge of criminal procedure; 31 of 181 (17.1%) chose inadequate skills in communicating with clients, and 13 of 181 (7.2%) chose other inadequacies (See Figure 5). Accordingly, most lawyers surveyed believe that lawyers

stage to have time to supplement evidence, collect more inculpatory evidences that were previously obtained by means of serious violations of the criminal order and procedure (Article 245 and Article 280 of the CPC). This has created issues when applying the principle of presumption of innocence, much to the detriment of defense counsels and their clients.

usually lack the skills of collecting and submitting evidence as well as that of argumentation, which influence the effectiveness of their practice in criminal cases.

- (iii) Inputs recorded in the minutes of workshops organized under the framework of the Programme agreed that for a lawyer, all the above skills are equally important, and for effective criminal representation, lawyers need to master every relevant skill. However, lawyers should especially focus on two skills: to collect and submit evidence and argumentation in litigation. These are two skills of which many lawyers lack mastery and upon which they must improve to be able to meet the requirements of the 2015 CPC. One lawyer comments, “In order to be able to collect evidence, lawyers need to have evidence gathering skills. This is the weakness of most lawyers because they are often not as properly trained as investigators for these skills. To overcome this shortcoming, lawyers need to self-study to improve their skills, so that they can collect more exculpatory evidence”.

Figure 5. Limitation in the professional skills of defense counsels in practice



We believe that this survey result is consistent with other published research results. Nearly half of the current lawyers have not been properly trained in important practical legal skills. The effectiveness of lawyers' participation in legal proceedings still hasn't met the requirements for litigation at the trial in the spirit of judicial reform. Lawyers still lack experience in collecting documents, objects, and information related to the process of defense and debate, making requests and proposals at trial.³⁰ Some lawyers also have improper professional attitudes in dealing with procedure-conducting agencies and persons as well as their fellow colleagues, affecting the reputation of the lawyers' team.³¹

³⁰ Arguedas, Cristina C. “Duties of a criminal defense lawyer.” *Loyola of Los Angeles Law Review* 30, no. 1 (1996): 7-12.

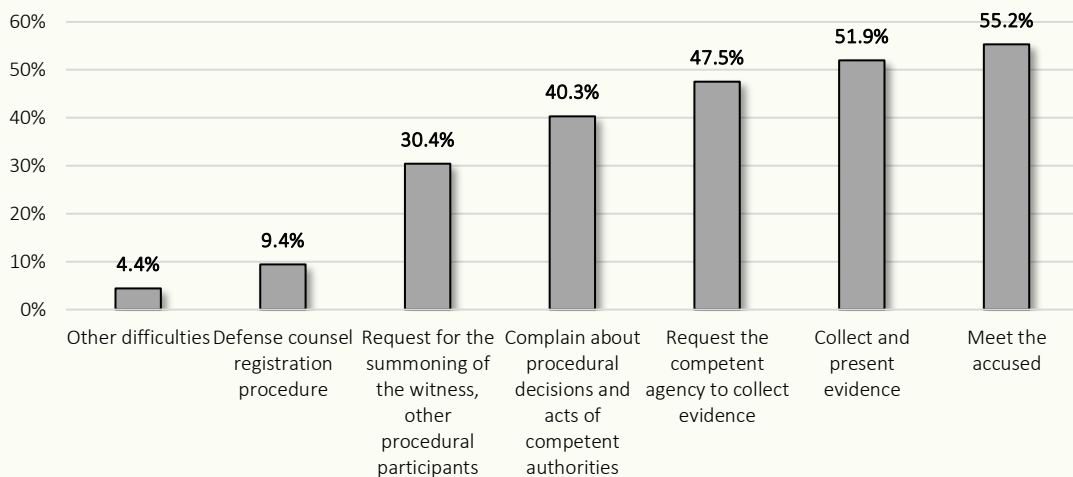
³¹ Pham, Minh Tuyen, “Factors influencing job satisfaction and performance of the lawyers in Vietnam.” *Management Science Letters* 10, no. 9 (2020): 1981-1992, <https://doi.org/10.5267/j.msl.2020.2.014>

4.4. Difficulties that lawyers face in legal defense

Different from survey questions in the above sub-sections, which mention the subjective prerogatives of lawyers themselves, influences on their role in practice, and the difficulties and barriers that lawyers face in legal defense, is one of the environmental factors limiting the presence of the defense lawyers in criminal proceedings, which reduces the effectiveness of the legal defense. Therefore, we conduct this survey with the following content.

Firstly, regarding the exercise of the rights of the defense counsel, according to participating lawyers, they usually face difficulties in exercising the following rights: right to meet the accused (55.2%); right to collect and present evidence (51.9%); right to request the competent agency to conduct criminal procedure to collect evidence (47.5%); right to complain about procedural decisions and acts of agencies or persons competent to conduct criminal procedure (40.3%); right to request the summoning of the witness and other procedural participants (30.4%); right to participate in criminal procedure (only required to follow the defense counsel registration procedure) (9.4%); and other difficulties (4.4%) due to many factors. These factors include that procedure-conducting agencies and persons still cause difficulties for lawyers in exercising the rights of the defense counsels in some cases and the lack of practical experiences of some lawyers themselves after the 2015 CPC took legal effect (See Figure 6).

Figure 6. Evaluation of lawyers on the difficulty of exercising the rights of the defense counsel



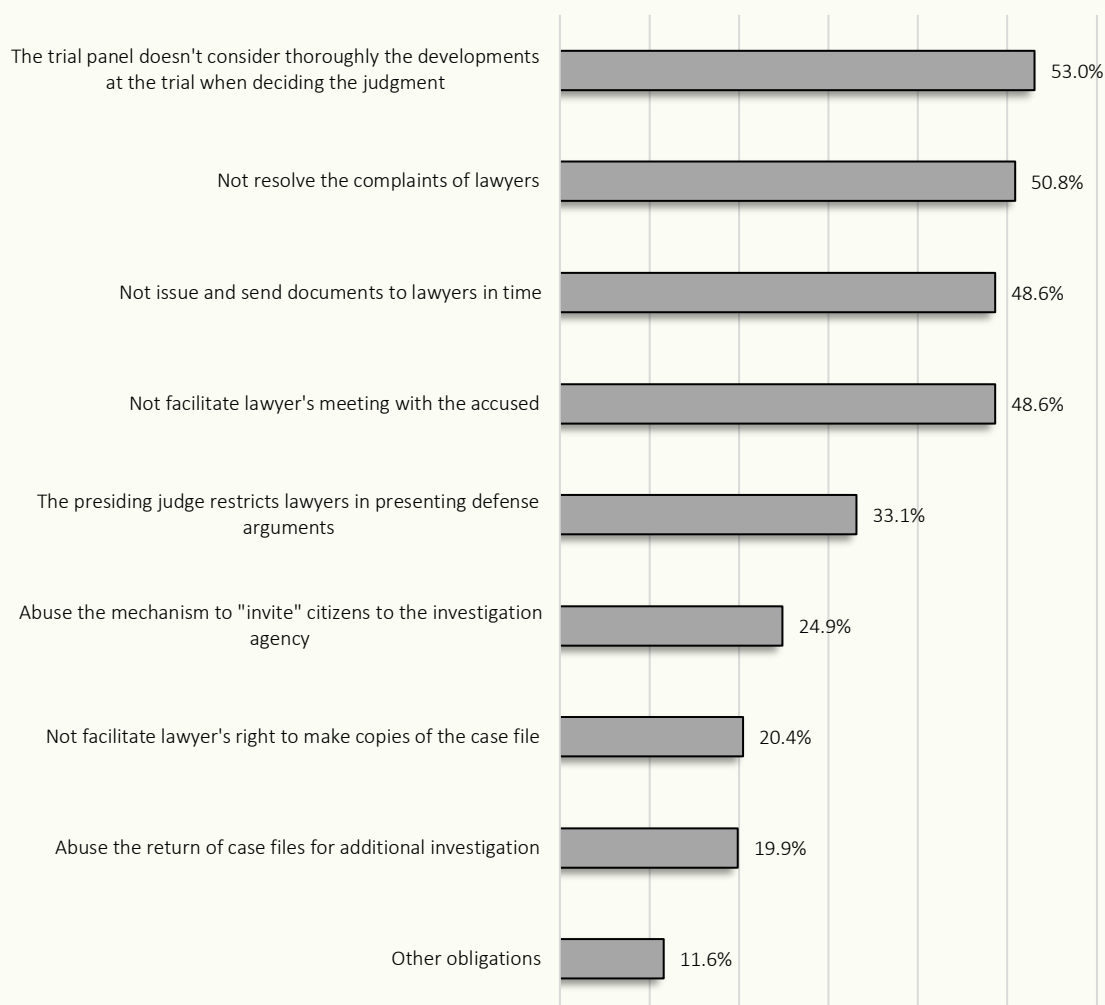
Based on the evidence, defense lawyers still face many barriers when exercising the rights of the defense counsel, especially the right to meet the accused.^{32,33} In addition, defense lawyers also face difficulties in exercising the right to collect and present evidence,

³² Freedman, Monroe H., and Janet Starwood. "Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum." *Stanford Law Review* 29 (1976): 607-619.

³³ Poulin, Anne Bowen. "Strengthening the Criminal Defendant's Right to Counsel." *Cardozo Law Review* 28 (2006): 1213-1284.

request the the competent agency to conduct criminal procedure to collect evidence, and make complaints about procedural decisions and acts of agencies or competent persons in the course of criminal process.³⁴

Figure 7. Evaluation of lawyers on the authority’s restriction of legal defense activities



We have surveyed lawyer’s evaluation on how criminal justice agencies restrict legal defense activities in practice. Up to 96 of 181 lawyers participating in the survey stated that the trial panel did not often thoroughly consider the developments at trial when passing judgment (53%); 92 of 181 lawyers stated that the authority often neglected the complaints of the defense lawyer (50.8%); 88 of 181 lawyers stated that the authority did not often send documents to the defense lawyers in a timely fashion (48.6%); 88 of 181 lawyers stated that the authority did not often facilitate their meeting with the accused

³⁴ Davidkova-Dimitrova, D., “Protection of the right to a lawyer in criminal procedure of the Republic of Bulgaria.” *Constitutional Values in Contemporary Legal Space I* (2016): 302-312; Muraoka, Keiichi. “Roles of Defense Counsel: Ethical Issues in Criminal Defense.” *Hitotsubashi Journal of Law and Politics* 26 (1998): 11-18.

as prescribed by law (48.6%); 60 of 181 lawyers stated that the presiding judge often limited the arguments of lawyers (33.1%); 45 of 181 lawyers shared that the investigation agency often abused the mechanism of inviting citizens to the agency for investigation (24.9%); 37 of 181 lawyers stated that the authority did not often facilitate the exercise of their rights to take photos or make copies of the case file as prescribed by law (20.4%); 36 of 181 lawyers shared that the procedural agencies often abused the mechanism of returning the case file for additional investigation (19.9%); and 21 of 181 lawyers stated that the competent authority often incorrectly or incompletely performed other duties (11.6%) (see Figure 7). However, these respondents did not specify which other duties were incorrectly or incompletely performed.

The survey results described above show that there are still many difficulties in exercising the defense counsel's rights, such as meeting with clients in temporary detention facilities, requesting the investigation agency to collect and evaluate evidence, accessing documents and case files from criminal justice agencies, exercising rights at trial including the right to give arguments and to have their opinions reflected in the judgments in practice. The exercise of these rights depends heavily on criminal justice agencies.³⁵ There are also tremendous difficulties in exercising other rights that don't depend on procedure-conducting agencies but on other actors, such as the right to collect evidence, as lawyers do not possess authority necessary to exercise this right.³⁶ This finding is consistent with the opinions received at the five workshops with the five local bar associations, which demonstrate that it is very rare for lawyers to acquire documents, objects, and electronic data related to the defense and protection of the interests of their clients from agencies, organizations, and individuals. According to inputs from lawyers at the workshops under the Project, they have faced many limitations in collecting and presenting evidence. According to members of our focus group, It is very difficult for a lawyer to "present evidence and have the evidence accepted by the trial panel", and "it is very rare for the evidence collected by lawyers to be accepted by the court".

In practice, it is very difficult for lawyers to collect evidence. Unlike investigators and procurators, lawyers face many barriers when collecting documents from agencies and organizations. In many cases, agencies and organizations tend not to cooperate and do not provide documents related to the case to lawyers, but rather they only provide them to the investigative agency when requested. We also agree with the opinion that describes more clearly the nature of this situation: When not receiving the cooperation from these agencies, organizations, or individuals, the lawyer must turn to "request the agency competent to conduct criminal proceedings" to collect evidence. Thus, the collection of evidence by lawyers still requires them to request it from the procedure-conducting agency, and whether or not to proceed at the request of lawyers depends on

³⁵ Hafrida, Retno Kusniati, and Yulia Monita. "Imprisonment as a Criminal Sanction against Corporations in Forestry Crimes: How Is It Possible?" *Hasanuddin Law Review* 8, no. 2 (2022): 160-170, <http://dx.doi.org/10.20956/halrev.v8i2.3187>; Shumei, Hou, and Ron Keith. "The defense lawyer in the scales of Chinese criminal justice." *Journal of Contemporary China* 20, no. 70 (2011): 379-395, <https://doi.org/10.1080/10670564.2011.565172>.

³⁶ Liu, Sida, and Terence C. Halliday. "Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers." *Law & Society Review* 45, no. 4 (2011): 831-866, <https://doi.org/10.1111/j.1540-5893.2011.00458.x>

the subjective will of the procedure-conducting actor, which assesses whether a lawyer has used all the necessary means but is still unable to collect evidence.³⁷ This practically nullifies the new provision on the role of the defense counsel in collecting evidence, and the situation is essentially no different from the previous scenario.³⁸ The defense counsel must find the exculpatory evidence entirely by himself or herself. There is no institutionalized mechanism for a defense attorney to request assistance from the state or from private entities, and so defense lawyers often tend to use private relationships to obtain such assistance.³⁹ However, that process is particularly difficult to execute because defense lawyers often face what is known as “diplomatic denial”. That is, people do not want to become involved with the involved, or they are reluctant to provide information or give testimony.⁴⁰

4.5. Number of lawyers presented in criminal cases

As mentioned, the number of lawyers in Vietnam has been escalating in recent years with a total of 16,134 lawyers on September 30th, 2021. The number of criminal cases that had the presence of lawyers is significantly larger compared to civil, commercial, administrative, labor case in the five-year period from 2015 to 2020 (See Table 1). However, from 2015 till the end of 2020, 37,503 cases are with assigned lawyers and 43,568 cases with lawyers hired by their clients (See Table 2). The rate of cases in which the client reached out for lawyers was 53.7%, just 7.8% more than the number of cases in which the lawyers were assigned to participate.

Table 1. Litigation cases with the presence of lawyers from 2015-2020

	Criminal	Civil	Commercial	Administrative	Labor
Cases	81,072	67,339	52,885	4,097	1,854

Source: Vietnam Bar Federation, 2021

When combining the number of criminal cases brought to trial (both in the first instance and at the appellate level) with the number of criminal cases with a defense lawyer in 2018, 2019, and 2020, it can be seen that the rate of criminal cases with a defense lawyer compared to the total number of cases brought to trial is significantly lower (See Table 2). In 2018, there were only 12,486 cases with defense lawyers compared to a total of 70,754 criminal cases brought to trial (61,669 first instance trials and 9,085 appeal trials),

³⁷ Le, Minh Đức. *Thuc hien phap luat ve quyen, nghia vu cua luat su trong hoat dong to tung hinh su o Vietnam hien nay* [Implementation of law on the rights and obligations of lawyers in criminal justice activities in Vietnam today] (Doctoral dissertation, Hanoi Law University, 2020).

³⁸ Gallant, Kenneth S. “The role and powers of defense counsel in the Rome Statute of the International Criminal Court.” *International Lawyer* 34, no. 1 (2000): 21-44.

³⁹ Christoph, Antons, *Law and Society in East Asia*, (Routledge, 2017), <https://doi.org/10.4324/9781315091976>

⁴⁰ Phan, Trung Hoai, *Co so ly luan hoan thien phap luat ve luat su o Vietnam hien nay* [Theoretical Grounds to Fulfill the Legislation on Lawyers in Vietnam Today] (Doctoral dissertation, National Political Academy, 2003).

just 15.9%. In 2019, there were 12,728 cases with defense lawyers over a total of 71,593 criminal cases brought to trial (61,850 first instance trials and 9,743 appeal trials), just 17.8%. In 2020, there were 11,933 cases with defense lawyers over a total of 68,098 criminal cases brought to trial (59,343 first instance trials and 8,755 appeal trials), just 17.3%. Thus, the presence of the defense lawyer in criminal cases are not prominent, accounting for under 1/5 of criminal cases brought to trial. This reflects the culture in Vietnam, which hasn't been open to using legal services for defense. The accused and their families haven't seen lawyers as a mean to exercise the right to the legal defense of the accused. This could be due to many various reasons that could prompt other research to study further.

Table 2. The presence of the defense lawyer in criminal cases from 2015-2020

	2015	2016	2017	2018	2019	2020	Total
Criminal cases with assigned defense lawyer	6,749	6,194	5,905	7,421	5,477	5,757	37,503
Criminal cases with defense lawyers hired by the client	5,398	6,884	12,795	5,065	7,251	6,176	43,569
Total criminal cases with the presence of lawyers	12,147	13,078	18,700	12,486	12,728	11,933	81,072

Source: Vietnam Bar Federation, 2021

5. Conclusion

The laws of Vietnam have provided more rights to the defense counsel, reflecting the trend towards democratizing criminal justice activities, promoting adversarial process, and ensuring the right of criminal defense to the accused in the criminal justice system of Vietnam. However, this does not mean that the role of the defense counsel has become substantive in criminal cases. Firstly, the awareness, capacity, and skills of lawyers are still limited, circumstances which are demonstrated by our data reflecting lawyers' understanding of the new rights that the CPC has prescribed for lawyers and lawyers' self-evaluation of their own professional knowledge and skills. Thirdly, the rights of defense counsel have not been fully provided, nor has the right to the presumption of innocence of their clients been clearly stipulated. Therefore, the rights of the defense counsel are also limited. In particular, we found that by surveying lawyers' practical experience, the exercise of the rights of the defense counsel still depends heavily on criminal justice agencies, creating a wide gap between the law and its implementation in practice. Last but not least in importance, the actual number of lawyers present in criminal cases accounts for a very small fraction of the total criminal cases in practice.

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