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Luong Thi, My Quynh

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**LUND UNIVERSITY
FACULTY OF LAW**



**HOCHIMINH CITY
UNIVERSITY OF LAW**

LUONG THI MY QUYNH

**GUARANTEE OF THE ACCUSED PERSON'S RIGHT
TO DEFENSE COUNSEL – A COMPARATIVE STUDY
OF VIETNAMESE, GERMAN AND AMERICAN
CRIMINAL PROCEDURE LAWS**

Field of Study: International and Comparative Law

Code: 62.38.60.01

DOCTORAL DISSERTATION OF LAW

HO CHI MINH CITY - 2011



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HO CHI MINH CITY - 2011

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List of Abbreviations

ABA	American Bar Association
AfCHPR	African Charter on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
Art.	Article
Arts.	Articles
BGH	<i>Bundesgerichtshof</i> (German Federal Court of Appeals)
BGHSt	<i>Entscheidungen des Bundesgerichtshofes</i> (Decisions of German Federal Court of Appeals)
BverfG	<i>Bundesverfassungsgericht</i> (German Federal Constitution Court)
BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i> (Decisions of the German Federal Constitutional Court)
BVerfGG	<i>Bundesverfassungsgerichts-Gesetz</i> (Federal Constitutional Court Act)
CCP	Code of Criminal Procedure
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EGGVG	<i>Gerichtsverfassungsgesetz</i> (The German Courts Organization Act)
EU	European Union
GG	<i>Grundgesetz</i> (The Basic Law or German Federal Constitution)
GVG	<i>Gerichtsverfassungsgesetz</i> (The German Courts Organization Act)
HRC	The UN Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

JGG	<i>Jugendgerichtsgesetz</i> (Juvenile Court Act)
NLADA	The United States of America National Legal Aid & Defender Association
StGB	<i>Strafgesetzbuch</i> (The German Criminal Code)
StPO	<i>Strafprozeßordnung</i> (German Code of Criminal Procedure)
StV	<i>Strafverteidiger</i> (Defence attorney in German)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nation Development Program
US	United States of America

INTRODUCTION

Background

Guaranteeing human rights in general and the legitimate rights and interests of the accused in criminal proceedings in particular has always been considered a key task of the law and of the state's institutions. In other words, guaranteeing such procedural rights is an important part of the overall guarantee of people's rights. A society is generally considered a civilized and progressive one when every citizen is legally protected by a fair and democratically-run legislative system. As for persons accused of criminal activity in particular, despite their responsibility for the legal consequences of their violations of the law, their legitimate rights and interests must still be guaranteed. One of the rights of the accused that the state must guarantee is the right to defense counsel.

The constitutions and laws of most nations have indeed recognized the right to defense counsel as a basic procedural right of the accused and the state is responsible for guaranteeing its availability. At the international level, the right to defense counsel has also been recognized in most international legal instruments on human rights.¹ The details of the relevant legal instruments all show that the guarantee of the right to defense counsel is an important aspect of the guarantee of the right to a fair trial. However, criminal procedure is not necessarily an equal struggle between the opposing parties.² This means that, for fairness to prevail, all parties in the proceedings - including the prosecution and the defense - must each be vested with the opportunity to perform their functions.³ On this basis, the accused must be supported by defense counsels - who are qualified in terms of legal knowledge and capable of participating in proceedings in a manner which is also fair to the prosecution. Guaranteeing the right to defense counsel involves ensuring that the accused is supported by defense counsel and guaranteeing the requisite conditions for defense counsel so that they can protect their client against the allegations of the state.

¹ Article 11(1) of the Universal Declaration on Human Rights (UDHR), Article 14 (3) of the International Convention on Civil and Politics Rights (ICCPR), Article 6.3 (c) of the European Convention on Human Rights (ECHR), Article 8 of the American Convention on Human Rights (AmCHR), Article 7.1 (c) of the African Convention on Human and People's Rights (AfCHPR).

² Nguyễn Thái Phúc, *Vietnam criminal proceeding model - theoretical and practical issues (Mô hình Tố tụng hình sự Việt Nam - Những vấn đề lý luận và thực tiễn)*, Legal Science Journal, Issue 5(42), 2007.

³ Salvatore Zappalà, *Human Rights in International Criminal Procedure*, Oxford, 2005, pp. 109-125.

Currently, the tasks of guaranteeing human rights and improving the law of criminal procedure have attracted the attention of many nations. However, one of the difficulties that such nations face in the process is that of assuring a balance between the various objectives of criminal procedure; that is the balance between the task of handling crime and maintaining strict legislation and the guaranteeing and effective protection of the procedural rights of the accused. In a few nations, the procedural rights of the accused, including the right to defense counsel, are not fully guaranteed, and are, indeed, often violated. According to surveys by a group of researchers, the right to defense counsel at the pre-trial stage is not always guaranteed even in many European nations.⁴ According to the National Committee on the Right to Counsel,⁵ in the United States, the constitutional right to counsel for defendants who cannot afford to hire a lawyer despite facing the possibility of imprisonment is weakened as many states and localities still fail to provide competent criminal defense counsel. In very many countries, insufficient funding and/or oversight of public defender systems has led to unacceptable caseloads, supervision and training, resulting in inadequate representation. Representation is frequently perfunctory and so deficient as not to amount to representation at all. In fact, in both Europe and America, there have been moves towards the continued development and improvement of legislation in order to provide complete legal mechanisms which will protect the accused's right to defense counsel. Basing themselves on the Lisbon Treaty,⁶ European member states have been taken a number of steps to foster and establish a complete and coherent mechanism guaranteeing the basic procedural rights of the accused in EU as the whole.⁷ As to

⁴ For instance, national legislation may provide the right for a lawyer immediately on arrest but if there is no system by which a lawyer can be contacted on a 24-hour basis then the arrested person may not be in a position to exercise their right to counsel effectively. Beside that, the law may provide for a right to cross-examine witnesses or to call evidence, but without lawyers who actively use these rights on behalf of defendants, they will not be available in practice. See Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Effective Criminal Defense in Europe*, Antwerp-Oxford-Portland, Intersentia, 2010, ISBN 978-94-000-005-7, p. 2.

⁵ This organization was established in 2004 by the Constitution Project Group which is working to reform the nation's broken criminal justice system and to strengthen the rules of law through scholarship, consensus policy reforms, advocacy, and public education.

See available at < <http://www.constitutionproject.org/committees/righttocounselcommittee.php>>.

⁶ The Treaty entered into force on 1 December 2009.

⁷ In 2009, the European Council adopted the Stockholm programme, setting out the EU strategy in the area of freedom, security and justice for the period 2010-2014. One of the areas highlighted for action was procedural rights. The first measure, the Directive on the right to an interpreter and to the translation of documents during the investigation and the trial, was approved in October 2010. This is something of a landmark, as the first criminal justice measure to be adopted by the co-decision procedure and the first to address safeguards for the accused. It guarantees the right to interpreters throughout criminal proceedings, including when receiving legal advice, as well as the translation of all essential documents. The next roadmap measure to be discussed will be the right to legal advice.

the US, it is impossible that lawyers there are not aware of the latest Report of the National Committee on the Right to Counsel⁸ which appeared in April 2009. This Organization has used the recommendations in this report to try and educate state and federal policy makers regarding the critical reforms necessary to achieve a truly fair criminal justice system for all individuals.⁹ In China and other countries in Asia criminal justice systems have been reformed. One of the key tasks of these reforms is to improve the provisions of the current laws on criminal procedure concerning the procedural rights of the accused and ensure they are in line with international standards.¹⁰ Currently, China has amended the Law on Lawyers to prepare the ground for the ratification of the ICCPR.¹¹

In Vietnam, the settlement of criminal cases tends to indicate that incorrect judgments occur which naturally prejudices the legitimate rights and interests of citizens, including the right to have defense counsel in criminal cases. This results from various causes, of which the overlapping and contradictory nature of the laws is one. Even though the Vietnamese Criminal Procedure Code has undergone several amendments and supplements, it has only partly overcome its existing shortcomings. The legal rights and interests of the accused have not been fully guaranteed and are often violated. Under these circumstances, the State must clearly show the intent to speedily improve the legal system in general and the Criminal Procedure Code in particular. As have many other nations around the world, Vietnam has been carrying out a comprehensive reform of criminal justice. One of the key tasks of the reform is to expand the proceedings at criminal trials, in which the need for further expansion of the rights of defense counsel and the accused is emphasized.¹² This is a firm basis on which to improve the fairness of the legislation in general and the guaranteeing of the accused's right to defense counsel in particular.

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>>.

⁸ Founded in 2004 in the framework of the Constitution Project,

<<http://www.constitutionproject.org/cjp/righttocounsel.php>>.

⁹ This Report named "Justice Denied - America's Continuing Neglect of Our Constitutional Right to Counsel" has been supported by generous contributions from the Open Society Institute and the Wallace Global Fund. This Report is available at <www.constitutionproject.org> and <www.nlada.org>.

¹⁰ The Republic of China has signed but not ratified the ICCPR. To prepare for its ratification, and implement the key project of the reform of the criminal justice system, China continued working towards making its law of criminal procedure more compatible with international standards on fair trials and human rights.

See available at <http://www.icclr.law.ubc.ca/china_iiscj/criminal_proc/index.html>.

¹¹ According to the report titled Assessment Report on the National Human Rights Action Plan of China (2009-2010), <http://www.chinadaily.com.cn/china/2011-07/14/content_12904570.htm>.

¹² Resolution 08/NQ/TW dated 2 January 2002 of the Politburo prescribing the objectives of judicial reform and improving the quality of judicial services, and Resolution 49/NQ/TW dated 2 June 2005 of the Politburo on "Judicial Reform Strategy until 2020".

The above shows that guaranteeing procedural rights in general and the right to defense counsel in particular is a global concern and not merely a matter affecting each nation. As such, the expansion of international cooperation in the fight against crime in general and the concomitant reform of criminal procedure in particular is an objective necessity in line with the general trend towards legal harmonization. This requires Vietnam to continue further speeding up the process of judicial reform in order to minimize the impact of current limitations. Wishing to contribute to the enhancement of the effectiveness of improving the law regarding the right to defense counsel, the author chose to undertake research at PhD level on the theme “*Guarantee of the accused person’s right to defense counsel - A comparative study of Vietnamese, German and American Criminal Procedure Laws (Bảo đảm quyền có người bào chữa của người bị buộc tội - So sánh giữa luật tố tụng hình sự Việt Nam, Đức và Mỹ)*”. In the author’s opinion, the research should be based on the following theoretical and practical foundations:

First, like Germany, the US and many other nations in the world, Vietnam pays considerable attention to the setting up and improving of legal instruments in the field of criminal procedure which relate to the guarantee of the procedural rights of the accused, of which the guarantee of the right to defense counsel is one of the most important. As a result, studying and comparing the legal mechanisms guaranteeing the right to defense counsel in these three nations will be necessary for establishing its foundations.

Secondly, Vietnamese, German and US criminal procedure law have all recognized that the right to defense counsel is a fundamental procedural right of the accused that needs to be fully guaranteed. Despite key successes in legislative aspect, there are a number of shortcomings in the regulations that need to be analyzed, clarified and improved. As to Vietnam, difficulties and problems regarding both the awareness and the practical application of these regulations have not been resolved. My theme may lead me to explore the contents of a number of laws that need to be improved.

Thirdly, the practical application of Vietnamese criminal procedure laws is poorer than the statutory regulations would anticipate. The knowledge and professional conduct of persons conducting proceedings and of counsel still contain shortcomings and mismatches. This may affect or even damage the rights and interests of accused persons involved in proceedings. As such, it is advisable to

study measures to remedy such circumstances.

Fourthly, researching and comparing the criminal procedure laws of Vietnam and those of certain nations other regarding the guarantee of the right to defense counsel is a sound requirement in line with the general trend towards legal harmonization. This will give Vietnam opportunities to study and learn from experience, in a selective manner, when making, amending, supplementing and applying criminal procedure laws on the guarantee of the right to defense counsel. On such a basis, Vietnam can improve the statutory regulations on the right to counsel, and enhance the effectiveness of the investigation, prosecution and judgment of criminal cases.

Purposes

This dissertation has two aims. The first is to study the laws of Vietnam, Germany and the US regarding the guarantee of the accused's right to defense counsel. To serve this purpose, the dissertation focuses on research which will clarify in a scientific manner the provisions of the applicable criminal procedural laws and materials providing, in each country, the practical context of the guarantee of the right to defense counsel in the countries selected. The foregoing research has been conducted to answer the question of how the accused's right to defense counsel is guaranteed in criminal procedure in Vietnam, Germany and the United States. The second aim of this dissertation is to propose suitable and practicable solutions to improving the relevant criminal procedure laws of Vietnam and thus to contributing to the enhancement of the effectiveness of the settlement of criminal cases and the handling of crimes while still protecting human rights.

In line with these two aims, this dissertation will consider the following matters:

First, giving a comparison between the scientific and historical perspectives on guaranteeing the right to defense counsel and clarifying the common theoretical basis for guaranteeing this right in criminal procedure.

Secondly, clarifying the contents of the applicable provisions of international law and the laws of Vietnam, Germany and the United States on guaranteeing the right to defense counsel. This will be effected by the comparative method with a view to finding similarities and differences, and then explaining such similarities and differences; concurrently, analyzing and pointing out the advantages and limitations of the applicable criminal procedure laws of.

Thirdly, learning about and giving certain assessments on the actual situation of the guarantee of the right to defense counsel in Vietnam, Germany and the United States again by the comparative method, for the purpose of acknowledging the strengths and weaknesses of the laws in each nation.

Finally, on the basis of this research and the study of the theoretical foundation and applicable laws as well as the practical application of the laws of Germany and the United States on the right to defense counsel, the dissertation proposes a number of ways to improve the applicable laws of Vietnam and the effectiveness of the guarantee of this right in criminal procedure.

Delimitation

Criminal procedure has a close link to human rights. The punishment of crime must go hand in hand with the safeguarding of procedural rights. One of the most important procedural rights is the accused's right to a defense counsel. For such a right to be effectively guaranteed there must be at first an effective safeguarding mechanism. The present research project lies in the field of criminal procedure law and uses a comparative approach. However, it explores questions concerning the right to defense counsel from a legal perspective rather than from an economic or social one. That is why the immediate concern will be the theoretical standpoints and current provisions of the criminal procedure laws of Vietnam, Germany and the United States which regulate the right to defense counsel as well as the practice of the authorities and the courts in their judgments. In addition, international legal documents directly related to the research topic will also be analysed to investigate the conformity of these national laws to international standards.

Research methods

As mentioned, the objective of the present research is to study the provisions of Vietnamese, German and the United States laws regulating the right to defense counsel in order to propose recommendations for improving Vietnamese law. For that objective to be achieved, the author uses a number of the research methods belonging to legal science. The following paragraphs will present why and how they are used.

The universal tasks of sciences, including legal science, are description, explanation, evaluation and prediction. For the present research, the legal dogmatic method will be used to interpret, clarify, assess the content of valid legal norms,

synthesize the norms according to unified criteria and based on that predict and recommend the developmental path of those legal norms.¹³ By using this research method, the author wishes to take a multi-dimensional and comprehensive view of the regulations on the right to have defense counsel of some typical legal systems in order to be able to propose recommendations for improving Vietnamese law. Thus, the analysis of relevant legal documents, court judgments, authorities' decisions, policies and legal doctrines in international law is presented in Chapter 1; then the analyses on the laws on the right to defense counsel of the three selected countries are presented in Chapters 2 (Vietnam), 3 (Germany) and 4 (the United States).

Differences in the nature of the legal systems considered will determine the particular method used for each of the three countries. In the United States, court judgments and decisions are important for legal interpretation. That is why the analysis of case law will be used in Chapter 4 on the American model. Most of the cases mentioned in that chapter come from the US Supreme Court and US Courts of Appeal. Some cases from State supreme courts are also used to illustrate a particular point. The same method is used for cases of the European Court of Human Rights (ECtHR) in Chapter 1 (particularly section 1.2.2) and their effect on the member states, like Germany, where case law is not so prevalent. The analysis of German law in Chapter 3 presents great challenges as the majority of materials and databases are in German. Nevertheless, there are cases and commentaries on ECtHR's cases, published articles and books in English by German authors which provide good and reliable sources of information. Information on the German model can also be gleaned from accredited internet web-sites, and academic research papers published on the Internet. The analysis and interpretation of Vietnamese law on the right to defense counsel does not pose such a difficulty as there are numerous sources of information in Vietnamese. Vietnamese legal documents and guiding documents relating to the Supreme People's Court provide important sources of information for Chapter 2. Annual statistics of the court and procuracy branches are also used to illustrate the analysis.

In order to make comments and evaluations at both the general and the national level (Chapter 5), an effort has been made to synthesize the provisions of international and national laws according to common criteria. The end result is a

¹³Aarnio, Aulis, *Reason and Authority - A Treaty on the Dynamic Paradigm of Legal Dogmatics*, Ashgate Dartmouth, Aldershot, 1997, pp. 68, 75; Aleksander Peczenik, *Theory Choice in Jurisprudence*, Stockholm Institute for Scandianvian Law 1957-2010, p. 302, <<http://www.scandinavianlaw.se/pdf/48-18.pdf>>.

comprehensive view of the Vietnamese, German and American laws on the right to have defense counsel. Moreover, the interpretation in Chapter 5 (sections 5.1.1 and 5.1.2) is necessary since the three legal systems have their own peculiarities in terms of sources of law, legislative opinions and legal culture. The interpretation is also used in section 5.2 where the recommendations are presented.

In a comparative research like the present one, the main research method is always comparison.¹⁴ Comparison between different legal systems aims not only at finding similarities and differences but also making a comprehensive assessment of a legal system.¹⁵ In addition, comparison is an effective method to help point out the strengths and weaknesses of a legal system. This has great importance for the exchange of legislative and law enforcement experience between countries. The comparative method is therefore the main research tool of the present work. Criteria for comparison between the three selected systems are discussed in the beginning chapter so as to guide the later comparisons of the contents of the law on the right to counsel in each of the three countries. There are two main criminal procedure models - the inquisitorial and the adversarial. The comparative method is also used to shed light on the different legal theories regarding the right to defense counsel in the two models (Chapter 1, section 1.1). Comparison is also used in chapters dealing with specific countries, here based on the most common criteria (Chapter 2 on Vietnam, Chapter 3 on Germany and Chapter 4 on the US). Criminal procedure law is formal law, thus having specific peculiarities in the different countries. To be effective, a comparison made in each country will follow the theoretical analyses and criteria discussed in Chapter 1, so as to ensure the coherence of the whole dissertation. In Chapters 2, 3 and 4, the similarities and differences between the three countries concerning the right to defense counsel are also pointed out. Nevertheless, Chapter 5 is where the comparative method is used most extensively. After a review of issues relating to the right to have defense counsel in each system, the comparative method is used to illustrate the similarities and differences between the Vietnamese model on the one hand and the German and American ones on the other. The level of conformity of each model to relevant international law is also discussed. Comparison demonstrates the strengths and weaknesses of the Vietnamese model and shows that no model is perfect. It has also shown that if any

¹⁴ Michael Bordan, *Comparative law*, Kluwer, Norstedts Juridik, Tano, 2000, p. 21.

¹⁵ Gordley, James, "Is Comparative Law a Distinct Discipline?", 46 *Am. J. Comp. L* 607, 613 (1998).

lesson is to be learnt, it must be focused on selected and appropriate experience. This aspect of the research is presented in Chapter 5 (section 5.2).

Lastly, the legal historical method is used to demonstrate linkages of issues concerning the right to defense counsel at different periods. In addition, interviews were used to obtain information by way of discussion with legal experts, lawyers and legal scholars in the field of criminal procedure. Such interviews were helpful in providing the author with a multi-dimensional view of the legal systems at work.

Materials

There is a vast range of materials on criminal procedure whether discussed from a legal or a human right perspective. Most of the materials concerns American and European law.¹⁶ Less material exists on international criminal procedure.¹⁷ The materials available are useful in providing a basic knowledge of international criminal procedure law and the guarantees of the procedural rights of the accused in American and European laws (particularly the interpretation of the ECtHR on ECHR). Information on the German criminal procedure law is mostly found in books and academic articles which are written from a comparative perspective.¹⁸ In particular, the book entitled “*Effective Criminal Defense in Europe*”¹⁹ provides a comprehensive range of updated information on the right to defense counsel in

¹⁶ See e.g., Mireille Delmas-Marty, J.R. Spencer, *European Criminal Procedure*, Cambridge University Press, 2002; Richard Clayton, Hugh Tomlinson, *Fair Trial Rights*, Oxford, 2006; Rechar Vogle, Barbara Huber, *Criminal Procedure in Europe*, Max-Planck Institute, Dunker & Humblot, Berlin, 2008; *The Right to a Fair Trial*, Science and the technique of democracy, No.28, Council of Europe, 2000; Jerold H. Israel, Wayne R. LaFave, *Criminal Procedure – Constitutional Limitations*, Thompson West, 2006; David J. Bodenhamer, *Fair Trial – Rights of the Accused in American History*, Oxford, 1992; Harry I. Subin, Chester L. Mirsky, Ian S. Weinstein, *The Criminal Process – Prosecution and Defense Function*, West, 2003; Israel, Kasmisar, LaFave, *Criminal Procedure and the Constitution*, Thomson West, 2004; Joseph G. Cook, Paul Marcus, Melanie D. Wilson, *Criminal Procedure*, LexisNexis, 2009; Ronald Bannaszak, *Fair Trial Right of the Accused*, Greenwood Press, 2002; John H. Landbein, *The Origins of the Adversary Criminal Trial*, Oxford, 2003.

¹⁷ See e.g., Salvatore Zappalà, *Human Right in International Criminal Procedure*, Oxford, 2005; Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford, 2006; Christoph J. Safferling, *Towards an International Criminal Procedure*, Oxford, 2007.

¹⁸ See e.g., Christine Van Den Wyngaert, *Criminal Procedure Systems in the European Community*, Butterworths, 1993; Craig M. Bradley, *Criminal Procedure – A worldwide study*, Carolina Academic Press, 2007; Harry R. Dammer, Erika Fairchild, *Comparative Criminal Justice Systems*, Thomson Wadsworth, 2006; Hodgson Jacqueline, *The role of the Criminal Defense Lawyer in an Inquisitorial Procudure: Legal and Ethic Contranst*, Hart Publishing, Volum 9, 2006; Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, Virginia Law Review, Vol.56, 1970; Richard S. Frase and Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. Int'l & Comp. L. Rev. 317 (1995).

¹⁹ See *supra* note 4.

Germany. There are not many titles which directly explore the guarantee of the right to defense counsel in Vietnam;²⁰ secondary sources of information are mainly used.

Aside from books, research projects, academic articles published on legal journals, international and national legal documents, court judgments and decisions and decisions of relevant authorities form an important source of information for the present research. Information from accredited websites is also used. Such information is updated as of September 2011.

Outline

The dissertation is composed of five chapters. Chapter 1 discusses general issues concerning the accused's right to defense counsel. The chapter demonstrates that there is consensus on the theoretical issues relating to this guarantee: for example, from a historical perspective the guarantee of the right to defense counsel stems from the overall need to guarantee the rights of citizens in their relationship with the State; the guarantee of the right to defense counsel is an inevitable measure for safeguarding the right to a fair trial and the right to have a defense counsel is closely linked to the responsibility of the relevant authorities. A section of Chapter 1 is devoted to summarizing and introducing the legislative purview on the guarantee of the right to defense counsel provided by international conventions on human rights. That section also points out the relationship between theoretical issues and legislative practices; it analyses international standards on the major legal guarantees for the right to defense counsel. The conclusions of Chapter 1 provide guidance when analysing and explaining the mechanisms guaranteeing the right to defense counsel in the national legal systems next dealt with.

National criminal procedure law is discussed in 3 subsequent chapters: Chapter 2 on Vietnam, Chapter 3 on Germany and Chapter 4 on the United States. This order of the countries under discussion is based on the ultimate objective of the present research, which is to make recommendations for improving Vietnamese criminal procedure law on the right to have defense counsel. That is why, of the three countries, Vietnam is dealt with first. Dealing with the other two countries after Vietnam will allow the strengths and weaknesses of the Vietnamese model to be explored and discussed thoroughly, based on which relevant recommendations will

²⁰ See e.g., *Guaranteeing the human right in Vietnamese Criminal Justice (Bảo đảm quyền con người trong tư pháp hình sự Việt Nam)*, Edited by Dr. Vo Thi Kim Oanh, National University of Ho Chi Minh City, 2010; Pham Hong Hai, *Guaranteeing the right to defense of the accused (Bảo đảm quyền bào chữa của người bị buộc tội)*, The People's Publisher, 1999.

be made in Chapter 5. The general issues presented in Chapter 1 will guide the content and structure of the discussion on the national models: features of the national criminal procedure as a whole, the guarantees of the right to a defense counsel in the national model and the practicalities of the right to have defense counsel in that country. The first two questions are closely linked to each other, while a discussion of the third question will reflect on the effectiveness of the guarantee in each of the three countries.

Based on the conclusions made in Chapter 2, 3 and 4, Chapter 5 assesses and compares the three national models with a view to proposing recommendations for improving the criminal procedure law of Vietnam relating to the right to defense counsel. The assessment and comparison are made on two levels: general and particular. The research will have shown that there are only a few differences between Vietnam and Germany concerning criminal procedure, thus there are many similarities between the two countries concerning the guarantee of the right to defense counsel. In contrast, the American criminal procedure is very different from the Vietnamese and German models. As a consequence, the effectiveness of the guarantee of the right to defense counsel in each country is different. However, all three models are in agreement on the most important issues of the right to defense counsel - in line with the general spirit of the international conventions in the field, to which all three countries adhere. Chapter 5 ends with a list of recommendations to Vietnam. There are two types of recommendations, those of a broad, directive nature and those of a more particular nature which are targeted at particular regulations on the guarantee of the right to defense counsel.

Each chapter begins with a brief introduction of the content to be presented and ends with a summary of the research undertaken.

Footnotes

To facilitate the presentation of the materials referred to in the dissertation, the numbering of the footnotes restarts from 1 in each chapter.

CHAPTER 1: BASIC ISSUES ON GUARANTEEING THE ACCUSED PERSON'S RIGHT TO DEFENSE COUNSEL

In criminal procedure, the right to defense counsel is a fundamental procedural right of the accused. This right is now recognized in most international conventions on human rights and in the legal systems of most nations. That said, the history of how the right to defense counsel was recognized and guaranteed has not yet been comprehensively reviewed. The contents of Chapter 1 systematize and gather up the foundations, in terms of both theory and practice, of the setting up laws on guaranteeing the right to defense counsel. Chapter 1 aims to clarify two major issues: (1) from what theoretical basis did the guarantee of the right to defense counsel emerge? (2) how is the right to defense counsel guaranteed in international criminal procedure law?

As to the first question, the author has determined that the right to defense counsel is closely connected with and is based on the concept of '*due process*'. This is a historical concept and a basis of the formation and development of the '*right to a fair trial*', a fundamental principle guaranteeing the rights of the accused. Studies on the relationship between the concept of '*due process*' and the concept of the '*right to fair trial*' will help us understand the formation and development of the demand to guarantee the accused's rights, of which the right to counsel is one. In addition, historical information on the right to defense counsel in typical nations utilising each of the two criminal procedural models (*adversarial* and *inquisitorial*) is given by the author to show the historical formation and development of the right to defense counsel.

The second part of Chapter 1 is a review of the content of the guarantee of the right to counsel in international legal documents. This part will reflect the inheritance and development of the foundational theories on guaranteeing the right to defence counsel (as presented in the first part) and how this functions in the process of making laws. Naturally, the contents of the guarantee of the right to counsel have been recognized in most international legal documents on human rights. This is a key criterion for nations improving their criminal procedure laws regarding the guarantee of the right to defense counsel.

1.1. Basic theoretical issues on the guarantee of the accused person's right to defense counsel

1.1.1. Historical views of the guarantee of the right to defense counsel

At one stage in legal history, there was no formal definition of the right to defense counsel. However, the right of a person charged with a criminal offense to have the assistance of counsel is not a new concept. This right appeared at a very early time and is closely attached to the judgment at trial. Research has established that trials in which the defendants were allowed the assistance of counsel can be traced back through several centuries.¹ Many scholars referred to the *Leges Henrici Primi*, commonly known as the laws of King Henry I, as the first written reference to the appearance of that right in England. This is a collection of early English common and statutory laws, which is believed to have been composed in the early 12th century.² Translations of the book, originally in Latin, are sometimes uncertain. However, as regards the right to counsel, all legal scholars' works seem to refer to one passage in the book, which Donahue attempted to translate as follows: "In criminal or capital cases let no man seek *consilium*; rather let him forthwith deny [the charge] without having pleaded [and] without any asking for *consilium*, of whatever nation or state of life he may be; [then] let his defender or his lord follow up his affirmative defence or denial by the appropriate method of proof."³

As analyzed by Donahue, the passage reveals that during the middle Medieval time, an accused person him/herself had to plead in a criminal trial. To plead he/she must not seek help from *consilium*, who could be friends or kinsmen who, with knowledge of the facts of the case, could attempt to sway the opinion of the court to the benefit of the accused. This essentially meant that the accused person was not entitled to any assistance before and at the time of the plea. After having pleaded, the accused were entitled to legal assistance, which could be provided by a man learned in the law, the *pleader*, who would be comparable to today's practicing lawyers. It is clear from Donahue's analyses that during Medieval times, the accused person was indeed allowed legal assistance at some stage of the criminal

¹ Felix Rackow, *The right to counsel: English and America Precedent*, The William and Mary Quaterly, Third Series, Vol.11, No.1, (1954), <<http://www.jstor.org/stable/1923146>>.

² See, for example, Charles Donahue, Jr., *An historical argument for the right to counsel during police interrogation*, Yale Law Journal, 1964, pp. 1020-21; Marvin Becker and George Heidelbaugh, *The right to counsel in criminal cases – An inquiry into the history and practice in England and America*, 28 Notre Dam L. 351 (1952-1953).

³ Charles Donahue, *supra* note 2, pp. 1027-28.

procedure.⁴ This view seems to be shared by many other scholars.⁵ It is quite obvious from scholarly works on the *Leges* that in its time the accused person was primarily expected and supposed to stand alone to defend him/herself as regards the fact of his/her case. The right to defense counsel, if ever available, was focused on the settlement of the legal aspects of the case alone. It was, however, recorded in some cases in the 14th century that the right to defense counsel was not granted to persons accused of felony at all.⁶

Several authors⁷ have also shown that the right to defense counsel began to appear at the time of formation of the adversarial system,⁸ which developed in the later sixteenth and seventeenth centuries. At that time a series of treason trials in England led to calls for changes in the way the accused could defend themselves against the Crown. As noted above, this shows that the initial guarantee of the right to a defence related to allowing the accused to defend him/herself. However, practice judgment at that time demonstrated that the defendant's self-defence before the court (and representing the King) was very challenging and could even give rise to an adverse effect, especially in serious criminal cases. The view that the defendant should be assisted by an attorney during trial then emerged. During the period from the 15th to the early 17th century, as evidence becoming prevalent in criminal trials, the right to defense counsel became allowed for lesser crimes and misdemeanors too. This was indicated clearly by Bulstrode Whiteloke: "for a trespass or sixpences⁹ value, a man may have a counselor to plead for him."¹⁰ The right to

⁴ *Ibid.*, p. 1019.

⁵ See for example, William Blackstone, *Commentaries on the Laws of England*, Vol. 4, 1769, p. 355; Becker and Heidelbaugh, *supra* note 2, pp. 355-56; Herman Cohen, *A history of the bar* (1929), Reprinted 2005, The Lawbook Exchange, Ltd., Clark, New Jersey, pp. 1-19.

⁶ See Chowdhary-Best, *The History of right to counsel*, *Journal of Criminal Law*, 40 (1976), pp. 275-80, which described a case of a knight who was charged with rape and brought to trial by an indictment. The judge in the case informed the accused that: "you ought to know, that the king is party to this action ex officio, hence for this reason of law it does not appear you should have counsel against the king, who thus prosecutes you officially". Latter, the judge emphasized that: "if we concede counsel to you against the law, and the jury decides in your favour, as it may do with God's help, it will be said that you were delivered by the partiality of the judge; and hence we do not dare to do this, nor ought you to wish it."

⁷ See general John H. Langbein, *The Origins of the Adversary Trial*, Oxford, 2003; Harry R. Dammer, Erika Fairchild, *Comparative Criminal Justice Systems*, Thomson Wadsworth, 2006; Ronald Banaszak, *Fair Trial Right of the Accused*, Greenwood Press, 2002.

⁸ The adversarial system is a set of legal procedures used in Common law countries to determine the truth during adjudication whereby the prosecution and defence counsel compete against each other while the judge ensures fairness and adherence to the rule. England and America are considered as typical of countries applying this model. Contrary to the adversarial system is the inquisitorial system which was developed in the late 16th century in Spain and other Catholic countries. Differing from the adversarial system, the manner of finding the truth may be based on torture or other less violent forms of questioning and the judges played an important role in determining the evidence. France and Germany are typical examples of this system. See Harry R. Dammer, Erika Fairchild, *supra* note 7.

⁹ A small coin of the United Kingdom worth six pennies; not minted since 1970.

defense counsel seems then to have been a reaction against the English practice of denying the assistance of an attorney in serious criminal cases and requiring defendants to appear before the court and defend themselves in their own words.¹¹ Since 1836, full assurance of the right to counsel has been granted not only in felony but also in misdemeanor trials.¹² The right to be represented by counsel is a way of extending or improving on the right to self-defend as self-defence was unsafe and might even be forbidden before the King. Researchers believe that allowing defence counsel was actually the first step towards a trial system that would eventually come to be lawyer-dominated versus the earlier lawyer-free system.¹³ This led to the formation of a regime which guarantees the right to have counsel to defendants in common law countries which becomes a criterion of an adversarial trial.¹⁴

Initial manifestations of the right to have counsel are not only the presence of defense counsel in serious criminal cases but also the granting of counsel as a favor given by the King to the indigent, the mark of a charitable policy.¹⁵ Swygart has shown that England has a five-century long tradition of providing free lawyers for indigent people in both criminal and civil cases.¹⁶ This tradition originated in 1494, when Parliament passed a law which stated that the English courts would provide free publicly paid counsel for poor persons. However, its application in reality was very limited.¹⁷ This is still considered as the first legal indication of the guarantee of a right to defense counsel for indigent people, although this guarantee was not recognized in each separate legal system, even when this right was recognized in most international conventions on human rights.¹⁸ That said, a progressive outlook

¹⁰ Bulstrode Whiteloke, *Cobbett's parliamentary history*, 1343, cited in Chowdharay-Best, *supra* note 6, pp. 275-80.

¹¹ John H. Langbein, *supra* note 7.

¹² In 1836, Parliament passed an Act for enabling persons indicted of felony to make their defence by counsel or attorney, which is also known as the 1836 Felony Act. The act abolished the fact-law distinction with respect to the granting of the right to counsel. It also guaranteed the right to counsel for all those accused of felony. See general, Charles Donahue, *supra* note 2, pp. 1027-1028; Chowdharay-Best, *supra* note 6, p. 279; Laurie Fulton, *The right to counsel clause of the sixth amendment*, 26 Am. Crim. L. Rev. 1599 (1989), at p. 1600.

¹³ John H. Langbein, *supra* note 7.

¹⁴ That is the trial sense where the parties concerned (the accusing party and the accused) are present, and where the judge acted as an arbitrator controlling and orienting all adversarial activities of the parties and giving judgment in a fair manner. See John H. Langbein, *Ibid.*,

¹⁵ L. H. Baker, *An Introduce to English Legal History* 134, 2d Ed., (1979); Luther M. Swygart, *Should Indigent Civil litigants in the Federal Courts have a Right to Appointed Counsel*, 39 Washington and Lee Law Review 1267 (1982).

¹⁶ Luther M Swygart, *supra* note 15.

¹⁷ *Ibid.*,

¹⁸ Harry R. Dammer, Erika Fairchild, *supra* note 7, pp. 80-90.

has strongly influenced the awareness of law-makers in modern times. Many scholars have recognised that the adversarial system always acknowledges that counsel have played an important role in providing fairness.¹⁹ Judges in England, and in other countries using an adversarial system assume that the concept of assistance by counsel involves two separate matters. The first is whether or not the accused shall have the right to have the assistance of his friends (his counsel) in making his defence against the charge for which he has been indicted, provided that this counsel be supplied at his own expense; and second, whether or not it is the duty of the state to supply counsel to the defendant, if the defendant cannot afford to obtain his own.²⁰ These initial indications of the history of the guarantee of the right to defense counsel are markers leading to the current recognition and development of this right in most criminal procedure systems.²¹

The development of the right to defense counsel in England rapidly spread to other European countries, even where the inquisitorial system exists. From the view point of criminal procedure under the English accusatory system, seventeenth century France affords a convenient starting point.²² Like the rest of the Continent, France had adopted the inquisitorial system of criminal procedure law, a regimen of legal techniques which derived their origin in part, at least, from Roman law which was rediscovered in the thirteenth century.²³ However, unlike Common law, initially the right to defence counsel was not accepted, and this was even clearly stated in the statutes. For example, Article 162 of the Ordinance of 1539 had stipulated that: “In criminal matters the parties shall in no wise be heard by counsel or agency of any third person; but they shall answer by their own word of mouth for the crimes of which they are accused.”²⁴ Despite such comprehensive language, the humanity or good sense of the French judiciary had to some extent construed away the inflexibility of the prohibition, so that a certain discretion came to adhere to the courts. Some judges still interpreted the article strictly and refused counsel in all

¹⁹ John H. Langbein, *supra* note 7.

²⁰ Felix Rackow, *supra* note 1.

²¹ John H. Langbein, *supra* note 7.

²² Esmein, *History of Continental Criminal Procedure*, (Vol. 5 of Continental Legal History Series, 1913, at p.196). As quoted by Francis J. Morrissey, *Escobedo's European Ancestors*, ABA Journal, August 1966, Vol.52, pp. 723-24.

²³ Harry R. Dammer, Erika Fairchild, *supra* note 7, pp. 142-43.

²⁴ Francis J. Morrissey, *supra* note 22.

cases even if others had felt free to permit and even to assign counsel in various types of prosecution.²⁵

In the subsequent Ordinance of 1670, the right to counsel was officially considered. The criminal procedure of France had already become:

absolutely secret, not only in the sense that everything took place beyond the range of the public eye, but in the sense that no production of documents was made to the accused. The aid of counsel and the freedom to summon witnesses for the defence had been taken away from him one after the other.²⁶

The conference deliberating on the Ordinance of 1670 proposed to remedy this insecurity. The opinion of *Guillaume de Lamoignon, First President of the Parlement de Paris*, was believed to have a critical effect on the subsequent recognition of the right to have counsel. He assumed that:

*No evil which could happen in the administration of justice is comparable to that of causing the death of an innocent person, and it would be better to acquit a thousand guilty. This counsel... is not a privilege granted by the Ordinance or by the laws. It is a liberty obtained from natural law, which is older than all human laws.*²⁷

Lamoignon's speech on the right to defense counsel has reverberated down the centuries,²⁸ but was unheard and unheeded in the France of Louis XIV. The Ordinance of 1670, in its final form, still prohibited the employment of counsel in capital cases. Not until 1808 did the Napoleonic Code of Criminal Procedure make it compulsory that the defendant should have a lawyer when tried in the assize court. French law also required that an attorney represent the accused during the process of pretrial investigation.²⁹ Soon after that, the accused in France was granted the right to the assistance of an *avocat* (attorney), and if he or she cannot afford one, then one is to be appointed.³⁰

In brief, by comparison with England, countries with an inquisitorial tradition only allowed the presence of counsel in criminal cases at a later time. However, both adversarial and inquisitorial systems eventually adopted the view that the right to

²⁵ *Ibid.*,

²⁶ *Ibid.*,

²⁷ *Ibid.*,

²⁸ *Ibid.*,

²⁹ *Ibid.*,

³⁰ Craig M. Bradley, *Criminal procedure – A worldwide Study*, Carolina Academic Press, 2007, pp. 233-37.

defense counsel is a fundamental human right of the accused and the State has a responsibility to assist the accused in implementing his/her legitimate rights.

In conclusion, the right to defense counsel is linked to the formation of the adversarial system, which requires a fair balance between the parties engaged in the proceedings. Crucial here is the acknowledgement that there must be an equal contest of two adversarial forces, between the accused and the prosecutor. As such, the right to defense counsel is a procedural right belonging to the accused – who is accused by the State of committing an offense. Historical studies have indicated that despite certain drawbacks, the guarantee of the right to defense counsel always attaches to the State. Where the accused is indigent or is in other difficult circumstances, he/she will be entitled to enjoy special assistance. All this is now seen as a basic foundation for any legal system. The right to defense counsel is currently acknowledged in Constitutions and laws of most countries. Moreover, this right has been further standardized in international conventions on human rights and such provisions are seen as standard in countries which guarantee the right to have counsel. This guarantee, in the context of international conventions on human rights means, according to Treschel, the right to have the professional assistance and services of counsel.³¹

The above is a summary of the history of the origin of the right to defense counsel in the two criminal procedure systems representing two procedural models, the adversarial model (England) and the inquisitorial model (France). It is likely that these two legal systems have strongly influenced the formation and development of the right to defense counsel throughout the world. Nevertheless, the recognition of the right to defense counsel as well as the establishment of regimes guaranteeing such rights are not the same in all law systems. However, the recognition of the right to defense counsel is always an important aspect in guaranteeing the fairness of any criminal procedure.

1.1.2. Legal foundation of the right to defense counsel

Following from the very nature of criminal procedure, prosecution by the State of the accused reveals an imbalance in term of rights and interests. As such, the accused must be equipped with certain legal rights if they are to be able to protect their legitimate rights and interests. This issue, in the broad sense, is not just the

³¹ For every elaborate treaties on this aspect of the right to defence. See Stephan Trechsel, *Human Rights in criminal proceedings*, Oxford, 2005, p. 244.

guarantee of the rights and interests of the accused as such but also the guarantee of the objectiveness and fairness of the whole process of criminal procedure. The guarantee of the accused's rights in general and the guarantee of the right to defence counsel in particular must be based upon a fair balance between the parties involved in criminal procedure. Knowledge of the criminal procedure has indicated that the right to defense counsel has been based on the theory of due process of law and on the right to a fair trial. What follows is aimed at clarifying the connection between fundamental theories in criminal procedure and the actual formation of the right to defense counsel. We shall assert the importance of such general legal foundations in the establishment of the guarantee of the right to defense counsel.

1.1.2.1. Due Process of law

In most legal systems worldwide, we can easily find the right to or the principle of a "Fair Trial" as a basic legal right of citizens. Originally, this right emerged late in the world's history and is connected to the theory of the Due Process of Law. At the time of its appearance, this concept of the due process of law is simply understood as a progressive ideology to protect human rights from the severe provisions of the laws. However, the current basic contents of the "due process of law" have been acknowledged and developed not only by scholars but in legislative conceptions in many countries. Studying the origin of the "due process of law" may illustrate the significance as well as the necessity of guaranteeing citizens' rights – the fundamental legal guarantee of human rights generally and the rights of the accused in particular.

A primary manifestation of the due process of law has been found in the Law of the Twelve Tables.³² This Law has been considered as the earliest statute law of the Roman Republic, enacted in 455 BC. The founding of this Law was the result of a fight for fairness of rights initiated by a number of plebeians complaining of the unfairness of the treatment of the nobility in the Roman Public. The contents of the Law were specified in 12 Tables, which mainly covered the guarantee of legitimate rights and interests to all citizens. The right to have all parties present at a hearing was emphasized in Table 2.1; the principle of equality among citizens in Table 9.1; and the prohibition of any acts of bribery of judicial agencies was provided for in

³² Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, Berkeley Journal of International Law (BJIL), Vol.3, Fall 2009, <http://bjil.typepad.com/publicist/2010/01/the-right-to-a-fair-trial-in-international-law-with-specific-reference-to-the-work-of-the-icty.html#_ednref8>.

Table 9. In terms of criminal cases, the Law acknowledged the equality of the adverse parties in the procedural process. In order to guarantee the legitimate rights and interests of the accused, Table 1 of the Law specified: "Where a person is accused of any offense, not only he/she but also the accusing person must be present at the court trial". In addition, Table 9 provided punishments for acts violating legal proceedings and relating to the persons participating in the judgment of the case. In particular, the penalty shall be death for a judge or arbiter legally appointed who has been found guilty of receiving a bribe for giving an acquittal in Table 9.4.

It is likely that the above mentioned Law could be considered as the first indication of the concept of the due process of law. Even though the provisions of the Law were not complete or ideal and they have rarely been mentioned, their ideas have been absorbed and developed in modern legislation³³ that has outlined progressively broader conceptions of the guarantee of citizens' rights under the law in general and the rights of the accused in particular. At this time, the right to a defense was not mentioned. However, the arrival of the concept of the due process of law was the foundation for subsequent developments in the rights of the accused, among which is the right to a defense. A similar indication related to the due process of law has been also found in continental European countries. The French Declaration of Human and Civil Rights in 1789 and the Napoleonic Code in 1808 acknowledged that a defendant has enjoys a presumption of innocence and is required to have a representative to protect him/her before the court. The spirit of these provisions spread and affected the laws of many other civil law countries in Europe.

Similarly, in common law systems, the concept of due process also has its roots in early English law. King John in 1215 conceded in the Magna Carta³⁴ as follows: "No free man shall be taken or imprisoned or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Magna Carta itself immediately became part of the "law of the land". However, it did no more than require the monarchy to obey the law of the land. In the year of 1354, in the reign of Edward III, the phrase *due process of law* first appeared in a statutory rendition of Magna Carta. These words were used to explain the protection set fourth in Magna Carta, as follows: "No man of what state

³³ The principles of the Law may be found in legal documents providing for fundamental procedural rights, for example, the right to trial, the right to defend oneself and, the right to be judged by an independent court.

³⁴ Magna Carta is an English legal Charter issued in 1215. It was the first document forced on an English King by his subjects as an attempt to limit his power by law.

or condition he is, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."

It can be said that the fundamental contents of these legal documents (both the Law of the Twelve Tables and Magna Carta) have laid an emphasis on the due process of law with the end result that it is considered as an essential requirement in the guarantee of human rights in general and the accused's rights in particular. This can be seen as the first legal guarantee of the right to defense counsel.

From a theoretical point of view, this origin of the due process of law has been seen by most researchers as leading to a concept of fairness which serves to guarantee the accused's rights in general and the right to defense counsel in particular. In 1608, the English jurist Edward Coke wrote a treatise in which he discussed the meaning of Magna Carta. Coke explained the words '*per legem terrae*' as meaning 'Without being brought in to answer but by due process of the common law.'³⁵ Beside that, Coke set down a series of common law rights in his work (four volume *Institutes of the Law of England*) that protect the freeman's life and liberty, among them due process of law.³⁶ Throughout the many centuries of English legal history, there have been many laws and treatises which asserted that various different requirements were part of "due process" or part of the "law of the land", but usually that was merely because of what the actual existing law happened to be, rather than because of any intrinsic requirement.³⁷

Following Edward Coke, an American scholar, Herbert Baker, has further refined the concept of the due process of law by recognizing its purposes during the proof of crimes. Herbert Packer considered that the dominant models of criminal justice might be evaluated within the frameworks of two models: the *Crime Control model* and the *Due Process model*. The Crime Control model is based on the proposition that the repression of criminal conduct is the essential function of the criminal process.³⁸ This is designed to protect the rights of law-abiding citizens by stressing efficient apprehension and punishment of criminals. Thus, the police play an important role in finding someone guilty and the later stages in the criminal process

³⁵ Richard Clayton and Hugh Tomlinson, *Fair Trial Rights*, Oxford University Press, 2006, p. 26.

³⁶ *Ibid.*,

³⁷ Ronald Banaszak, *supra* note 7.

³⁸ Herbert Packer, *The Limit of the Criminal Sanction*, Stanford University Press, 1968, p. 158 -159.

should be reduced as much as possible. So the main tools of this model are the administrative hearing to establish the facts and the opportunity to plead guilty.

On the other hand, the Due Process model is grounded on the idea of fairness according to which everyone should be placed in the same position in the criminal process. It is designed to protect the rights of the accused by presenting formidable impediments to getting them past each step in the legal process.³⁹ Thus, a person may be found guilty only if the facts are clearly proved according to the law by a competent tribunal. This view of Packer expresses the view of the Fourteenth Amendment of US Constitution on Due Process: “no one shall be deprived of life or liberty without due process of law.”

It can be said that these views mark a major step in developing the concept of due process. Originally, Due Process results from following appropriate procedures and its nature is seen as fundamental to the protection of human rights. The fairness of the legal process has a particular significance in a criminal case and the influence of the idea of due process in criminal cases is obvious. It explains the requirement of there being a fair balance between the parties when resolving the case. This involves protecting the rights of the accused, including the right to defense counsel.

The aforementioned opinions of the common law have shown that the due process of law is the origin of the guarantee of the accused's rights. This guarantee is also in play in an adversarial trial where the initiative of the counsel is respected.⁴⁰ The adversarial trial is not just a typical characteristic of the nations following the adversarial model but also an orientation in those European law systems following the inquisitorial model.⁴¹ The demand for due process of law has long been seen as a core foundation when setting up and improving criminal procedure laws generally and the accused's rights in particular. Obviously due process of law is always accompanied by and attached to the principle of the right to a fair trial. To guarantee the procedural rights of the accused, including the right to defense counsel, one must first have a concept of due process of law where the legitimate rights and

³⁹ *Ibid.*, at pp.163-64.

⁴⁰ Norman Dorsen, Michel Rosenfeld, Andra Sajó, Susanne Baer, *Comparative Constitutionalism-Cases and Materials*, Thomson West, 2003, p. 1050.

⁴¹ The formal aspects of an adversarial trial are emphasized in numerous judgments of the European Court of Human Rights. See general Norman Dorsen, Michel Rosenfeld, Andra Sajó, Susanne Baer, *supra* note 40, p. 1051; Malgorzata Wasek-Wiaderek, *The principle of “equality arms” in criminal procedure under Article 6 of the European Convention on Human rights and its functions in criminal justice of selected European Countries - A comparative view*, Leuven University Press, 2000, p. 11.

interest of the parties involved in the case are taken into consideration in an objective and fair manner.

1.1.2.2. Principle of the Right to Fair trial

From the foregoing analyses, we can see that the basic content of the concept of *due process of law* is fairness. Fairness is expressed in two ways: (1) all procedures must be conducted in a fair manner, and (2) the parties involved in the procedural process must be fairly treated. On the side of the accused, fairness requires that the competent entities, particularly the court make their awards responsibly. And the principle of the right to a fair trial is considered as a tool protecting the rights and interests of each individual against State arbitrariness and autocracy.

From a historical viewpoint, as shown above, the right to a fair trial is connected to the concept of due process of law and can be traced back to Magna Carta (1215).⁴² In its theoretical aspects, the principle of the right to a fair trial is recognized in different ways. As a matter of form, Stefan Trechsel has written that the guarantee of a fair trial is only a procedure, designed to secure ‘procedural justice’ rather than ‘result-orientated justice’, i.e. a decision or judgment based on the true facts and the proper application of the law only.⁴³ In the same spirit, law-makers in England have always assumed that the right to a fair trial comprises a number of elements to be considered under the following headings: independent and impartial tribunal, fair hearing, public hearing, hearing within a reasonable time and reasoned judgment.⁴⁴ In terms of the contents, the right to a fair trial should be understood as protecting the search for truth. Representing this view, Danny J. Boggs considered that: “[C]haracteristics [such as] an impartial decision maker, an atmosphere conducive to consideration, with relevant evidence considered and irrelevant evidence excluded [,] are aimed primarily at improving the chances of arriving at a verdict that accords with some notion of preexisting, objective truth.”⁴⁵ In the most general sense, to guarantee the right to a fair trial in practice, the agencies involved must be obliged to be *independent* and *impartial*. If either of these factors is lacking, there can be no fairness. Independence means that the court and the judge do not depend on any individual or organization of the State authorities.⁴⁶ In addition, fairness is

⁴² Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford, 2005, p. 3.

⁴³ Stefan Trechsel, *supra* note 31, p. 83.

⁴⁴ Richard Clayton, Hugh Tomlinson, *supra* note 35, p. 26.

⁴⁵ Danny J. Boggs, *The Right to a Fair Trial*, U.Chi. Legal F.1,4 (1998). As quoted by Norman Dorsen, Michel Rosenfeld, Andras Sajó, Susanne Baer, *supra* note 40, p. 1050.

⁴⁶ Stefan Trechsel, *supra* note 31, p. 49.

deemed to involve the thorough consideration of the circumstances as well as the provisions of all relevant laws.⁴⁷ Impartiality requires that the judge not be biased in favor of either party.⁴⁸ The above concepts form a solid foundation for a theoretical basis which will guarantee the accused's rights in general and the right to defence counsel in particular.

In terms of criminal proceedings, the principle of the right to a fair trial entails the right to defense counsel. In 1993, M. Cherif Bassiouni⁴⁹ indicated in his survey that no fewer than 38 national constitutions contained provisions that protected the right to a fair trial or hearing in criminal cases. However, he recognized that many other constitutions contained language that could be explained as guaranteeing a similar right. Almost all the relevant provisions described the rights of the accused in criminal cases, focusing on the right to defense. For example, seven national constitutions guarantee the right to a procedure containing all the safeguards needed for the defense. The right to a defense is related to the right to a fair trial and is dealt with in conjunction with this right.⁵⁰ The "right to a defense", without more, is guaranteed in twenty - one national constitutions, but the specific interpretation attached to this rubric is not evident from the constitutional texts alone. It could merely imply the right to a fair trial, but also specifically include the right to defense counsel, or even simply the right to defend oneself. In ten additional constitutions, the right to defense is more specifically guaranteed by provisions such as "at every level of the proceeding." Cherif's survey strongly suggests that the right to defense counsel is needed if the right to a fair trial is to be guaranteed. In other words, the principle of a fair trial is itself a fundamental guarantee which is the key measure in protecting the particular rights of the accused.

Discussing the right to a fair trial, Cherif acknowledges two aspects: the first is the principle of *equality of arms* and the second is the right to an adversarial proceeding.⁵¹ Sharing this view with Cherif, another scholar assumes that the principle of *equality of arms* implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do

⁴⁷ *Ibid.*,

⁴⁸ *Ibid.*,

⁴⁹ M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedure Protection and Equivalent Protection in National Constitutions*, 3 Duke J. Comp.&Int'l. L.235 (1993), pp. 267-68.

⁵⁰ *Ibid.*,

⁵¹ *Ibid.*,

not place him at a substantial disadvantage *vis-à-vis* his opponent.⁵² Accordingly, the court just gives its conclusion after both the prosecution and the defense side are given the opportunity to comment on the observations filed and evidence adduced by the other party.⁵³ This means that no decision, which is not entirely and unconditionally in favour of an individual, may be taken unless the person concerned was previously given an opportunity to state his or her position on the issue. Of course, the right also implies that the court has an obligation to take the submissions of the defence into account, which is an obvious precondition for the effectiveness of an adversarial proceeding. This observation shows that, as the term ‘equality of arms’ indicates, this criterion is a comparative one. A comparison of the actual treatment of the opposing parties must be undertaken in order to ascertain whether an applicant has been disadvantaged. The notion of ‘adversarial proceeding’ presupposes equal adversaries and in a sense is more specific.

In any case, the most fundamental aspect of ‘fairness’ in proceedings is the right to be heard.⁵⁴ In criminal cases, *equality of arms* requires the defence to be on an equal footing with the prosecution. All the written evidence that the prosecution submits to the court must be communicated to defense counsel so that it can present its counter-arguments.⁵⁵

Similar to this view of the right to a fair trial, German scholars have also recognized that the right to a fair trial also depends greatly on the responsibility of the competent authorities, particularly the court. According to Zipf, Shroeder and Roxin, the principle of “procedural care” (Fürsorgepflicht des Gerichtes)⁵⁶ may also be derived from the concept of “fairen Verfahrens” (the right to a fair trial). The core of this principle is the obligation to inform and advise the accused about the results and disadvantages of various procedural acts. This obligation is not only imposed on the court, but also on all organs involved in the criminal process (the police, the public prosecutor and the like). Roxin also stressed that the significant element of the notion of “fairen Verfahrens” is the “Waffengleichheit” (means “equality of arms”).⁵⁷ Further clarifying the opinion of Roxin, E. Muller asserted that, the equality of arms requires that persons conducting the proceedings must

⁵² Salvatore Zappalà, *supra* note 42, pp. 96 -112.

⁵³ *Ibid.*,

⁵⁴ *Ibid.*,

⁵⁵ Salvatore Zappalà, *supra* note 42, pp. 96 -112.

⁵⁶ Malgorzata Wasek-Wiaderek, *supra* note 41, p. 12.

⁵⁷ *Ibid.*,

listen to the opinions of all the parties involved as the basis of the search for truth while concurrently considering the accused as the focal point of the proceedings.⁵⁸ According to Muller, equality of arms is not just a formal concept and it is not only fairness in terms of the rights of the accused as against those of the prosecutors. In his opinion, fairness should be also considered as equality of opportunity (“Chancegleichheit”).⁵⁹ This means that unequal treatment of one party *vis-à-vis* the other which is not objectively justified by the role it plays in procedure is forbidden as a breach of the equality requirement.⁶⁰

Based upon these theoretical opinions, it becomes relatively easier to see if the right to a fair trial is recognized in a specific legal instrument. Today, the intertwined concepts of due process and the right to a fair trial are much more developed and have been the subject of a great deal of international law making. The right to a fair trial is one of the human rights best protected under international law. The Universal Declaration of Human Rights (UDHR) established some general principles on the right of persons facing criminal charges. These are contained in three key Articles: Article 9 deal with protection against arbitrary arrest; Article 10 expresses the right to be tried in public and in full equality by an independent and impartial tribunal; Article 11 provides some more detailed provisions, such as the presumption of innocence and the right of the accused to have ‘all the guarantees necessary for his defence’. Compliance with the general principles set out in UDHR, the right to a fair trial is reflected in the international legal instruments on human rights. Provisions protecting rights of fair trial can also be found in Articles 14, 16 of the International Covenant on Civil and Political Rights (ICCPR); Articles 5, 6 of the European Convention on Human Rights (ECHR); Articles 3, 8, 9 and 10 of the American Convention on Human Rights (ACHR); Articles 2, 7 and 26 of the African Charter on Human and People’s Rights (AfCHPR).

In practice, the concept of the right to a fair trial is interpreted in more detail and more specifically by the agencies implementing the Treaties. For instance, according to the United Nations Human Rights Committee’s interpretation, the right to a fair trial is broader than the sum of the individual fair trial guarantees and depends on the entire conduct of the trial.⁶¹ Similar sentiments have been expressed

⁵⁸ E.Muller, *Der Ger Grundsatz der Waffengleichheit in Strafverfahren*, NJW 1976, No. 24, p. 1064. Quoted by Malgorzata and Wasek-Wiaderek, *supra* note 4, p. 49.

⁵⁹ *Ibid.*,

⁶⁰ *Ibid.*,

⁶¹ General Comment No. 13, paragraph 5 (13/4/1989).

by the Inter-American Court of Human Rights.⁶² In another sense, the right to a fair trial is seen as equivalent to the *equality of arms*. According to the European Court of Human Rights (ECtHR), “[e]quality of arms, which must be observed throughout the trial process, mean that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case.”⁶³ In this case, the Court found that the right to a fair trial was violated where one side was denied access to relevant documents in the case file.

On the drafting side, the international instruments on the protection of individual rights in criminal trial are very similar. Among the general fair trial protections are: (1) the right to be heard by a competent, independent and impartial tribunal; (2) the right to a public hearing; (3) the right to be heard within a reasonable time; (4) the right to counsel; (5) the right to interpretation. In criminal proceedings the following also apply in addition to the general guarantees already mention: (1) the right to be notified of the charge against one in a timely manner; (2) the right to adequate time and means for the preparation of one’s defence; (3) the right of an accused to defend him/her self in person or to be assisted by a counsel of his/ her choosing, and to communicate freely and privately with his/her counsel; (4) the right to call witnesses; (5) the right not to incriminate oneself; (6) the right to appeal.

On the basis of these most general standards, nations also have similar expressions on the guarantee of the right to a fair trial and the right to defense counsel, as a minimum, must always be respected by the State. For instance, the principle of the right to a fair trial in Germany is deemed to be a basic guarantee of the accused’s rights. Accordingly, the accused in Germany are equipped with the following minimal guarantees: the right of the witness to be examined in the presence of a lawyer of his or her choice; the right of the accused deprived of financial means to be represented, in every serious case, by a defense lawyer paid by the state; the inadmissibility of evidence obtained by the conscious abuse of the power of the state; the obligation to inform during the trial the suspect about all investigative activity taken; the particularly careful evaluation of the credibility of the core

⁶² *Exception to the Exhaustion of Domestic Remedies*, Annual Report of the Inter-American Court (August 10, 1990), OAS/ser.L/V/III.23, doc. 12, rev.1991, p. 44, paragraph 24.

⁶³ *Ofrer and Hopfinger*, Application Nos. 524/59 and 617/59, European Commission of Human Rights, Yearbook, December 12, 1960, pp. 680, 696.

evidence; and the respect for the justified expectations of the accused person.⁶⁴ Similarly, the development of the criminal trial in the US is of particular interest.⁶⁵ A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for the resolution of issues defined in advance of the proceeding. Fair trial rights are used to protect the accused from arbitrary government action and it seem as a general guarantee linked to the principle of equality of arms.⁶⁶ The right to a fair trial is a standard mostly adduced in awards related to the right to defense counsel.⁶⁷ For example, in a well-known case,⁶⁸ the judge stressed that: “[T]he right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial...”⁶⁹ Vietnamese laws have some of the same characteristics. Manifestations of the right to a fair trial have been acknowledged in the Code of Criminal Procedure in the form of fundamental principles, including: the principle of equal rights before the court (Article 19); the principle of public trial (Article 18); the principle of independence of judges and lay judges (Article 16); the principle of guarantee of the right to defence of the accused (Article 11); the principle of presumption of innocent (Article 9); the principle of the determination of the facts in criminal cases (Article 10).

The above has clearly indicated that the right to a fair trial has a wide application. It covers all procedural rights of the accused, of which the right to defence counsel is one among others, albeit an essential one. Specific study of the right to a defence in international legal documents (section 1.2) will give a further demonstration of the foundational aspects of the right to defense counsel.

From the foregoing analyses, it can be seen that there is a intimate and correlative connection between due process, the right to a fair trial and the right to defence counsel. Each right is a condition for the other right and vice versa. Additionally, this connection also reflects the importance of the right to defense counsel. The next

⁶⁴ These rights were pointed out in Decisions of the Federal Constitutional Court (BVerf GG) and of the Federal Court of Justice (BGH). As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Effective Criminal Defence in Europe*, Antwerp-Oxford-Portland, Intersentia 2010, ISBN 978-94-000-0093-3, pp. 280-95.

⁶⁵ Christopher J. M. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2007, p. 14.

⁶⁶ See in general Ronald Banaszak, *supra* note 7.

⁶⁷ For more detail see *infra* Chapter 4.

⁶⁸ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁶⁹ In this case, the petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him; but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defence about as well as could be expected of a layman; but he was convicted and sentenced to imprisonment.

section of Chapter 1 will further clarify the meaning of the guarantee of the right to defense counsel.

1.1.3. Purpose of the right to defense counsel

Why do accused persons need to defense counsel to protect their rights and interests? And why does the State have the responsibility of guaranteeing this right of theirs? The historical summary given above has demonstrated that the formation and development of the right to defense counsel expresses the demand for the protection of the legitimate rights and interests of people facing the power of the State. A fair judgment is called for by the parties to a criminal case. This can only be the end result of a fair procedure, at which the rights of the accused must be respected and guaranteed. This guarantee has the following aspects:

First, the right to defense counsel is aimed at giving the accused the opportunity of seeing his or her legitimate rights and interests protected during the process of the criminal procedure. Counsel acts as an advisor to the accused, to assist in defending against the accusations of criminal procedure specialists such as investigators, prosecutors and judges and all this reflects a subjective requirement of the principle of “equality of arms”. In addition, the counsel will be the person giving the accused the necessary skills, including knowledge of the fundamental rights of the accused guaranteed in criminal procedure laws (including both national laws and international conventions). Treschel assumed that this is a technical objective. The aim is to create an attachment between the right to have counsel and the nature of the procedural progress. The right to defense counsel will guarantee that the accused can take a more active role in criminal procedure instead of an inherently negative position. Commenting on the role of the accused, Treschel reckoned that, “*the assistance of counsel is the key which opens the door to all the rights and possibilities of defence in the substantive sense of the term. It is clear that the law – substantive as well as procedural - is a rather complicated matter, which is often unintelligible to the layperson.*”⁷⁰ The author totally agree with this opinion.

The second aspect of the right to defense counsel is to guarantee general humanitarian aims. As before, the accused will have to confront the accusations of competent agencies during the procedural process. A series of such decisions involving arrest, detention, interrogation, etc may lead to unemployment and

⁷⁰ Stephan Trechsel, *supra* note 31, p. 245.

separation from one's family and general alienation from society. These consequences may well result in psychological problems for the accused. It can be seen that law-makers have also recognized the possibility of such consequences and the potential unfairness if the accused are not assisted by the counsel.⁷¹ Sharing this opinion, Treschel assumed that counsel also served humanitarian purposes as they assist the accused in both the legal and spiritual senses.⁷²

From the above, we can see that implementing the right to a defence through counsel is an efficient way of guaranteeing the rights of the accused.

1.2. Guarantee of the right to defense counsel in international legal documents

1.2.1. Overview of the legal documents connected with the guarantee of the right to defense counsel

The right to defense counsel is recognized and guaranteed in most international conventions on human rights. In this section, the author will present aspects of the guarantee by analyzing the provisions of relevant international conventions on human rights; I will also suggest the impact these conventions might have on practical law-making. In addition, some regulations of a number of countries will be reviewed to show consistency with the conventions.

International legal documents regarding the right to defense counsel are all based on the founding principle of the right to a fair trial. They establish international standards on the right to defense counsel in Treaties (Conventions) which are then legally binding on their member countries.

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the UDHR. Article 11(1) of this Declaration stated: "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*". Even the foregoing statement does not directly mention the right to defense counsel but subsequent interpretation of Article 11 has shown that the right to defense counsel is a key element of the right to a fair trial as mentioned in Article 10 of the Declaration: "*Everyone is entitled in full equality to a fair and public*

⁷¹ The criterion of humanitarian purpose originated from international conventions on human rights. In a regional context, the European Commission on Human Rights has accepted humanitarianism as a fundamental ground for the guarantee of the right to defence counsel in its report on *Can v. Austria* (FS), 30 Sept, 1985, Series A, No.96, 1986.

⁷² See also Stephan Trechsel, *supra* note 31, p. 246.

hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Based upon the spirit of the Declaration, the right to defense counsel has been recognized in international legal instruments in two contexts: (1) the global context (the United Nations itself) and (2) the regional context.

In the global context, the right to defense counsel is recognized in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as follows: everyone charged with an offence shall have the right (1) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (2) to defend in person or through legal assistance of his own choosing; (3) if he does not have legal assistance, legal assistance will be provided 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. In addition, the right to defense counsel was also be guaranteed by the other relevant international instruments, such as the United Nations Basic Principles on the Role of Lawyers, the Rome Statute of the International Criminal Court etc. Besides, the organizes of the United Nations play significant role in explaining and guiding the application of provisions of the ICCPR on the right to defense counsel, e.g. the United Nations Commission on Human Rights (UNCHR).

In many regional instruments, covering Europe, America and Africa, the right to defense counsel is now recognized. Europe can be deemed to be the leading region in developing regimes protecting human rights. The relevant instrument in Europe is the European Convention on Human Rights (ECHR). Similar to the regulations in the ICCPR, the right to defense counsel is guaranteed in Article 6 of the ECHR. According to this, the accused shall have the right (1) to have adequate time and the facilities for the preparation of his defence; (2) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. In practice, the expansion of the guarantee of the right to defense counsel is one which is continually discussed in Europe, especially among the member states of the European Union (EU). The European Commission has repeatedly expressed its intention to consolidate and set up a legally complete and consistent regime which

will guarantee the basic procedural rights of the accused in the EU as a whole.⁷³ Most proposals of the European Council have emphasized the importance and necessity of guaranteeing the right to defense counsel and have viewed it as a focal point where consistency among the member nations of the EU in relation to the guarantee of fundamental human rights is a crucial matter.⁷⁴ However, the efforts of the European Commission have not been entirely supported by member states.⁷⁵ To counter this, the Council of the European Union (the EU Council) presented a “Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings” on 23 October 2009.⁷⁶ The Council has also passed a Resolution on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Accordingly, the EU accepts the ECHR as the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, and the judgments of the European Court of Human Rights (ECtHR) are seen as the basis for harmonising the criminal justice systems of the Member States and for strengthening their mutual trust. The roadmap has also provided new directions for reaffirming and expanding the procedural rights of the accused person, including the right to legal counsel. Currently, the Treaty of Lisbon⁷⁷ effective on 1 December 2009 has unified many issues relating to EU legislation and has suggested a path to joining the European Convention on Human Rights of the European Union.⁷⁸ If this happened, it would mean that the EU and other organizations of the EU will be responsible to the ECtHR in respect of matters governed by the ECHR. According to European scholars now, the guarantee of the right to an effective defense must be understood at 3 levels: *first*, the right to defense counsel must ensure that the accused shall be supported in a timely and full manner with all conditions needed to implement his rights being satisfied; *second*,

⁷³ The European Commission has alternately proposed to standardize the guarantee of the accused’s basic procedural rights in the European Union, of which the right to defence counsel is one. Taking the proposals in ‘Green Paper’ 2003 (COM(2003)75 final) as an example, this ‘Green Paper’ outlined a standard guaranteeing basic procedural rights of the accused (2004) as was later provided in Draft Council Framework Decision, COM/2004/0328 final. In this, the Commission emphasized that giving such outlines is ‘not to duplicate what is in the ECHR but rather to promote compliance at a consistent standard’. This content was again proposed in the 2007 outline (German Presidency draft 2007).

⁷⁴ For example, in the above ‘Green Paper’, the Commission stated “Some rights are so fundamental that they should be given priority at this stage. First of all among them is the right to legal advice and assistance. If an accused has no lawyer, they are less likely to be aware of their rights and therefore to have those rights accepted. The Commission sees this right as the foundation of all other rights.”

⁷⁵ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 64, p. 14.

⁷⁶ 11457/09 DROIPEN 53 COPEN 120.

⁷⁷ The birth of the Treaty of Lisbon, Treaty on European Union (TEU) and Treaty on functioning of the European Union (TTEU).

⁷⁸ This content was also recorded at Art. 52 of the Charter of Fundamental Rights of European Union.

the right to defense counsel must be recognized in the system of statutory documents and must be laid out in practice; *third*, improvement of the knowledge and professionalism of defense counsel must be provided for. All this derives from acknowledging that the right to an effective defense stems from respecting human rights and placing the accused in the central position in a criminal case.⁷⁹ The member nations of the European Convention on Human Rights have indeed fostered better assurances of the accused's right to a defense.

In America and Africa, the right to defense counsel has been recognized in the American Convention on Human Rights and the Convention on Human Rights and People's Rights respectively. In America, the foundational principles of the 1948 American Declaration of the Rights and Duties of Man have been re-confirmed in the American Convention on Human Rights which was adopted in 1969. The right to defense counsel is acknowledged in Article 8 of this Convention. Accordingly, a person who is charged with an offence shall have the following rights: (1) the right to have adequate time and means for the preparation of his defence; (2) the right to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (3) the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts. This Convention determines the human rights which member nations have to abide by and to guarantee, and concurrently established the Inter-American Court of Human Rights. The Convention is now binding upon 24 out of the 35 member nations of the Organization of American States (OAS). The United States is not a member of this Convention even though it signed in 1977.⁸⁰

The foundational instrument on human rights in Africa is the African Charter on Human and Peoples' Rights – AfCHPR (hereinafter referred to as the African Charter) passed by the Organization of African Unity (OAU) on 27 June 1981, effective on 21 October 1981. The right to defense counsel is acknowledged in Article 7 of the Charter as follows: "Every individual shall have the right to defence, including the right to be defended by counsel of his choice..." In comparison with the previous Conventions on human right, the guarantee of the right to defense counsel in the African Charter has a narrower extent. An African

⁷⁹ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 64, p. 6-7.

⁸⁰ But has not proceeded with ratification.

Court of Human Rights was set up after the Protocol supplementing the African Charter on Human and People's Rights (itself passed in 1998) took effect in 2004.

In Asia, various nations have made efforts to establish a regime of human rights in the Asian region.⁸¹ However, no instrument legally binding member nations in the whole of Asia on human rights has been promulgated. As such, no general agreement covers Asian laws on the accused's rights.

The above-mentioned international legal instruments are those recognizing the right to defense counsel. In the following sections, on the basis of the UN International Declaration of Human Rights, the author will focus on introducing and analyzing provisions in the above international legal instruments which recognize the right to defence counsel. In addition, the awards and decisions of the guiding and implementing agencies related to International Treaties will be also taken into consideration to further understand specific standards of the guarantee of the right to defense counsel of the accused.

1.2.2. The right to defense counsel under international legal documents

Based upon the connection between the accused's rights and the principle of the right to a fair trial, the International Conventions on Human Rights have basically had the same recognition of the minimal guarantees of the right to defense counsel. Such guarantees are now analyzed specifically.

1. Right to adequate time and facilities for preparing the defence

Most international legal instruments have mentioned the State's responsibility for guaranteeing favorable conditions for the accused and his counsel when preparing of the defence. The right to adequate time and facilitates for the preparation of the accused's defence is contained in Article 14.3(b) of the ICCPR, Article 6.3(b) of the ECHR, and Article 8.2(c) of the AmCHR. According to the definitions provided in these instruments, the right to the preparation of a defence implies two aspects: (1) guaranteeing a proper period of time; and (2) facilitating the preparation of the defence.

⁸¹ In the Arab region, the Arab Charter on Human Rights was enacted in 1994. Currently, the Arab nations are discussing the establishment of an agency to protect and improve human rights in their region on the basis of this instrument. In 2008, the Charter of the Association of Southeast Asian Nations was passed, marking a milestone in the development history of this Association. The Charter includes a provision (Art. 14) stipulating the establishment of a regional human right agency. ASEAN nations have now agreed upon the establishment of the ASEAN Human Rights Body. General agreements on the accused's rights have not been officially recognized so far.

According to General Comment no. 13 of the United Nations Human Rights Committee, “what is ‘adequate time’ depends on the circumstances of each case” (paragraph 9). It will also largely depend on its complexity. As to the concept of facilities, the United Nations Human Rights Committee in General Comment no. 13 stated that “facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel” (paragraph 9).

Similarly, Article 6.3(b) ECHR gives the accused the right to adequate time and facilities for preparing the defence. The judgments of the ECtHR have the same way of understanding the right to the preparation of a defence. The duration of the “necessary time” is not specified as it is strongly dependant on the complexity of each individual case. Examples of violations because of lack of time for preparation are short notice of the trial, short time limits for lodging appeals, replacement of the lawyer or new evidence during or shortly before the trial.⁸² Providing facilities for preparation imply that detainees are entitled to receive a sufficient number of visits from their lawyers in the absence of a supervisor,⁸³ and also require access to the case file.⁸⁴

In a broader sense, the requisite guarantees for the preparation of a defence include timely financial support. The UN Basic Principles on the Role of Lawyers provides that each government under the UN is to supply the funding and other resources needed to make adequate legal services available to its citizens who are poor or disadvantaged.⁸⁵

2. Right of access to counsel

One of the most important rights of the accused person is that he has direct accessed to legal counsel as soon as possible. However the right of access to legal counsel is not fully recognized in all the international conventions on human rights. Despite this, in most judicial decisions, the right to have access to counsel is applied during both pre-trial investigation and the trial.

⁸² Hadjianastassiou v. Greece 1992 (12945/87); Twalib v. Greece 1998 (42/1997/826/1032); G.B. v. France 2001 (44069/98).

⁸³ ECtHR 27 November 2008, Salduz v. Turkey (application no. 36391/02); Öcalan v. Turkey 2005 (46221/99, Grand Chamber); S. v. Switzerland 1991 (12629/87; 13965/88) § 48; Brennan v. UK 2001 (39846/98).

⁸⁴ ECtHR, 16 December 1992, Edwards (no. 13071/87), § 35-38.

⁸⁵ International Covenant on Civil and Political Rights, Art. 9(1). This is a binding treaty upon all nations that have ratified it.

The UN Human Rights Committee has stated on several occasions that the right to counsel must be safeguarded during pretrial investigation.⁸⁶ Similarly, the ECtHR considers that the lack of legal assistance during a suspect's interrogation would constitute a restriction of his defence rights.⁸⁷ Thus, the accused is also entitled to access to a lawyer from the moment he is taken into police custody.⁸⁸ This right is guaranteed during pre-trial proceedings⁸⁹ and, indeed, the right of access to counsel arises before any police questioning.⁹⁰ To ensure that the accused has such immediate access, he must be properly informed about his right to be assisted by a lawyer. If the information is insufficient, he has not truly been given access to legal assistance.⁹¹

The right of access to counsel is stipulated quite similar in domestic law systems. For instance, in England and Wales a compulsory right to counsel at the pre-trial stage was introduced for the first time by section 58 of the Police and Criminal Evidence Act 1984 (PACE). In Canada, Section 10(b) of the Charter of Rights and Freedoms provides a right to counsel upon arrest. In Russia, the 2001 Code of Criminal Procedure (Article 49.3) requires the early entrance of licensed defence counsel at the pre-trial investigation stage. However, a recent survey shows that there are still some EU member states that do not accept the involvement of defense counsel during police interrogation.⁹²

3. The right to free legal counsel

The right to free legal assistance derives from Article 14.3(d) of the ICCPR, Article 6.3(c) of the ECHR, and Article 8.2(e) of the American Convention on Human Rights along with other UN documents such as the 1990 Basic Principles on the Role of Lawyers (Rule 6),⁹³ Article 67.1(d) of the Rome Statute of the International

⁸⁶ *Caldas v. Uruguay*, U.N. Doc. No. 40 (A/38/40) (1983); *Machado v. Uruguay*, U.N. Doc. A/39/40 (1981).

⁸⁷ ECtHR, Grand Chamber, 27 November 2008, *Salduz* (no. 36391/02), § 54-55 and ECtHR 11 December 2008, *Panovits* (no. 4268/04), § 66 and 70-73.

⁸⁸ ECtHR 8 February 1996, *John Murray v. UK* (Series A 1996-I), ECtHR 27 November 2008, *Salduz v. Turkey* (application no. 36391/02).

⁸⁹ ECtHR 24 November 1993, *Imbrioscia v. Switzerland* (Series A, N°275, para. 36).

⁹⁰ ECtHR 27 November 2008, *Salduz v. Turkey* (application no. 36391/02); ECtHR 11 December 2008, *Panovits v. Cyprus* (application no. 4268/04); ECtHR 24 September 2009, *Pishchalnikov v. Russia* (application no. 7025/04) and ECtHR 13 October 2009, *Dayanan v. Turkey* (application no 7377/03).

⁹¹ ECtHR 11 December 2008, *Panovits v. Cyprus* (application no. 4268/04); *Plonka v. Poland* 2009 (20310/02); *Zhelezov v. Russia* 2002 (48040/99 decision).

⁹² Taru Spronken, Gert Vermeulen, Dorris de Vocht Laurens van Puyenbroeck, *EU Procedural Rights in Criminal Proceedings*, MakluAntwerp - Apeldoorn - Portland, 2009.

⁹³ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Criminal Court (ICC Statute) etc. Accordingly, the accused has the right to have free legal counsel if he does not have sufficient means to pay for it.

Under the American Convention, there is an “inalienable” right to free legal assistance where the person does not have the means to pay for it. This is qualified slightly in the ICCPR and the ECHR, which add the additional criteria of “the interests of justice”. In determining the meaning of the interests of justice, the United Nations Draft Declaration on the Right to a Fair Trial and a Remedy,⁹⁴ at paragraph 50(a), states that “[t]he interests of justice in a particular case should be determined by consideration of the seriousness of the offense of which the defendant is accused and the severity of the sentence which he or she risks.”

The European Court of Human Rights in interpreting the same phrase has gone further in its consideration of the factors relevant to the appointment of legal representation. The accused has a right to free legal aid provided that he does not have “sufficient means” and that the “interests of justice” require legal aid. There is no case law regarding the level of “sufficient means”. The defendant has the burden of showing that he lacks such means.⁹⁵ He does not have to prove lack of means beyond all doubt; it is sufficient that there are “some indications” of lack of means.⁹⁶ Whether the “interests of justice” requires free legal assistance depends mainly on the seriousness of the offence and the possible sentence, but also on the complexity of the case and the ability of the defendant to present his own case.⁹⁷

Another aspect of the right to free legal counsel is mandatory free legal counsel. Almost all international treaties indicate that the accused has the right to defend him/herself in person or through legal counsel of his/her own choosing, but most do not provide any provision on mandatory defence counsel. This is standard practice in many states around the world (for example Russia, Germany, China, Vietnam etc.), particularly with regard to vulnerable groups such as children or those with mental disabilities. It is also standard practice in many states to afford a mandatory defence to those who have committed serious offenses.

In brief, in both instruments, the accused will be guaranteed the right to have an appointed counsel if he cannot afford to pay counsel and the interests of justice call

⁹⁴ E/CN.4/Sub.2/1993/24/Add.1, (25 June 1993).

⁹⁵ *Croissant v. Germany* 1992 (13611/88) § 37: “the Court considers it admissible, under the Convention, that the burden of proving a lack of sufficient means should be borne by the person who pleads it”.

⁹⁶ *Pakelli v. Germany* 1983 (8398/78) § 34.

⁹⁷ *Benham v. UK* 1996 (7/1995/513/597 Grand Chamber).

for it. It can be said that this shows a noble strain of and in humanity. This guarantee once again stresses the State's responsibility towards the accused who faces financial difficulties. It can be seen at once that the indigent accused will always be protected by special support policies in most countries. Nevertheless, in practice, the guarantee of the right to defence counsel at no cost to the accused is still a serious and problematic issue in many countries. However, it remains necessary and meaningful to bring out the practical implications of the aspects of guarantee mentioned above. In the context of globalization, each country should at least be oriented towards certain minimum standards on democracy and impartiality.

4. Right to communicate with defense counsel

Article 14.3(b) of the ICCPR specifically guarantees the right to private contact with counsel.⁹⁸ The United Nations Human Rights Committee has noted that access to counsel is important for the protection of a detainee (General Comment no. 20, paragraph 11). It has also noted that communication with counsel should take place in conditions that give full respect to the confidentiality of the communications and that "lawyers should be able to counsel and represent their clients in accordance with their established professional standards and judgment without any restrictions, pressures or undue influences from any quarter" (General Comment no. 13, paragraph 9). In most related cases judged by the UN Human Right Committee, the right to contact counsel is regarded as necessary to protect the accused person's rights when he is in provisional custody, or he/she cannot hire a counsel or when private communication to the counsel is denied.⁹⁹

In the same spirit, according to judgments of the ECtHR¹⁰⁰ contacts between a prisoner and the outside world (including the counsel) must be freely allowed and must be private. Contact can be implemented via mail, telephone or some other means of communication.

5. Right of the defence to examine witnesses present in the court

⁹⁸ A similar content is found in Art. 8.2(d) of the ACHR, Art. 6.3(c) of the ECHR, Art. 7.1(c) of AfCHPR, Principles 8 and 22 of the United Nations Basic Principles on the Role of Lawyers, Principles 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

⁹⁹ *Kelly v. Jamaica* (U.N. Doc. CCPR/C/57/D/537/1993); *Gridin v. Russian Federation* (U.N. Doc. CCPR/C/69/D/770/1997); *Khomidova v. Tajikistan* (U.N. Doc. CCPR/C/81/D/1117/2002).

¹⁰⁰ ECtHR, *Öcalan v. Turkey* 2005 (46221/99, Grand Chamber); ECtHR, *Imbrioscia v. Switzerland* 1993 (Series A, No.275, para. 36).

As the accused is in general in need of the assistance of counsel, counsel plays the really important role here. If they are not allowed to function fully and in an independent and fair manner, the function of the defence will not be guaranteed. However, this right is mentioned only in the AmCHR (Article 8.6).

These are the fundamental aspects which ensure the right to defense counsel in international law. In brief, the general spirit of the International Convention on Human Rights in relation to the right to defense counsel suggests two aspects are crucial: *first*, it is required to guarantee rights for not only the accused but also for their counsel; *secondly*, and most emphatically, it is the State's responsibility to assist counsel and their clients with all the conditions needed if they are to implement their rights. The above more detailed prescriptions represent fundamental orientations that member countries must observe and respect.

In conclusion, criminal procedure is a particular function of the State established to deal with criminal cases and thus protect the interests of the State and society, and the legitimate rights and interests of persons, the accused among them.¹⁰¹ However, in criminal procedure, the competent authorities proceeding against the accused may revoke or limit their right to liberty or other rights. In terms of the guarantee of human rights, the accused must be entitled to prove their innocence as well as to present evidence and circumstances rebutting or extenuating criminal liability. This right is called the right to a defence. In cases where the accused fails to implement this right him/herself, he or she has the right to ask other persons to assist them in their defence.

In the legal systems of most nations, the guarantee of the right to defence counsel is one of the factors guaranteeing fairness in criminal procedure. Even though the ways of finding the truth vary between procedural models, the common purpose of criminal procedure is not just to punish someone for a crime that has occurred, but to find the person who has actually offended.¹⁰² In Continental European legal systems, an inquisitor is used to find out the truth. Common law systems prefer the view that the truth would emerge in a discussion between adversarial parties.¹⁰³ These different approaches to evidence have led to differences in the role of

¹⁰¹ Phạm Hồng Hải, *Vai trò của luật sư – người bào chữa – Thực trạng và những giải pháp nhằm nâng cao chất lượng tranh tụng trong tố tụng hình sự (Role of defence counsel - Reality and resolutions for strengthening quality of controversies in criminal proceedings)*, Presentation at the International Seminar on “Right of access to counsel in Vietnamese Criminal Procedure”, Ho Chi Minh City, December 2010.

¹⁰² Christoph J. M. Safferling, *supra* note 65, p. 18.

¹⁰³ *Ibid.*,

counsel.¹⁰⁴ Nevertheless, the guarantee of the right to counsel in both the adversarial and the inquisitorial model is based upon the more fundamental concept of due process. A historical review of several systems of criminal justice has indicated that due process requires parties in the proceedings to have equal opportunities to summon and present evidence. The right to a fair trial is one result of the demand for due process and this is also equivalent to the equality of arms. Counsel is an essential party in the proceedings as history has also shown that the development of fairness at trial is linked to the role of the counsel. Adequate measures which guarantee the fairness of procedure must satisfy two criteria: (1) they regard the accused as a focus of attention in the settlement of criminal cases; (2) they acknowledge the equal role of the counsel in assessing evidence. The contents of Chapter 1 have shown us the link between fairness in criminal procedure and the guarantee of the right to counsel. In other words, this is a relationship between generality and particularity. Guaranteeing the right to defense counsel is an important aspect of guaranteeing the right to a fair trial and vice versa. As a result, the objective relationship between fair trial and the guarantee of the right to counsel has been recognized by international law. Accordingly, the right to defense counsel is a *jus cogens*¹⁰⁵ in the exercise of the right to a fair trial and must be guaranteed. In international legal documents, the guarantee of the right to defense counsel consists of the following fundamental aspects:

- The accused has the right to a defense via counsel chosen by him/her or appointed by the court;
- The competent authority is obliged to appoint counsel for the accused in case where she/he cannot affordable to hire one;
- The right to counsel is guaranteed in all procedural stages, including pre-trial and trial (and appeal);
- The accused has the right to communicate with his/her counsel;
- The accused and his/her counsel have the right to be provided with a reasonable period of time and essential conditions to prepare their defence.

¹⁰⁴ Particulars are stated in the next Chapters of this Dissertation.

¹⁰⁵ The 1986 Vienna Convention on the Law of Treaties affirmed *jus cogens* as an accepted doctrine in international law. According to Art. 53 of the Vienna Convention, *jus cogens* is 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.

These can be deemed as general standards guaranteeing the right to defence counsel in international law and which must be recognized in the laws of parties to international treaties. Vietnamese, German and US law are generally in compliance with international standards, and concurrently must have specific guarantees of the right to defense counsel. The scope of the guarantee in international law will be a norm which will reconcile and control the regulations of those considered in the following Chapters of this dissertation.

CHAPTER 2: GUARANTEE OF THE ACCUSED PERSON'S RIGHT TO DEFENSE COUNSEL UNDER VIETNAMESE CRIMINAL PROCEDURE LAWS

Since the Sixth National Congress of the Communist Party of Vietnam (held in 1986), the policy of comprehensive reform of our country was launched and has subsequently been implemented. An aspect of this was stated to be the “continuous establishment and improvement of the State of the Socialist Republic of Vietnam, focusing on administrative reform”. Judicial reform can be seen as an objective and necessary part of adapting the state to changes in the economy and the political system. This will continue to be a major task for the State in general and the judicial authorities and one subordinate to the task of establishing the State under rule of law, Government thus becoming of the people, by the people and for the people. Judicial reform in Vietnam is currently being considered and in our present situation, the integration of some foreign-based law may be necessary for improving our legal system. In order to achieve such integration, however, lawmakers first need clearly to understand the advantages and shortcomings of the domestic system. Studying Vietnamese law regarding the guarantee of the right to defense counsel and comparing this to German and American law will enable the author to give a comprehensive assessment of the current state of Vietnamese law regarding this issue both in concept and in its practical enforcement. As a result, the contents of Chapter 2 are not merely a description, analysis and assessment of the effectiveness of the guarantee of the right to defense counsel in the current criminal procedure law of Vietnam but also study the historical background and particular characteristics of Vietnamese criminal procedure. This is the basis one needs if one is to expound on the advantages and shortcomings of Vietnamese law on the right to defense counsel.

2.1. Overview

2.1.1. Background on Vietnamese criminal procedure

Vietnam has a political system which is under the leadership of one Party, the State organization is a unifying one and it does not have a Federal form. The enacting of legal normative acts is conducted by the National Assembly, the highest legislative body. The legal system is represented by provisions in document form (law and

sub-law) which are valid throughout the nation. The court's sentences are only valid for each specific case, without any value as precedents. Vietnamese criminal procedure is like that in the other socialist republics and derives from the criminal procedure system of the European continent. Its origins are characteristic of a state regime - these characteristics being highly influenced by the French and Russian models of criminal procedure, both republican states.¹ Vietnamese criminal procedure, too, is strongly affected by these models and bears the characteristics of the Inquisitorial Model where criminal investigation and proof of crime are in the hands of the prosecuting bodies, the judges also obviously playing an active role in the procedure at court.

The main purpose of the procedure is to attempt to determine the objective truth of a case and make a sound decision on what is to be done. Thus procedural activities begin with verification and the result is manifested by decisions, which include the conclusion of the Investigation Bodies and the Procuracy's Indictment. The Court organizes the showing of evidence in the case and gives its judgment based on the results of the interrogations at the trial combined with the consideration of the investigatory record and the Procuracy's indictment. The procedure at the court is simple and not so strict in terms of form;² for instance, the trial does not necessarily require the presence of the participants in the procedure,³ the collected evidence only needs to be verified at court and, indeed, the burden of interrogation is on the Court. The Court's decision is given based on its belief in the objective truth of the matter; it is not the result of any consideration about which party is more persuasive as may be the case in the more argumentation-oriented model.

At the pre-trial stage, the burden of proof is on the investigating bodies and the Procuracy's indictment: this is one of the basic principles of the Vietnamese criminal procedure law. The accused has various rights and is not forced to prove that he is innocent.⁴ The investigator mainly conducts the investigation in the pre-trial stage. The prosecutor performs two functions: first, representing the power of the State in the prosecution of criminal acts; second, supervising the activities of the judiciary.⁵ Giving the procurators this supervision function is aimed at ensuring

¹ Nguyễn Thái Phúc, *The Vietnamese Criminal Procedure Model - The theoretical and practical issues (Mô hình tố tụng hình sự Việt Nam - lý luận và thực tiễn)*, The legal science magazine, No. 5(42), 2007.

² Trần Văn Độ, *The Nature of Argumentation at Court (Bản chất tranh tụng tại phiên tòa)*, The Legal Science magazine, No. 4/2004.

³ Arts. 187, 191, 192, 193 CCP.

⁴ Art. 10 CCP

⁵ Art. 1 of the Law of People's Procuracy 2002.

compliance and consistency in the application of the laws. Accordingly, in addition to the right to prosecute,⁶ the Procuracy has the right to approve or cancel decisions of the Investigating Bodies⁷ and to implement the right to appeal against the judgements and decisions of the court at the different levels.⁸ The investigation of the case is based on the record. The court will have considered by way of the evidence given in interrogations at court, the investigating bodies' decisions and the Procuracy's indictment. This has led to *ai* "án bở tui" or "án bở tui".⁹ Consequently, the defense counsel's role in the procedure is rather small, especially in the trial stage. This has caused many problems relating to the guarantee of the rights of the accused: firstly, from the accused's side, they may not even be aware of the defense counsel's role which is to support and help them, then in some case, the accused did not ask for a defense counsel even when they can afford financial ability to hire one. Secondly, from the defense counsel's side, as they consider their participation is just a matter of form, they do not conduct their defense obligation whole-heartedly, or even responsibly, causing damage to their client.¹⁰ This situation has lasted for a very long time. Currently, with the strategic orientation of reforming justice in the spirit of two documents: Resolution No. 08/NQ/TW (2002) and Resolution No. 49/NQ/TW (2005) of the Ministry of Politics about enhancing argumentation activities in solving criminal cases, the defense counsel's role has been gradually acknowledged and he is able to consolidate the responsibility of the competent authorities and parties in maintaining the rights of the accused.

The role of the Lay Judge participating in criminal procedure at trial activities (trial and appellate) also needs to be looked at. The Lay Judge participates in the trial on the basis of independence and equality to the Judge. Such a trial must include the Lay Judge's participation as a constitutional principle.¹¹ And it is a basic principle

⁶ The conduct of the prosecution is laid down in Art. 112 (1,2,3), Arts. 166-169 of the Code of Criminal Procedure 2003, including: the right to institute criminal cases; the right to initiate criminal proceeding against the accused; to request the investigating bodies to institute criminal cases and to investigate following the Code of Criminal Procedure in case they have themselves found out about the crime; the right to directly conduct a number of investigation activities under the provisions of the Code of Criminal Procedure; the right to prosecute the accused before court by way of an indictment.

⁷ Art. 112 (4,5,6); Arts. 166-169 CCP.

⁸ Arts. 232, 275, 293 CCP.

⁹ "record-based case" or "unjust case" (terms refer judgements made by the judge at the court which had been actually approved prior to the opening of the trial and the cross-examination at the court is of a formality).

¹⁰ The Science Conference Summary Record on amending, and supplementing the Articles of Criminal Procedure Code 2003 by Hanoi Lawyer Union held in 8/10/2009.

¹¹ Arts. 129, 130 of the Vietnamese Constitution.

of Vietnamese criminal procedure.¹² The Lay Judge in Vietnamese criminal procedure is like an independent member of the Court. The Lay Judge has a role in deciding every aspect of the crime and punishment of the defendant. The sentence is determined by majority voting¹³ and the number of Lay Judges (in the trial court) is always more than the number of professional judges.¹⁴ Those voting includes one Judge and two Lay Judges and in felony cases, 2 Judges and 3 Lay Judges. The purpose of the Lay Judge's presence is to ensure the court's objectivity. However, the current regulation has found many problems in sentencing; causing damage to the accused's rights. The lack of professionalism of the Lay Judge along with the regulation on majority voting method where the Lay Judges are always more numerous than the Professional judges is considered as one of the causes of the lack of justice in criminal procedure.¹⁵ This situation not only affects the standards of trial, but also affects the accused's right to a defense. This may lead to the wrong man being convicted of the wrong crime so the matter will need to be considered by the appeal or cassation procedure, or the trial reopened with costs for the defense and other court activities.

2.1.2. History and development of the right to defense counsel under Vietnamese Criminal Procedure Law¹⁶

In Vietnamese laws, legal guarantees of the right to defense counsel have been attaching to relevant statutory regulations on the right to defend of the accused. As such, studying the formation and development of the right to defense counsel in Vietnam criminal procedure law is an inseparable part of studying the formation and development of the right to defend in general. In this part, the study starts with the history of founding the Democratic Republic of Vietnam in 1946. This time ended the existence of the absolute monarchy institution over the centuries, and marked the beginning of the formation and development of the whole legal system of Vietnam in a new institution.

¹² Art. 16 CCP

¹³ Art. 17 CCP

¹⁴ Art. 185 CCP

¹⁵ The Summary Report of the Supreme People's Court, 2007.

¹⁶ See general: Hanoi University of Law, *Text book on Criminal Procedure*, People's Police Publisher, 2007; Phạm Hồng Hải, *Guaranteeing the right to defense of the accused (Đảm bảo quyền bào chữa của người bị buộc tội)*, People's Police Publisher, 1999; Nguyễn Văn Tuấn, *The role of lawyer in criminal procedure (Vai trò của luật sư trong tố tụng hình sự)*, National Politic Publisher, 2000.

2.1.2.1. Period from 1945 to 1954

Immediately after the successful August Revolution in Vietnam (August 1945), along with strengthening the government, the state of Vietnam was interested in strengthening the legal system. A few days after fathering the Republican Democracy of Vietnam through the Declaration of Independence, President Ho Chi Minh on 13th September, 1945 signed Decree number 33c which established a Military Court, and provided that: “The Defendant can defend himself in person or depend on someone representing him”.

Decree number 13/SL on organizing the hierarchy of courts and judges also stated clearly that “Lawyers have the right to defend before all kinds of Court, except the Court of first instance”.

Through the contents of these documents, we can see that Vietnamese justice in general, and criminal procedure in particular, underwent a basic change with the coming of the Republican Democracy of Vietnam. Previously, in the period of monarchy, there was little distinction between criminal law and criminal procedure, so the latter was not held to be of much account. Criminal procedure was, if anything, used by the feudal ruling class to suppress democratic movements and restrain the freedom of the working population. Criminal procedure law after the August Revolution protected and reinforced civil rights, including the right to a defense for the accused/defendant. However, there were still some limitations to this right. Specifically, lawyers only had the right to appear at trials under the jurisdiction of second-rank or higher courts or the military court. They did not have the right to appear before primary courts – the defendant still of course has the right to defend himself.

In order to overcome that situation, Decree number 21 on organizing the people courts, issued on 14th February, 1946 provided that the accused has the right to defend himself or be defended by another. Moreover, there were other stipulations guaranteeing a better implementation of this right in Decree 28/NĐ of 25th February, 1946 which was intended to implement Decree number 21. This stated that:

“Tribunal presidents have to check if the accused has someone to defend them or if they desire to ask someone to defend them or not;

Lawyers have the right to see the documents of the case, to ask the tribunal president for further investigation and to visit and have private talks with their clients without intervention;

The accused and his or her lawyers have the right to complain about the jurisdiction of the court...”

The first Constitution of Vietnam - the Constitution of 1946 - also acknowledged the right to a defense in Article 67: “The defendant has the right to self defense or to be defended by a lawyer”. More details are found in other documents, such as Decree 69 of 18th June, 1949 or Decree 144 of 22nd December, 1949. In these provisions, the right to a defense was extended. Based on this, the accused can be defended by another who might not be a lawyer and before any court, the right to defense counsel in the special case where the presence of a lawyer is compulsory has not been dealt with. However, at this period of time, there were still no provisions on appointed defense counsel. The lawyer entering a case was dependent on the financial capacity of the accused; the state had no responsibilities to appoint defense counsel, even in felony cases.

However, in the first half of 1950s, there were stipulations regarding “people’s advocate” encouraging grass roots participation in preventing crime and in maintaining the legitimate rights of the accused/defendant. Decree 01/NĐ on 2nd January 1950 on the conditions for becoming a “people’s advocate” provided that such defense counsels have an equal legal position to lawyers, and that all citizens can be designated as this kind of defense counsel, except for certain classes of persons, such as: the officer of the Resistance Commission; the clerk of the court; etc. These stipulations overcame any casualness of tribunal presidents when designating defense counsels thus more effectively guaranteeing the rights of the accused/defendant.

In this period, the principle of guaranteeing the rights to a defense of a detainee, accused or defendant acquired a solid legal foundation. In spite of the difficult circumstances involved in founding the state and facing up to war, our state still enacted laws providing for the institution of defense rights.

2.1.2.2. Period from 1955 to 1988 (before the coming into effect of Vietnamese Code of Criminal Procedure)

While building socialism in the north and conducting national revolution in the south, the activities of investigating, prosecuting, judging and instituting the right to a defense developed in accordance with the democratic nature of socialist law and respect for civil rights and interests.

“The scheme on the right to defend”, which was passed on 20th June 1956 in a National Justice Meeting, defined this right in detail at each stage of tribunal action, creating favorable conditions for the implementation of the right to a defense.

The 1959 Constitution also recognized that “the right to a defense of a defendant is guaranteed” in Article 101. It not only provided that the accused and defendant have the right of self-vindication but also provided a mechanism guaranteeing it. The definition in the 1959 Constitution is more progressive than that in the 1946 Constitution. Furthermore, it established a stable legal basis for expanding this right in subsequent documents.

The People’s Court Organizing Law dated 15th July 1960 stated: “The right to a defense of a defendant is guaranteed. Apart from self-vindication, defendants can have someone else protect them. Defendants can also rely on a person designated by the people’s organizations or accepted as a defense counsel by the People’s Court. If necessary, the People’s Court will assign a defense counsel to defend the accused.” We can see clearly that this is a concretization of the constitutional principle of the right.

Moreover, the significance and importance of this guarantee of the right to a defense was heightened by Circular 06/TC promulgated on 9th September 1967 by the Supreme People’s Court. This document has many more progressive points than earlier documents including:

- At trial, if there is reason to suspect the objectivity of the Judge or jurors, the defendant will have the right to ask for them to be changed.
- The Defendant has the right to present evidence, put forward a petition and give some final words before the pre-judgment deliberations.
- After the trial, the defense counsel can talk to the defendant about the judgment and help him or her appeal if necessary.

Circular 06/TC also clearly defined the circumstances where the accused was obliged to have counsel namely: in cases of political crime; in cases where the defendant is an imbecile or a lunatic (mental weakness situation); in cases where the maximum sentence is life imprisonment or capital punishment. In other cases, if the defendant really needs to be defended, the court will try to assign a defense counsel and this may also happen on appeal. Circular 06/TC contained much detail about the role of the peoples' advocates in providing a list of peoples' advocates based on peoples' organization's recommendation.¹⁷ Defense was becoming seen as more democratic and advanced, encouraging people to work in this role. Although a list of peoples' advocate was presented, the accused could also retain another who was not on the list to protect him/her. However, the court can reject the defense counsel in this case.

In 1974, the number of cases where the use of counsel was compulsory was enlarged. Guidance enclosed with Circular 16-TATC from the Supreme People's Court dated 27th August 1974 included cases where the accused was a minor. All these documents confirmed that the right to a defense is the most important right belonging to the accused and it was necessary for the People's Court to guarantee it to defendants to make it complete.

On 30th April 1975 there was a historically important event: the South of Vietnam was liberated, and Vietnam was unified. Constructing and protecting our nation and reforming the legal system were again carried out at the same time. There was now to be only one legal system: the legal system of the Socialist Republic of Vietnam.

Based on the 1946 and 1959 Constitutions and developing their concepts, the new Constitution of 1980 once more confirmed the defendant's right to a defense of in Article 133: "The right to a defense of the defendant is guaranteed. An organization of counsel is established to help the accused and other concerned persons on their legal situation." This provision provided for a group who would help in defending the legal rights and interests of the accused and others concerned in a criminal case and is regarded as the basis for our current system.

Circular 691/QLTPK was issued on 31st October 1983 by the Ministry of Justice. It defined the Defense Bar and People's Advocate were charged to take part in protecting socialist legal norms in their activities. On 18th December 1987, the

¹⁷ The Supreme People's Court (1967), Systematization of Criminal Procedure Rules, pp. 38-39.

National Committee (now the National Assembly Standing Committee) passed the Counsel's Organization Law. It was the most important document to stipulate in detail the role of the Counsel's Organization in the state. The appearance of the Law met a necessary demand of society, and helped guarantee the rights of the accused.

Hence, we can see that the accused's right to a defense counsel has strengthened as time went by and the point of view of our law - makers was a progressive one. The greatest shortcoming is that the content of the right to a defense in criminal procedure was construed too narrowly. The right was only stipulated for the defendant as such, so defense action only occurred at trial and had no role in other earlier parts of criminal proceedings. This lack may derive from our historical condition: just freed from two wars, and in the process of recovery with all its attendant difficulties and challenges.

2.1.2.3. The period from 1989 to the present

The first Code of Criminal Procedure of the Socialist Republic of Vietnam (the 1989 Code of Criminal Procedure) was passed on 28th June 1988 by the National Assembly and took effect on the 1st January, 1989. It was an important step in the history of criminal procedure legislation in general and the right to a defense in particular. In Article 12 Chapter 1 of this Code, one basic principle called "Guarantee of the right to defense of accused and defendant" with the content "the accused and defendant shall have the right to defend by themselves or ask other persons to defend them. Investigating bodies, procuracies and courts shall have duty to ensure that the accused and defendants exercise their right to defense under provisions of this Code." This means that the right to a defense was not only a privilege of the defendant but also of the accused. The 1989 Code of Criminal Procedure also clearly distinguished between "the accused" and "the defendant". In Article 34, "the accused" are persons against whom criminal proceedings have been initiated; "the defendant" are persons whom the court has decided to bring to trial.

Along with the 1989 Code of Criminal Procedure, the 1992 Constitution - a Constitution renovating and expanding democracy - said: "the right to a defense of the defendant is guaranteed. The defendant can defend in person or ask another to defend them. The Organization of Counselors is set up to help the defendant..."

Since it appeared, the 1989 Code of Criminal Procedure has been amended four times. However, the first 3 amendments just focused on urgent issues linked to the

struggle to fight against and prevent crime. Because one might say they were not well prepared, these amendments have not overcome certain shortcomings in the Code.

With the recent reform of economic and administrative matters, justice was also subjected to the reform process. This was regarded as an important factor in promoting the construction of socialist jurisdiction. There are many notions and directions regarding reforming justice in the Resolution of the Party, especially Resolution 08-NQ/TW on 2nd January 2002 of the Politburo “Some important points in judicial work in the near future”. Some of the issues in the Resolution were transformed into modifications of the 1992 Constitution (as amended) and the passing of the People’s Court Organization Law 2002 together with changes in the stipulations of the Code of Criminal Procedure. It remains necessary to overcome the shortcomings of the Criminal Procedure Code so as to enhance the quality of judicial action, effectively guarantee the freedom of citizens, ensure the consolidation and synchronisation of legal documents, and fulfill all demands for the reformation of justice and the fight against crime.

Consequently, a fourth amendment of the Criminal Procedure Code was passed. On 26th November 2003, an Amendment to the Code of Criminal Procedure was passed in the fourth session of Congress term XI and took effect on 1st July 2004. In contrast to previous amendments, the Criminal Procedure Code was significantly modified in almost all its terms and some new concepts were introduced. This Amendment amended and supplemented Article 12 of the Vietnamese Code of Criminal Procedure after 2000, now is Article 11, which was now called “Guarantee of the right to defend of detainees, accused, defendants”. The addition of detainees derives from the fact that a detainee is treated as a person suspected of committing a crime and so also needs the right to defend.¹⁸ Accordingly, detainee, accused and defendant also have the right to defend by themselves or ask other persons to defend them. Investigators, Prosecutors and Judges’ Offices are charged with guaranteeing them their right to defend in accordance with the stipulations of the Code.

The enlargement of the class of those entitled to defend could well have encouraged defense counsels to work to protect the rights of those entitled to them. On the other hand, the fact that the defense counsel can participate as soon as someone is in

¹⁸ Legislative Affair, Institute of Inspection Science, “Amendments of the Criminal Procedure Code 2003”, Justice Publisher, 2003, p. 29.

custody, enables him speedily to collect the evidence needed for the defense. This regulation helps to rapidly determine the truth of any matter.

In conclusion, by way of legal historical research method, historical statistics have indicated that the right to defend in general and the right to defense counsel in particular in Vietnamese criminal procedure have remained stable and kept their historical nature. Their stability has been represented by the fact that provisions on the right to defend have been consistently recognized in Constitutions and legal instruments. Their historical nature has been expressed by the fact that legal guarantees of the right to defense have been further improved to be in line with each specific stage of history and the practical capacity of the competent authorities and persons involving in the settlement of criminal cases.¹⁹

Various legal instruments have shed light on the right to defense of the accused which is implemented in two ways: (1) the accused defends himself/herself, (2) or the accused has the assistance of the defense counsel. Through either of such ways, the accused must be guaranteed by regulations in conformity with timely assistance in defending against accusations of the State. By the aforesaid second way, the implementation of the right to defense by the assistance of the defense counsel always go together with legal guarantees not only for the accused but also for their defense counsel. In this content, to the certain extent, responsibilities of the competent authorities is a deciding factor towards the defense effectiveness of the defense counsel. On the contrary, the defense counsel are those, none better than them, who can best protect rights and interests of the accused towards accusations of the State. Defense counsel is a term referring those entitled to participate in defending the accused in criminal cases in accordance with the laws. They may be lawyers, advocates or other persons permitted by laws. It is a question that how can the accused have a defense counsel who he wishes? And which assistance do the Vietnamese laws provide so that the defense counsel can effectively perform his/her function and role in guaranteeing the equality of laws and protecting legitimate rights and interests of the accused? The answer will be given in the next parts hereof.

¹⁹ Phạm Văn Hộ, *The right to counsel of the accused under Vietnamese law 2007 (Quyền bào chữa của bị can, bị cáo trong tố tụng hình sự Việt Nam)*, Supreme People's Court Journal, No. 10/2007.

2.2. The current laws of Vietnamese criminal procedure guarantees the right of the accused to defense counsel

2.2.1. Right to defense counsel of the accused is a basic right

In term of content, the accused's right to defense counsel is recorded at 2 levels: first is, it is one of the Constitutional guarantees. Article 132, Constitution 1992 acknowledged: *“The right of the accused to a defense is guaranteed. The accused can defend himself or ask another to defend him. The lawyer organization is established in order to help the accused and involved parties protect their rights and lawful benefits and contribute to protecting the socialist legal system.”* The second is that, this right is redefined in the Code of Criminal Procedure (CCP) as a basic principle, recorded in Article 11: *“The detainee, the accused and the defendant have the right to defend themselves or ask others to defend for them. The Investigating Bodies, the Procuracy and the Court have the obligation to ensure the execution of the defense rights of the detainee, the accused and the defendant as stated in this Code.”* This right is further concretised in many Code Articles and in some of the subordinate legal documents. Accordingly, the right to defense counsel under the Vietnamese criminal procedure laws consists of 3 contents: (1) the right to defense counsel is a fundamental right of the accused; (2) the defense counsel is entitled to participate in criminal procedure to protect legitimate rights and interests of the accused in procedural stages; (3) the competent authorities are obliged to guarantee the accused and their defense counsel real right to defend. As to the above contents, the right to defense counsel under the Vietnamese criminal procedure laws has been guaranteed in two aspects. In legislative aspect, the right defense counsel is guaranteed by the Constitution. In terms of application of laws, the investigation bodies, procuracy bodies and courts are obliged to guarantee the accused to perform their right to defend and concurrently to make favorable for the defense counsel to well perform their function of defending.

According to Vietnamese law, the right to ask another person to defend is an obvious right of the accused, along with the right to self-defense (Article 11 CCP). They can even defend themselves and ask others to defend them at the same time.

The selection of the defense counsel depends on the accused's will (Article 57.1 CCP). They can waive this right. If the accused retains a defense counsel, the defense fee will be paid by him/her.

In the situation provided for by Article 57.2 CCP, the competent authorities have the obligation to ensure that a defense counsel participates in the procedure. This means that only when a defense counsel is assigned to participate in the procedure, can the procedure be carried out. This happens in 2 situations: the defendant or the accused is subject to the death penalty, or they are the minors or people suffering from mental or physical diseases. Guaranteeing the defense counsel's participation is an obligation of the Competent Authorities. If the Competent Authorities do not carry out the obligation of summoning a defense counsel in these cases, it will be considered as an extreme violation of procedure.

However, in the mandatory cases, the accused also has the right to request that he change or refuse the defense counsel recommended by the Competent Authorities (Article 57.2 CCP). If the accused requests this, the Competent Authorities are responsible for assigning another defense counsel to him. In this case, however, there may be an issue as to whether the new defense counsel has enough time to prepare for the defense and this has not yet been regulated in the CCP. It can be considered as a deficiency.

Under the provisions of Article 58 of the CCP, defense counsel shall participate in the case from the initiation of criminal proceeding against the accused. In the case of persons arrested under the provision of Article 81 (arresting persons in urgent cases) and Article 82 (arresting offenders red-handed or wanted offenders), defense counsel shall participate in the procedure even earlier, from the time custody decisions are issued. In case it is necessary to keep the investigation of crimes infringing upon national security secret, the chairmen of the procuracies may decide to allow defense counsel to participate in the procedure from the time of the termination of the investigation only.

Difficulties in financial capacity of the accused are not deemed to be a condition for guarantee of the right to defense counsel.

2.2.2. The Criminal Procedure Code on the defense counsel

2.2.2.1. Three kinds of defense counsel

The CCP categorizes the defense counsel as a litigating participant. Defense counsel has to help the accused on legal issues, help bring into light evidence and elements that would mitigate the guilt or penal liability of the accused and to contribute in the

protection of the law.²⁰ The presence of defense counsel in the criminal procedure is normally as requested by the accused. In some cases, defense counsel is called for by a mandatory defense writ made in accordance with Article 57.2 of the CCP (see *supra*).

It is provided by Article 56.1 of the CCP that those who can act as defense counsel are lawyers, people's advocates, or the statutory representative of the accused. Nevertheless, it is a fact that most defense counsel in criminal cases are practicing lawyers. In Vietnam, before the appearance of the Law on Lawyers (2006), by the Ordinance on Civil Servant (1998) and the Ordinance on Lawyers (2001),²¹ a person who is an official in a State office (including professors at a university) could not become a Lawyer. This stipulation was upheld in the 2006 Lawyer Law.²² This is a major shortcoming of the law and is a reason for a decreasing in the number of lawyers, who play an important role in defense activities in criminal procedure.

To participate in criminal procedure as a defense counsel, lawyers, people's advocate and representative of the accused must be given the defense counsel's certificate by the authorities (investigating bodies, procuracies, courts).²³ This is very specific provision of Vietnamese Code of Criminal Procedure. The fact shows that, defense activities of the counsel are still hampered by authorities in granting of defense counsel's certificate.²⁴

With respect to lawyer qualifications (lật su): According to Articles 10 to 12 of the Law on Lawyers adopted by the National Assembly on 29 June 2006, to become a practising lawyer a candidate must (1) hold a bachelor degree of laws, (2) be trained in a lawyer training course, and (3) have complete an apprenticeship for lawyers. After fulfilling all of these criteria, the candidate may be granted a license to practice law by the Ministry of Justice.

²⁰ Art. 58(3) CCP

²¹ The Law on Lawyers was enacted in 2006 and replaced this document.

²² Art. 17.4(c) of the Law on Lawyers.

²³ Article 56 (4) of the CCP provided that: "Within three days counting from the date of receiving the requests of the defense counsels enclosed with papers related to the defense, the investigating bodies, procuracies or court must consider and grant them the defense counsel's certificates so that they can perform the defense. If refusing to grant such certificates, they must set clearly the reasons therefor." Art. 27 paragraph 2 (a) Law lawyers provisions of the documents necessary for certification by the defense include the lawyer card, paper love solicitor's client and referral organization's law practice.

²⁴ Results of evaluation of Vietnam Bar Association, *Report of the actual situation and problems protecting the interests of lawyers in the local Bar Association*, Hanoi, 12/2009. See *infra* section 2.3.2.2.

It should be noted, however, that Article 56.1 of the CCP uses the term “*defense counsel*” (*luật sư bào chữa*) to denominate a lawyer who defends the accused in a criminal case. If a lawyer participates in a criminal case to protect the interest of those who are involve in the case but not on the defense side (such as the victim, civil plaintiffs, civil defendant, persons with interests and obligations related to the case), he/she just acts as a counsel for who concerned in the case, but not the defense counsel. The lawyer who represents the interest such persons in a criminal case has a totally different legal status from that of a “real” defense counsel. The difference between a lawyer (as a universal term) and a defense lawyer in a criminal case is meaningful for the correct understanding of the two terms. The criterion for differentiating between the *criminal defense counsel* and the lawyer who are *the representative of the other participants* in criminal procedure is based on the defining who is the client of the lawyer. If his client is accused person, he will act with status of a defense counsel following Article 57 of the CCP.

With respect to the statutory representative of the accused (người đại diện hợp pháp của người bị buộc tội)

To date, the CCP does not have any specific provisions to regulate the legal status of the statutory representative of the accused in relation to a criminal charge. However, the Intersectoral Circular No. 01/TTLN dated 8 December 1988, a legal document of lower legal validity to guide the implementation of the CCP in some aspects, does regulate issues concerning the statutory representative for offender who is juvenile. According to this, the statutory representative of such an offender shall be his/her “parent or mentor”. Consequently, an issue concerning the statutory representative can only be raised when the defendant is an adolescent or handicapped. A related question is then who can become such a statutory representative? There have been criminal trials in Vietnam where the failure to identify the right statutory representative has led to failure in the disposition of the verdicts.²⁵ Some courts identify a parent of the defendant as his/her statutory representative; while others select his/her brother, sister, aunt or uncle or even guardian; still other courts draw on representatives from entities such as the defendant’s school, youth union or women’s association. It can be seen that there is a discrepancy between the practice of identifying the statutory representatives for

²⁵ Trần Văn Bảy, *Người bào chữa và bảo đảm quyền bào chữa trong tố tụng hình sự Việt Nam (Defense counsel and guaranteeing the right to defense counsel in Vietnamese criminal proceedings)*, Compendium of seminar “Guaranteeing human rights in Vietnamese criminal proceedings), HoChiMinh City, 2006.

defendant and what is written in the law. It has even happened that in some cases that the court accepted an authorized representative as defense counsel in order to guarantee the right to counsel of the defendant. As the current CCP does not state clearly who can become the defendant's statutory representative, the authorities tend to rely on a provision in the Civil Code of 1995, according to which one of the following persons can act as statutory representative for a defendant: parent or guardian (with respect to juvenile). With respect to the accused who are adult, their statutory representative are those allowed by the competent authorities to participate in criminal procedure in accordance with the laws. Resort to the Civil Code should, however, only be had when necessary and in the long run there should be detailed provisions on this issue in the CCP.

With respect to the people's advocate (bào chữa viên nhân dân)

In accordance with the CCP, like lawyers and statutory representatives, people's advocate can also participate in the criminal process as defense counsel. The root of the legal regulations on people's advocate is found in Presidential Decree No. 69/SL dated 18 June 1949. For a long period of time, until the 1987 Ordinance on Lawyers was issued, the defense in criminal cases had indeed mostly been taken care of by people's advocates. Be that as it may, the service of people's advocates is amateur rather than professional. When the 1988 CCP was adopted, however, there were no provisions in the law that regulated the service of people's advocates.

According to Article 57.3 of the 2003 CCP, to become a people's advocate one must: (1) be a member of the Vietnamese Fatherland Front; and (2) be appointed to represent the detainee, accused or defendant in question. In practice, many qualified persons (for example those who used to work for a legal enforcement agency or legal scholars) cannot provide this service because they lack one of these criteria.²⁶ This practice seems to run counter to the ideal of the service of people's counsel, which is to provide free legal aid and to extend free legal services to the wider population, particularly the poor in accordance with the Poliburo's Resolution No 48/NQ-TW dated 24 May 2005 on the strategy for constructing and improving the legal system by 2010 with a vision for 2020 and Resolution 49/NQ-TW dated 2 June 2005 on the judicial reform strategy until 2020.

²⁶ Trần Văn Bảy, *Ibid.*,

The presence of defense counsel in criminal proceedings is linked to “the people’s characteristic” of the litigation process. The defense counsel does not represent public authority so he is capable of overseeing the criminal proceedings and fighting against any corruption and abuse of power in the judicial sector in a fair and objective manner. Defense counsel, like any citizen, must also follow the law. The obligation to follow the law, however, does not run counter to the defense counsel’s task of defending and protecting the legal rights and interests of the defendant. On the contrary, there is synergy between the two tasks and obligations because both of them have the same purpose, which is to make sure that the criminal process is carried out legally and unbiasedly, whereby the interests of the public, the state and the citizens are all effectively protected.

2.2.2.2. Rights and obligations of defense counsel under the provisions of the Code of Criminal Procedure

As mentioned above, the effective defense of the accused depends greatly on the role of defense counsel. Hence, a very important element in guaranteeing the right to counsel of an accused is the guarantee of the rights of defense counsel as provided by law. The CCP has new provisions concerning the rights and obligations of defense counsel. It provides that the counsel shall be of equal weight to the authorities conducting the proceedings in the giving of evidence, documents, objects and argument before the court. The fact that the authorities conducting the proceedings are responsible for making sure that counsel can implement such rights is aimed at ensuring the honesty of the proceedings.²⁷ This provision is the key principle in relation to the role of the defense counsel in criminal cases.

Article 58.2 of the CCP lists various rights of the defense counsel involved in the defense, which have to be guaranteed, namely:

- To be present when testimony is taken from the person in custody, when the accused are interrogated, and to be able to question the persons in custody or the accused if the investigators allow it, and to be present at other investigation activities; to read the minutes of proceedings in which they have participated, and procedural decisions related to the persons whom they defend;

²⁷ Art. 19 CCP

- To require the investigating bodies to inform them in advance of the time and place of interrogating the accused so as to be able to be present when the accused are so interrogated;
- To request any change of procedure or change to the persons in charge, experts and/or interpreters in accordance with the provisions of this Code;
- To collect documents, objects and details related to the defense from the accused and their friends and relations or from agencies, organizations, and individuals at the requests of the accused, provided that they are not classified as State or business secrets.
- To present documents and objects, as well as claims;
- To meet persons kept in custody; to meet the accused or defendants under temporary detention;
- To read, take notes, and copy records in the case file, which are related to the defense, after the termination of the investigation according to law;
- To participate in questioning and arguing at court sessions;
- To file objections about procedural decisions and acts of the bodies and persons in charge of the procedure;
- To appeal against court judgments or decisions if the defendants are minors or persons with physical or mental defects as prescribed by Article 57.2(b) of this Code.

Beside that, under provisions of Article 58.3 of the CCP, the defense counsel has the following obligations:

- To apply every measure prescribed by law and to clarify all details so as to prove the innocence of the person in custody, accused or defendant as well as showing circumstances which might mitigate the penal liability of the accused or defendant;
- To provide legal assistance to the person in custody, accused or defendant whom they have undertake to defend provided there is no good reason to the contrary;
- To respect truth and the law; not to bribe, force or incite other persons to give false statements or supply untruthful documents;
- To appear in response to court subpoenas;
- Not to disclose secrets they learned of while engaging in their defence; not to use notes taken and/or copies from case files for the purpose of infringing upon the

State's interests or the legitimate rights and interests of agencies, organizations, and individuals.

The legal framework for the service of defense counsel to be provided under CCP can be summarised as follows:

1. The right to defense counsel of the detainee is recognized and defense counsel can participate in criminal procedure from the time of the arrest warrant.
2. The range of persons who can participate in criminal proceedings as people's advocate has been enlarged (Article 57.2)
3. Defense counsel is given the right to ask any investigative agency to inform him of the time and venue of any interrogation of the accused so that he can participate in it. The defense counsel is also entitled to review relevant litigation documents as well as decisions relating to his/her client. These concrete provisions have provided favourable conditions for both defense counsel and the prosecuting authorities in the carrying out of their obligations. Thanks to these provisions, the presence of defense counsel at interrogations is more frequent which must help prevent false testimony, which in its turn helps prevent the situation where the defendant revokes his/her testimony at trial on the grounds that investigator has forced testimony from him/her.²⁸

2.2.3. The responsibility of the Competent Authorities in guaranteeing the accused's right to defense counsel

The Competent Authorities' obligation to guarantee the general defense rights of the accused is an important principle recorded in Article 10 of the CCP: "The principle of guaranteeing the defense rights of the detainee, the accused and the defendant."

2.2.3.1. The responsibility of the Investigating Bodies

With their mission of investigating cases, the investigating bodies play a very important role. It could be said that, half of the work done on a case depends on the investigating process. Therefore, any error or violation in the Investigating bodies' activities can influence the fate of the accused. Moreover, the result of the Investigation bodies' activity will be the basis for the Procurator deciding whether

²⁸ Phạm Hồng Hải, *Những điểm mới về trách nhiệm, nghĩa vụ của NBC trong BLTTHS năm 2003 (New points on the responsibilities and obligations of defense counsel in the Criminal Procedure Code 2003)*, Compendium of seminar "Guaranteeing human rights in Vietnamese criminal proceedings", HoChiMinh City, June 2006.

to prosecute the accused at all and for the Court to use as its basis in judging the defendant. Hence, the lawful rights of the accused must be guaranteed at this stage above all.

The responsibility for guaranteeing the defense right in the investigating stage mainly belongs to the Investigating bodies' side. They must facilitate matters for the detainee allowing himself or others to protect the defense rights.

To guarantee these defense rights, the Investigating bodies must grant the defense counsel's certificate in timely (see supra).²⁹ If the grant of a certificate is refused, the reason must be clearly pointed out. The Investigating bodies must also allow the defense counsel to meet the accused person who is detained; must inform him in advance of the time and place where the accused will be interrogated so that the defense counsel can attend the interrogation. In fact there are still many problems in guaranteeing this right because as there is no relevant amplifying document yet.

In investigating activities like examining the scene, collecting the detainee's testimony, interrogating the accused, the Investigating bodies must follow the law and create a favorable condition so that subjects can defend their rights.

2.2.3.2. The responsibility of the Procuracies

The responsibility of the Competent Authorities including the Procuracy is to guarantee that the detainee, accused or defendant can execute his defense rights. The Procuracy must provide the necessary conditions and the measures provided by law so that they can enjoy the rights which the law has provided for them and create conditions for the defense counsel to actively take part in defending their lawful rights and interests. Besides, the Procuracy must prevent or restrict behavior that cause obstruction or harm to these defense right.

The Procuracy is represented by the Prosecutors' activities. The Prosecutor in the case must abide by the norms of criminal procedure law. He must be very objective and cautious in his activity. The stages of the criminal procedure are prosecution, investigation, trial and sentence. There are many subjects participating in each specific stage, but the Procuracy is the only body present at all stages. The Procuracy's duty in guaranteeing defense rights is represented by the following activities:

²⁹ Article 56.4 stated that: "In case of keeping persons in custody, within 24 hours as from the time of receiving the request of the defense counsels."

First, prosecute, investigate and apply the protective measures of the Competent Authorities if need be.

In these activities, the Procuracy's duty mainly consists of examining and supervising the procedure of the investigating bodies and certain other bodies involved in criminal procedure such as the customs body, the forest administration, frontier soldiers and naval police. Within its jurisdiction, the Procuracy has the right to abolish any decisions of the investigating bodies which are groundless and illegal (for instance the decision to prosecute the case, prosecute the accused or apply for or stop preventive measures); etc.

Secondly, guarantee defense rights when the record is transferred to the Procuracy and the trial stage.

According to the provision of the Code of Criminal Procedure, when the record is transferred to the Procuracy, it has the duty to apply all the measures provided for by law in order first not to allow a criminal to escape, but on the other hand not to unjustly prosecute an innocent person. The participation of the Procuracy is a guarantee of the lawfulness of the procedure.

At the trial (first instance and appellate), as well as participating in the procedure in general, the Prosecutor, on behalf of the Procuracy, must carry out his Prosecutor's activity but he must still respect the defense counsel's side. If he violates the defense rights of the accused, the Procuracy has the right to protest against this.

An issue that needs to be noticed is that in all the above, the Procuracy must create a favorable condition in which the defense counsel can execute his defense rights. If he has any requests or recommendations, the Procuracy must listen to his complaint: if it does not accept them, it must respond in writing.

2.2.3.3. The responsibility of the Courts

Guarantees for the defendant and his defense counsel at the first trial stage

The first trial is the first judging stage in the trial process of a criminal matter. During the trial, the court at trial level must follow the provisions of the law on the guarantee for the defendant to execute his defense rights at every steps just as was the case pre-trial.

The trial at court is the most important part of the whole criminal procedure process. Here, the Court examines all the evidence, listen to the argument and sentences the defendant. A trial at court always has two participating parties: the prosecuting side and the defending side, so the Court has to guarantee that the defendant and his defense counsel do indeed participate in court.

According to the provisions of Article 187 of the CCP: “*The defendant must be present at the court as summoned by the Court...*”. This provision points out that the presence of the defendant at the court is compulsory as, in accordance with the provisions of Article 184 of the CCP “*the Court has to directly determine the details of the case by questioning and listening to the defendant’s opinion...*”. Therefore the defendant must be present and his participation is a pre-condition for the exercise of his defense rights.

Article 187.1 of the CCP further provides that: “*If the defendant is absent without a plausible reason then he will be located, if absent with a plausible reason then the trial must be delayed. If the defendant has a mental disease or other fatal diseases then the Jury suspends the case temporarily until the defendant recovers. If the defendant is absent the case is temporarily suspended and the Court will request that the investigating body find the defendant.*” Hence, participation in the court is a compulsory obligation of the defendant, and is also a condition for the court’s carrying on with a trial, the judge could only carry out the trial when the defendant is absent in the cases which are provided for by the law at Article 187.2 namely: Courts may try the defendants in absential in the following cases: a) the defendant has escaped and his/her pursuit has been vain; b) the defendant stays abroad and cannot be summoned to the court seeion; c) the absence of the defendant causes no obstacle to the trial and he/she has been handed the summons properly.

Thus, for the defendant to participate in the trial as provided for by law, the court has an obligation to inform the defendant. This is manifested in the obligation of the court to hand over the “Decision to bring the case to trial” to the defendant. In case the trial is performed in absence of the defendant (see supra) the decision to bring the case to trial must be handed over to the defense counsel or his lawful representative (Article 182.1 CCP). The formal decision to bring the case to trial is the legal basis for the court’s engaging in the trial and the delivery of the indictment and the decision to bring the case to trial to the defendant or his defense counsel will help in the preparation of his defense. Beside receiving the decision to bring the

case to trial, the defendant must be legitimately summoned by the court. And the defendant only has the obligation to be present at court when he has been summoned legitimately by way of the appropriate document (Article 187.1 CCP). From this it can be understood that it is for the court to inform and summon the defendant. All this manifests the court's responsibility for ensuring the presence of the defendant at court and creates the conditions under which the defendant can execute his defense rights.

a. The court has the obligation to explain his rights and obligations to the defendant

Explaining the rights and obligations of the defendant is a compulsory obligation of the court chairman. According to Article 201 of the CCP: *“After listening to the Court secretary’s report and the list of the persons summoned who have been presented, the court chairman confirms their identities and explains to them their rights and obligations at the court.”* This is very important meaning for the defendant as, after the chairman’s explanation, the defendant is properly conscious of his rights and obligations as provided by the law, and he can effectively use these rights in his defense.

b. The court guarantees the defendant can enjoy his right of self-defense or ask others to defend him

It can be said that, the trial stage at the court is the point at which the execution of the right to a defense is most crucial, above all at the testimony stage. So the court has the obligation to guarantee that the defendant and his defense counsel can indeed enjoy the rights which are allowed by law at this stage of the defense.

According to Article 217.2 of the CCP : *“The defendant presents the claim for the defense words and if the defendant has a defense counsel then the latter conducts the defense for the defendant. The defendant retains the right to supplement the defense. This is the compulsory procedure that the law has provided for and the court has to respect it. Besides “the defendant and the defense counsel have the right to present their opinions about the Prosecutor’s indictment and offer their recommendation.” Moreover the court chairman must help the participants present their opinion, and cannot limit their time. The court chairman has the right to propose that the Prosecutor has to answer the points relating to the defense case which have not yet been argued by the Prosecutor (Article 218 CCP).*

The right to respond by way of oral testimony in criminal procedure in general and at the criminal court in particular is a key democratic provision. The Code of Criminal Procedure provides more detailed and specific provisions on this so as to create the conditions for the defense to participate in finding out the truth of a case and to contribute to making the resolution of the case swift, precise and objective.

c. The court's guarantee that the defendant can offer evidence and make requests

At the court the defendant has the right to offer evidence and make requests which the court will guarantee. The Jury will consider all of this both objectively and holistically.

The Code of Criminal Procedure provides a “Guarantee of equal rights before the Court” (Article 19). This principle requires the Competent Authorities, which includes the Court, to respect the rights of the defendant and the other competent parties when offering evidence and participating in argument at court. During the judging process, the court has to consider both the accusatory and the exculpatory evidence, the aggravating circumstances and the circumstances lightening the criminal responsibility of the defendant and it also cannot overlook elements relating to the personal identity of the criminal.

d. The court guarantee allowing a closing speech to the defendant

This is a special procedural right that belongs to the defendant alone. After the court chairman declares the end of argument, the defendant is allowed to give his final speech (Article 220 CCP).

The provision that allows the defendant to do this has a very important meaning for both the defendant and the Jury. As to the psychological aspect, it is when the defendant reflects most fully on the judicial process and the views of the Court, the Procuracy and the defendant himself. Sometimes the final words of the defendant can be important evidence because he will be moved and feel regret as he speaks out. The truth of the case, indeed, can be found from these closing words of the defendant. The law provides that *the Court is not allowed to limit the time of the defendant*, and also *“If in the final words, the defendant presents new circumstances which have an important bearing on the case, then the Jury must decide to return to the interrogation”* (Article 220 CCP).

The court chairman needs to reserve a reasonable time for the defendant to state the issues and recommendations which the Jury need to pay attention to. While considering its verdict, the Jury has to consider what the defendant has said with a view to mitigating any criminal responsibility. The Jury basically relies, though, on the evidence including documents which were verified in court.

Guarantee for the defendant to execute their defense right after sentencing, the panel has to create the necessary conditions for the defendant to execute his right of appeal against the decision of the Court and the sentence. This provision helps the defendant continue to execute the defense right at the appellate level. For the appeal rights to be guaranteed, the defendant and their defense counsel must be allowed to see the full sentence of the Court so the Court must guarantee that the defendant and his defense counsel will receive a copy of the sentence in a timely manner as provided by the law. That will allow them to exercise the right to appeal against the sentence or to seek to have their criminal liability lightened.

Guarantee of the right to have defense counsel at the appellate trial stage

The appellate trial means the re-trial of the cases or the review of first-instance decisions by immediate superior courts when the first-instance judgments or decisions in such cases are appealed against before they become legally valid. The appeal can be made by people who have interests concerning to the first-instance judgment³⁰ or by the procuracies.³¹ In order to guarantee the rights of the defendant, the appellate court has first to allow an appeal against the lower Court's decision and sentence. Article 231 of the CCP states: "*The defendant has the right to appeal the trial court's sentence or decision. The defense counsel has the right to appeal to protect minors or people with mental or physical diseases*". It could be said that this provision on the defendant's appeal rights is one of his most important rights. Through an appeal, the defendant can express his view of the trial court's sentence, and indicate what needs to be re-considered by the appellate court.

³⁰ Article 231 CCP stated that: (1) Defendants, victims and their lawful representatives shall have the right to appeal against first-instance judgments or decisions; (2) Defense counsels have the right to appeal in order to protect the interests of minor accused or accused with physical or mental defects; (3) Civil plaintiff, civil defendants and their lawful representatives shall have the right to appeal part of the judgments or decisions, which is related to damage compensation; (4) Person with interests and obligations related to the cases and their lawful representatives shall have the right to appeal part of the court judgment or decision, which is related to their interests and obligations; (5) Persons (including lawyers) who is representatives of the interests of minors or person with physical or mental defects shall have the right to appeal part of the judgments or decisions which is related to their interest and obligations of the persons whom they protect.

³¹ Article 232 CCP provided that: the procuracies of the same level and the immediate superior procuracies shall have the right to protest (appeal) first-instance judgments or decisions.

One point to note is that the defense counsel is the one who protects the defendant's right. From the point of view principle aspect, the defense counsel is not the subject of the appeal right. However, if they participate in the defense of a defendant who is a minor or has a mental or physical disease, they have effectively a right of co-appeal with the defendant who is their client. This is an independent right and does not depend on the defendant's will. The court has the obligation to guarantee that both the defendant and the defense counsel can execute this right as provided by the law.

The content of appeal is the basis for the appeal court to reconsider the sentence or decision in question. According to Article 236 CCP, when there is an appeal, the Court has to announce to the defendant and their defense counsel. This announcement ensures that the defendant can prepare his defense when participating in the appeal court.

As with the trial court, the defendant's participation is a compulsory requirement at the appeal court. The Jury can only judge the defendant in his absence in the situations provided by the law. Article 245 CCP provides: *"The defense counsel, people protecting the legal rights of the parties, the appellant and the persons whose rights and obligations are involved in the appeal will be summoned to participate in the court. If there is an unreasonable absence, the Jury can still conduct the procedure but they cannot issue the sentence or decision that is disadvantageous for the absent defendant or parties. In other cases, the hearing has to be delayed."*

At the appeal court, the defendant and their defense counsel have the right to supplement the evidence by documents and other objects that relate to the defense and the court has to consider both the old and the new evidence holistically. *The appellate sentence has to be based on both the old and the new evidence.* (Article 246 CCP).

During the appellate proceedings, the appellate court reconsiders the trial court sentence based on the contents of the appeal. For issues that are not appealed, the appellate court only considers if there are points that need to be considered with a view to lightening the defendant's criminal responsibility. The appellate court has no obligation to reconsidering issues that are not appealed and which could aggravate his criminal responsibility.

In the process of reconsidering the sentence in the appellate procedure, and in order to guarantee the defendant's rights, the appellate Jury has to abide by the procedures provided in Article 249 to Article 252 of the CCP on the Appellate Court's authorities and the obligation not to worsen the defendant's situation.

These are the provisions that the appellate court has follow, in order to protect the defendant's rights in the appellate court.

To conclude, in summary, when performing their functions and discharging their duties, the Competent Authorities have to focus on protecting the truth, the law and the lawful rights of the detainee, accused or defendant. The methods of guaranteeing these rights will allow the Competent Authorities and other competent parties to ensure the procedure proceeds fairly and is based on respect for basic human rights.

2.3. Comments on the practice of guaranteeing the right to defense counsel to accused persons in Vietnamese criminal procedure

2.3.1. Achievements made regarding the guarantee of the right to defense counsel of the accused

2.3.1.1. Legislative achievements

- Since the *Đổi- mới* policy was initiated,³² the Party and Government have enacted several Resolutions and other rules of law for the purpose of improving the State machinery and the legal system.³³ The first and foremost policy documents in this area are Resolution 08/NQ/TW dated 2 January 2002 prescribing the objectives of judicial reform and improving the quality of judicial services and Resolution 49/NQ/TW dated 2 June 2005 issuing the "Judicial Reform Strategy to 2020". One of the main tasks set forth in the two documents is to facilitate adversarial activities at the criminal trial with the further empowerment of the defense counsel and the accused as the key element. Trial proceedings shall be conducted in a manner which is more adversarial in contrast to the inquisitorial model, which had been in place so far. The verdict should be based primarily on the outcome of the adversarial

³² *Đổi-mới* is the name given to the economic reforms initiated in Vietnam in 1986 for a "socialist-oriented market economy".

³³ Hoàng Thế Liên, *The point of views of the Party and State about Judicial Reform from 1986 until the present (Quan điểm của Đảng và Nhà nước về cải cách Tư pháp từ năm 1986 cho tới nay)*, Article for seminar "Point of views about Judicial Reform in the context of creating a Socialist Republic State" (*Quan điểm về cải cách tư pháp trong bối cảnh xây dựng Nhà nước Xã hội chủ nghĩa do dân, vì dân*), Ministry of Justice, Hanoi, 2002.

activities at the trial, as well as on a thorough and comprehensive examination of the evidence, the opinions of the prosecutor, the accused, the defense counsel and other related persons.³⁴

- The Code of Criminal Procedure has provided a firm legal basis for the implementation of criminal law in general and the guarantee of the right to defense counsel in particular. Good revisions have been made to a number of legal provisions on the right to defense counsel. To be more precise, after the revision, the regulations on defense counsel and the right to defense counsel are clearer and more favorable. As an example the defense counsel is now allowed to participate in the criminal procedure from the date of detention; the defense counsel is also allowed to collect documents and objects that relate to the defense argument and to duplicate criminal file. These regulations work in a manner favorable to the defense counsel.

- The Law on Lawyers issued in 2006 marked a further important milestone in relation to the role of lawyers in the proceedings generally and in the defense in particular. With this as the legal foundation, the national lawyer organization was established on 12 May 2009 and named The Vietnam Bar Federation. The Vietnam Bar Federation is a representative organization of all local Bar Associations nationwide.³⁵ Accordingly, the Vietnam Lawyers Association is responsible for “representing and protecting the rights and interest of lawyers and the Bar Associations nationwide”, “settling any dispute related to legal fees and the cost of lawyers” and “collecting and reflecting the wishes, opinions, ideas and recommendations of lawyers”.³⁶ In addition to its provisions on lawyers and the organizations of lawyer, the Law on Lawyers has made a considerable contribution to guaranteeing of rights, interests and obligations of lawyers in proceedings, especially defense lawyers protecting the legitimate rights and interests of accused persons.

- Another humane legal document, the Law on Legal Aid, a much appreciated and humane law, was enacted on 29 June 2006. This law provides the right to free legal aid to the poor, the handicapped and orphans, who can ask for it to be provided by state-funded legal aid centers if they are accused of crimes. However, one has to

³⁴ Speech made by the former State President Trần Đức Lương at the national conference to review the four years of implementation of the Resolution 08NQ/TW and to inaugurate the implementation of Resolution NQ 49-NQ/TW dated 15/2 /2006 in Hanoi.

³⁵ Art. 64 of the Law on Lawyer.

³⁶ *Ibid.*, Art. 65.

admit that defense counsel services funded by legal aid are not so popular. According to the latest UNDP survey, legal aid is provided mainly in the form of legal consultancy (93.4%) rather than adversarial defense counsel at trial (5.76%). Further, information on legal aid has not been made clearly visible to the people. As of 2009, only about 60% of the population knew of the existence of legal aid services.³⁷ Further, legal aid is provided on request only and is not provided automatically by the State. Persons who want it and qualify for it need to go to a legal aid centre and find a defense counsel there. The prosecuting authorities are not obliged to provide legal aid to an accused person unlike the case of compulsory defense counsel provided in Article 57.2 of the CCP.

- Resolution 388/2003/NQ-UBTVQH11 adopted by the Standing Committee of the National Assembly (now the Law on State Compensation), also plays an important role in protecting the legitimate interests of the accused in general and their right to defense counsel in particular. This piece of legislation provides for compensation in the case of wrongful prosecuting activities or judicial decisions that wrongly harm individuals. This law, together with Article 31 of the CCP on the principle “guaranteeing the right to claims and denunciations in criminal procedure area”, should strengthen the responsibility of officials conducting criminal procedural activities and eliminate infringements of procedural law by prosecutors. According to the statistics of the People’s Supreme Procuracy, during the five years from the implementation of Resolution 388/2003/NQ-UBTVQH11, investigations have been suspended in the cases of 357 persons, while 144 persons have been acquitted. Up until 30 June 2008, 311 claims for state compensation had been made to the respective prosecuting authorities. Compensation has been made in favor of 210 persons with a total amount of 16,248,590,124 Vietnamese Dong.³⁸ It is clear that Resolution 388/2003/NQ-UBTVQH11 and its implementing document, Circular 01/2004/TTLT-VKSNDTC-BCA-TANDTC-BTP-BQP-BTC, contribute greatly to the protection of those accuseds who turn out to be innocent. Resolution 388/2003/NQ-UBTVQH11 (now the Law on State Compensation) also makes significant progress in the judicial reform area because it realizes the responsibility of the State vis-à-vis citizens. Once the legitimate rights and interests of citizens are protected, the trust in justice will be more firmly established.

³⁷ Source: National Legal Aids Agency, Ministry of Justice, <<http://moj.gov.vn/Pages/Cuctrogiupphaply.aspx>>, last visited on 26th March 2010.

³⁸ The Supreme People’s Procuracy, the 5-year review report on the implementation of Resolution 388/2003/NQ-UBTVQH11 on compensation for the wrongly accused and convicted caused by authorized persons in the criminal procedure area.

In conclusion: Enjoying a sound legal basis, the procedural rights of the accused in general and the right to defense counsel in particular have been increasingly consolidated and ensured. However, specific provisions in the legal instruments should be further amended to ensure consistency in the legal provisions and to promote efficiency in application of law. With such a foundation, the legitimate rights and interests of the community in criminal proceedings could be very well protected.

2.3.1.2. Achievements in the area of implementation of the law

Regarding the investigation, prosecution and adjudication:

In recent times, the authorities conducting proceedings at central and local levels have properly assessed and recognized how defense counsel can fulfill their rights and obligations in criminal cases and have made matters more favourable for them. The involvement of lawyers has not only ensured the right of defendants to have defense counsel but has also assisted the authorities conducting the proceedings in discovering and correcting mistakes and finding out the truth which leads to judicial correctness in compliance with the law to protect the socialist legislation. Especially, since the implementation of Resolution No. 08/NQ-TW dated 2 January 2002 and Resolution No. 49/NQ-TW dated 2 June 2005 of the Politburo on the Strategy on Judicial Reform to 2020 affirming the intention of the Party and the State to perfect the regime and ensure that lawyers fully participate in all court proceedings, the awareness of investigating bodies, courts, procuracies and lawyers has shown many positive changes. With the involvement of lawyers, the investigating bodies, procuracies and courts seem to be more diligent in implementing their duties. The rules and procedures for investigating, prosecuting and judging have been strictly complied with which helps to minimize mistakes and to prevent such extreme violations as priming, extorting and using corporal punishment. Being entitled to be involved in a democratic and equal manner at the court, lawyers themselves can, using the remedies provided by law, comply with the law and the Regulations on Professional Morality. They become more diligent and responsible in preparing their opinions and arguments when disputing with the procurators for the purpose of implementing proper procedural principles at court, all of which contributes to the key task of implementing judicial reform.³⁹

³⁹ Ministry of Justice, the *report of the survey on organization and proceeding participation activities of lawyer*, Hanoi, August 2009.

The positive impact of the guarantee of the right to defense counsel may be indicated in these further changes in the adjudication of criminal cases in recent years:

- To implement Resolution 08-NQ/TW dated 2 January 2002 of the Politburo, the court has reformed the way interrogation and cross-argument sessions are conducted at trial in pursuance of the requirements of judicial reform. The court has facilitated and guaranteed the enforcement of the rights and obligations of persons; Lawyers and other persons involved are permitted to present their arguments as they want; inquiries from the adjudicating panel and prosecutor at the trial are to be more objective; the verdict is based on evidence examined at the trial and presented in the case file. Penalties given by the court also show lenience to those who confess and cooperate with the authorities and those who are remorseful. The penalties also heighten the educational and preventive purposes of the law and have clearly met the requirements of the current context.

- In addition, the positive impact of the defense counsel on the outcome of criminal trials is obvious. In 2008, the number of appellate cases was reduced by 6% as compared to 2007. Also during 2008, trial courts gave a “not guilty” verdict in 53 cases and granted a waiver of criminal charge in 15 cases; in 357 cases the court granted probation and in many others the court delivered less severe sentences than what proposed by the prosecutor. Defense counsels were present in almost all of those cases.⁴⁰

Regarding the work of defense counsel: The participation of defense counsel in criminal proceedings is a new and positive factor in the process of establishing a society managed by law, on the basis of respect for human and civil rights.

The legal awareness of prosecuting officials and persons is being raised. Lawyers in Vietnam have been gradually improving the professionalism of their activities. The number of lawyers with a bachelor’s degree or higher has increased from 59% (1989) to 96.95% (2008). The number of lawyers who have followed the lawyer training course accounts for 65.8% of all lawyers in the country.⁴¹ This has considerably contributed to protecting trust in the law and ensuring the legitimate rights and interest of citizens participating in criminal cases.

⁴⁰ Supreme People’s Court Report in the year of 2008.

⁴¹ Ministry of Justice, *supra* note 39.

Most of the accused now realize their defense counsels' roles and positions. This will help them protect their legitimate rights and interests either by themselves or with the help of others.

Practice has shown that the number of criminal cases with defense counsel's participation is increasing. Survey results of the Ministry of Justice have shown that lawyers involved in criminal law make up 43.9% of all lawyers; those in other fields such as civil proceedings, economics, labor, marriage and family are less significant in number.⁴² This figure shows that the awareness of the authorities regarding the importance of defense counsel has clearly improved. And the percentage involvement of defense counsel in cases accepted and handled has been increasing. This is expressed by the following statistics:

Criminal cases in provincial courts, Supreme People's Court and Central Military Court, in which lawyers or other counsel were present from 2002-2006⁴³

Year	Total no. of cases	Total no. of accused	No. of cases with lawyer or other representation	%
2002	14,177	21,460	1,381	9.7
2003	14,596	22,836	1,452	9.9
2004	15,290	25,289	1,746	11.4
2005	13,570	22,240	1,819	13.4
2006	14,312	23,018	2,066	14.4

This situation was similar in 2008 and 2009. Statistics have shown that the number of criminal cases resolved at the Provincial Court, the Supreme Court and the Central Military Court in 2008 and 2009 have decreased compared with the years from 2002 to 2006. However, the number of cases having an involvement of

⁴² See *supra* note 40.

⁴³ Source: Supreme People's Court.

defense counsel and other representatives has been increasing. This is shown by the following statistics:

Criminal cases in provincial courts, Supreme People’s Court and Central Military court, in which lawyers or other counsel were present⁴⁴

Year	Total no. of cases	Total no. of accused	No. of cases with lawyer or other representation	%
2008	11.879	19.279	1074	9.0
2009	10.735	17.540	1021	9.5

Besides that, the following table show that the numbers of such cases in Ho Chi Minh City in 2008 increased significantly as compared to that in 2007. See below:⁴⁵

Year	Cases accepted by the court	Case handled by the court	Contracted defence counsel	Compulsory defence counsel
2007	2.132	2.117	312 (15%)	677 (32%)
2008	1.989	1.973	346 (17,5%)	718 (36%)

The number of practicing lawyers has also grown substantially during recent years. As of the beginning of 2010, there were 5,978 licensed lawyers, almost twice as many as in 2004 (3,149 lawyers).⁴⁶ Survey results have shown that currently a large number of lawyers have a bachelor’s degree, accounting for 92.23%. The percentage of lawyers having a Master's Degree or a Doctor of Philosophy is still very low. Among this total number of more than 5,000 lawyers, those who have experienced the lawyer training course have accounted for the large percentage of 65.8% of all lawyers nationwide.⁴⁷ According to the Ministry of Justice, lawyers have satisfied the greater part of the demand by criminal defendants and have also contributed significantly to the protection of the legitimate rights and interests of the accused, defendants and other parties. Lawyers are also of great help to the court

⁴⁴ *Ibid.*,

⁴⁵ Source: Ho Chi Minh Bar Association. Statistics from 1/1/2006 to 30/9/2008.

⁴⁶ Source: the Vietnam Bar Federation.

⁴⁷ Report of Ministry of Justice, *supra* note 39.

and other prosecuting authorities in handling criminal cases in an objective, accurate and lawful manner, contributing to the overall maintenance of socialist legality.⁴⁸

2.3.2. Shortcomings in the practice of the right to defense counsel

2.3.2.1. Regarding normative regulations

Even though the Code of Criminal Procedure has further recognized and supplemented provisions regarding the ensurance of the right to defense counsel of the accused, the existence of certain difficulties is still a problem. This has led to the fact that the right to defend of the accused has not been entirely ensured and it has affected the efficiency in performing general duties of the Criminal Proceedings. After research and study, we have found that shortcomings in provisions of the Code of Criminal Procedures and relevant legal documents mostly rely on the promulgation of proceeding rights of the defense counsel as participating in criminal cases, particularly:

First, the fact that the current law on criminal procedure does not recognize the adversarial nature of criminal procedure as a fundamental principle means that the demarcation between the functioning of the prosecutor, the defense and the court and between the adversarial parties to a case as a group and the court is unclear. This may lead to bias against defense counsel in criminal proceedings, with an adverse impact on the legitimate rights and interests of the accused. The mechanism specifying argument at the trial as in Resolution No. 08/NQ-TW dated 2 January 2002 and Resolution No. 49/NQ-TW dated 2 June 2005 issued by the Politburo is relatively new not only for lawyers but also for the authorities conducting the proceedings.⁴⁹ Both sides are unfamiliar with these rules and may have problems implementing the various rights and obligations.

Secondly, the provisions of the laws are not consistent or comprehensive, therefore and it seems hard to create a legal mechanism strong enough to ensure that lawyers shall be entitled to involve in the proceedings in a substantive way, and to ensure the presence of such facilities and practical measures that lawyers can effectively enjoy their rights and obligations. Specifically, lawyers are still faced with

⁴⁸ The 2008 review report of the Ministry of Justice.

⁴⁹ Report of Ministry of Justice, *supra* note 39.

difficulties and obstacles when seeking to become involved in proceedings at the investigation stage. As an example, the authorities conducting the proceedings usually issue certificates of involvement in the proceedings in a very slow manner, calling for many documents and applying numerous procedural rules; the fact that lawyers can themselves collect evidence, objects and documents related to the defense has not realized in practice and they remain dependent on the case files prepared by the investigating bodies. The regulations stating that lawyers are entitled to meet with the defendants and the accused and to be present during interrogation have not been strictly complied with by the authorities conducting the proceedings. Copying documents has also given rise to many difficulties since each authority has its own regulations which are all subject to the subjective whims of the persons conducting the proceedings. At trial, the views, opinions, suggestions and recommendations of lawyers have not been considered or assessed by the arbitration council. They have not explained their reasons for not accepting these views and opinions and the role of lawyers at trial has not been truly respected.

Thirdly, the regulation on rejection of defense counsel in cases where it is required that defense counsel be provided as per Article 57.2 of the CCP is not clear. As mentioned above, compulsory defense counsel shall be appointed by prosecuting authorities for the benefit of adolescents, handicapped people or those who risk death penalty even if the latter do not select ones themselves. If the latter rejects the counsels appointed for them, the adjudicating panel is obliged to explain to them the benefit of having such counsel and that the State will bear the costs relating to them. If they still insist on not having defense counsel, the refusal will be recorded and trial proceedings are continued in accordance with the general rules of procedure (Resolution 03/2004 dated 2 October 2004 of the Judges Council of the Supreme People's Court). It has happened in practice that a beneficiary of the compulsory defense counsel rule rejected counsel during the investigation phase but changed his or her mind during the adjudicating phase. The question is whether this change must lead to the appointment of counsel at the later stage? Unfortunately current law is silent on this.

Fourthly, current regulations on the selection of and changes in compulsory defense counsel are controversial. According to Article 57.2 of the CCP, "the accused and defendants are allowed to ask for a change of or refuse defense counsel" in the cases mentioned in points (a) and (b) of the same article. This regulation has been subject to a number of different opinions. The more popular opinion is that the regulation is

correctly formulated because it is the decision of the accused whether to select his or her own counsel; and if it is a legal right then the beneficiary can rely or not rely on it. Another opinion is that the right should be applicable to those mentioned at Point (a) of Article 57.2 only, i.e. to accuseds who risk the death penalty. Such people are usually aware of their behavior and the possible consequences of not having a defense counsel so it makes sense to permit them to have the right. In contrast, those mentioned at Point (b) are handicapped and may not be aware of the consequences of refusing compulsory defense counsel. According to the proponents of this opinion, the right to refuse should only apply to those mentioned at Point (a), Article 57.2 and it should only be applied to Point (b) case as the prosecuting authorities think fit.⁵⁰

One should bear in mind that the compulsory defense counsel rule imposes an obligation on the prosecuting authorities rather than defendants or their legal representatives. On the part of the accused, it is their right to accept or refuse the compulsory defense counsel; with respect to accused who are adolescent or handicapped, their right to change defense counsel is exercised by their legal representatives. As for the right to refuse defense counsel, we share the second opinion that prosecuting authorities shall approve such a refusal where adolescents and handicapped people are concerned. Indeed, such approval should also be required in death penalty cases, because:

- The purpose of the rule is to protect rigidly human rights in and the right to a defense of the defendant in particular in cases where the law deems it necessary to have a defense counsel. Regardless of the accused being adolescent, handicapped or facing the death penalty, they must have defense counsel. Only when it has been approved by the prosecuting authorities should they not have counsel.
- Also, the right to refuse compulsory defense counsel can be restricted by prosecuting authorities in the cases prescribed in Article 57.2. The restriction is prescribed in order to guarantee the right to a defense of the accused. This is not contrary to the guarantee of the right to defense counsel, which indeed specifies that the prosecuting authorities must guarantee the accused's right to defense counsel.

⁵⁰ Nguyễn Duy Hưng, *Sự tham gia của người bào chữa trong quá trình tố tụng hình sự (Participation of the defense counsel in criminal procedure)*, Compendium of scientific seminar "Contributing ideas to the draft of Criminal Code", Criminal Law Faculty, Ho Chi Minh City University of Law, 2003.

- The regulation on the time when defense counsel can participate in criminal proceedings against a person who is accused of a crime against national security (Article 58.1 CCP) is problematic. Under current law, defense counsel can only participate in the criminal proceedings after the investigation has been completed. This significantly restricts the right to defense counsel and thereby works against the constitutional principle that “all citizens shall be equal before law.”

The shortcomings in the current criminal procedure legislation discussed above have affected the application of the law, causing the legitimate rights and interests of the accused to be inadequately guaranteed. These shortcomings need to be rectified.

Fifthly, the unclear provisions of the Code of Criminal Procedure have created the difficulties to the defense counsel to perform their defense function. This is the main problems affecting the guarantee of the right to defense counsel of the accused. The difficulties presented in the following aspects:

- *Regarding the right to be informed of the interrogation time and venue by the investigating agency* (Article 58.2(b) CCP): according to the Code, the defense counsel has the right to *make a request* to the investigating agency, and it is the privilege of the agency to satisfy such request. To ensure the meaningfulness and enforceability of such an important legal right of defense counsel, the code should make it an obligation on the investigating agency to inform the defense counsel of all the investigative activities intended to be carried out against the defense counsel’s client. The investigating agency must satisfy any request for information made by the defense counsel, and failure to do so should be considered a severe violation of the right to counsel of the accused. Such a failure should be considered as blameworthy as the failure to serve a bill of indictment on the defendant before the trial takes place. Activities of the authorities that have been conducted in violation of this right of defense counsel should be null and void. The law would thus make it clear that the defense counsel should be able to clearly state which investigative activities he/she wishes to participate in and the investigating agency should be obliged to inform defense counsel of such activities beforehand. But if the investigating agency is obliged to inform the defense counsel of such activities, but the information should be confined to those activities that are asked about by the defense counsel. We share with a view point that the law should also provide a time

limit for the provision of such information.⁵¹ It has also happened in practice that the defense counsel cannot take part in a certain investigation activities due to objective reasons. Should that be the case, the defense counsel should make a written request to the investigating agency asking for the activities to take place later. The investigating agency may then decide to postpone the investigating activities in question if it deems this is without adverse impact on the investigation progress.

- *Regarding the right of the defense counsel to appear at interrogations by the investigator:* Article 58.2(a) of the CCP provides that defense counsel can be present at an interrogation session and ask questions if permission is granted by the investigator who is in charge of the interrogation. With respect to other investigative activities, defense counsel can participate but is not allowed to put questions. It should be observed that it is not for defense counsel to determine when and how to participate in the investigation which is made against his/her client. This is quite a substantial, yet unfounded, limitation of the law. The law should declare the right of the defense counsel to participate in investigative activities and extend such right to all such activities; as a consequence the investigator may restrict this right only when there is reason to believe that the defense counsel is deliberately hindering the investigation process. One example would be that when defense counsel participates in a confrontation between his/her client and other related persons in a criminal case, the defense counsel should be able to put questions to his/her client as well as to the others; another is that when defense counsel participates in examining expert opinion he/she should be entitled to put questions to the expert. If this right is not enforceable during the investigation phase, there may be a risk that expert opinions will have to be solicited as the court might find the earlier opinion to be biased, unfounded or linked to a violation of procedural law at the time it was solicited. Such an extension of the right of the defense counsel to participate and to put question during the investigation phase may serve to eliminate investigator bias, which undoubtedly does occur in practice. The investigator in charge of the investigation should be obliged to take notes in any investigation and record all questions of defense counsel and their answers.

⁵¹ Nguyễn Thái Phúc, *Guaranteeing the human rights in criminal procedure (Đảm bảo quyền con người trong tố tụng hình sự)*, The theme of science research, 7/2009.

- *Regarding the right of the defense counsel to collect materials and items related to the defense:* Article 58.2(d) of the CCP provides that defense counsel is entitled to collect documents, items and details related to their defense from persons in custody, accuseds and defendants and their relatives or from agencies, organizations and individuals at the request of such persons, provided that they are not classified as State or business secrets; and to present such documents, and items to support the defense. This provision marks an appreciable progress in improving the procedural rights of the defense counsel and helping them discharge their function more effectively, through which the procedural rights of the accused and defendants are ultimately guaranteed. Unfortunately, the impact of such provisions of the CCP 2003 in practice is very limited, due to the following shortcomings:

First, the right is not enforceable if the defense counsel asks the authorities or other individuals to supply documents or objects that can be used by him/her because he/she does not have power to compel their production. Such a request of the defense counsel does not have binding effect and persons are not obliged to satisfy the request.

Secondly, the law does not provide for the manner and form in which defense counsel can collect documents or items. As a consequence, the reliability of such documents or items may be doubtful. It is not clear how documents or items should be handed over by the accused or his relatives to defense counsel in a lawful manner, i.e. should they be in written form? If so, what form would the written note take? As another example, the defense counsel may collect statements of an individual about certain aspects of the crime. But it is not clear whether the note of such statement must meet the requirements applicable to the same note that would be made by the investigating agency or whether the collecting process must follow the procedure for collecting a witness' testimony in accordance with Article 135 of the CCP. Indeed, is such activity of defense counsel part of the litigation at all following Article 64 about evidence?⁵²

Thirdly, the law does not say anything about the evidential value of the documents or items collected by the defense counsel. It is still a question whether or not they

⁵² Article 64. 3 of the CCP reads: "Evidences are facts which are collected in order and procedure prescribed by this Code, which are used by the investigating bodies, procuracies and court as grounds to determine whether or not criminal acts have been committed, person committing such acts as well as other circumstances necessary for the proper settlement of the cases."

can be considered evidence? According to one scholar,⁵³ the fact that the CCP 2003 provides for Article 58.2 leads to the extension of the defense counsel's rights (in particular the right to collect evidence and present it to the prosecuting authorities) and also highlights the responsibility of the defense counsel during the preparation of his/her defense at the trial etc. The provision mentioned above will surely rectify a false opinion that has been around for quite a long time among prosecuting authorities that only evidence that is collected by the prosecuting authorities can be used in a criminal case. It has happened in many trials that adjudicating panels discarded documents and items that were presented by the defense counsel claiming that such documents or items had not been collected by the investigating authorities and were therefore not part of the case file etc. Could the defense counsel's proposing evidence be considered as a right? Article 58 of the CCP mentions only the right "to show documents and to make requests" of the defense counsel. According to Articles 64, 65 of the CCP, evidence consists of facts which are collected in the order and procedure prescribed by the Code; only the prosecuting authorities are entitled to collect evidence and the collection of evidence shall be made in accordance with the manner and form provided by law. For example, the testimony of witnesses shall be collected by a prosecuting authority and shall be recorded in the form of testimony minutes, which satisfies the requirements set forth in Article 135 of the CCP. It is understood in accordance with the provisions stated therein that the collection of evidence is the prerogative of the prosecuting authorities. Obviously documents and items collected by the defense counsel are not evidence *per se*. For them to be used as evidence in a criminal case the defense counsel must present them to a prosecuting authority requesting they be recognized as evidence and the authority can indeed turn them into evidence by a decision to include them in the case file. The fact that the current provisions of the CCP do not recognize defense counsel's right to propose evidence until the documents and items concerned have been included in the case file is reasonable. However, the code should state clearly that he does have "the right to propose documents and items to be used as evidence". It should also make it clear that if the prosecuting authorities reject those documents or items, the defense counsel shall have the right of appeal. The defense counsel would then have the alternative of presenting the

⁵³ Phạm Hồng Hải, *supra* note 28.

documents or items at trial, in which case it would be up to the adjudicating panel to accept them as evidence.

Fourthly, does the defense counsel have the right to require a prosecuting authority to pursue a particular line of investigation and thus collect evidence that the former deems important? For example to demand that the investigating agency takes the testimony of a Mr. A or Ms. B as witnesses of the criminal act in question? Article 58 of the CCP mentions the right to “require” in a very general term. In our view, the article does provide for the right of the defense counsel to propose that documents, items and witness testimony be taken as evidence. In practice, the defense counsel makes this request in order to have evidence that could eliminate or reduce the criminal responsibility of his/her client collected and this also benefits the prosecuting authorities because they can double check the reliability of the facts that are examined. Given the above, this right of the defense counsel should be stated more clearly in the code.

- *The defense counsel is entitled to meet with his/her clients who are in custody* (Article 58.2(e)): Unfortunately, the code does not provide more details on critical questions such as when and how to meet, whether someone from the prison has to be there to supervise and whether there is a limit on the length of any meeting. That is the reason why this legal provision does not really have any value. In reality, the defense counsel can only meet with his client during the final stage of the investigation phase when “all the important information has been fixed in the case file and the defense counsel is allowed to ask non-important issues.”⁵⁴

In order clearly understand this right, it is required to refer to a number of other guiding instruments. Paragraph 2, Clause 22 of the Regulation on temporary custody and detention issued with Decree No. 89/1998/NĐ-CP (as amended and supplemented by Decree No. 98/2002/NĐ-CP in 2002) providing “Persons temporarily kept in custody and detained may meet their relatives, lawyers or other defense counsels, which shall be decided by the body taking their cases. The defense counsels shall meet persons in temporary custody or detention as prescribed by law in office rooms of the temporary custody or detention houses”. Item (d), paragraph 2 of Circular No. 08/2001/TT-BCA dated 12 November 2001 of the Minister of Public Security providing guidelines on implementation of a number of articles on the Regulation on temporary custody and detention stipulated “any cases

⁵⁴ Trần Văn Bảy, *supra* note 25.

permitting persons in temporary custody or detention to meet their relatives, lawyers or other defense counsels shall be decided by the head of the body taking their cases. Lawyers or other defense counsels who want to meet the persons in temporary custody or detention must have certificate of defense counsel in the case issued by the Head of the Investigating Body, the Director of the Procuracies, the Chief Justice of the court or the Tribunal Council and practicing certificate or introduction letter of Bar Association.” Based on these papers, the supervisors of the detention house; Head of the custody house shall conduct the procedures that the defense counsels could meet persons in temporary custody or detention in place and time as provided and each time of meeting shall not exceed 1 hour. This guideline has no basis and has caused difficulty for the defense counsels.

The meeting of defense counsel, especially in case of temporary custody is greatly important and meaningful in terms of ensuring human right of the accused. However, with such narrow regulation, the defense counsel is limited to the conducting of defending function in protecting legitimate rights and interests of the accused. Personally, in order to ensure this right of the defense counsels, it is firstly required to consistently comprehend regulations of legal instruments. Paragraph 2, Article 83 of the Law on promulgation of legal documents in 2008 provided that in the event of legal documents having different rulings on the same issue or problem, those legal documents taking superior legal effect shall be applied. Decree No. 89/1998/NĐ-CP; Decree No. 98/2002/NĐ-CP; Circular No. 08/2001/TT-BCA are those issued prior to and having junior validity in comparison with the Code of Criminal Procedure in 2003. Therefore, the application of this right with respect to the defense counsel must be consistently comprehended in accordance with item e, paragraph 2, Article 58 of the Code of Criminal Procedure in 2003 providing that the defense counsels shall have right to meet the accused or defendants being under temporary detention. However, for the purpose of acquiring such objective, the Code of Criminal Procedure is required to clearly stipulate procedures, place and time of meeting client of the defense counsels.

- *Regarding mandatory defense cases:* Compulsory participation of defense counsel is provided for in Article 57.2 of the CCP. In general the participation of a defense counsel is dependent on the will of the accused, defendant or detainee. The latter can hire counsel directly or authorize his relatives to do so. Nevertheless, in some particular cases such participation is not dependent on the will of the latter. These are specified in Article 57.2, where the prosecuting authorities are obliged to hire

defense counsel or ask the Fatherland Front to appoint a people's advocate for the accused even if the latter does not so request. This is often referred to as an assigned defense in practice. The obligation is imposed on the prosecuting authorities rather than the accused. That means that in Article 57.2 cases, i.e. cases involving juvenile, handicapped people or crimes subject to the death penalty, the prosecuting authorities may proceed only after having appointed defense counsel for the latter. The participation of such compulsory defense counsel has the following characteristics:

Firstly, the legal basis for the participation of the compulsory defense counsel is a invitation made by a prosecuting authority.

Secondly, counsel's fees are paid by the State.

Thirdly, the decision of the appointing authority (the Bar or the Fatherland Front Committee) gives the legal ground for the provision of the defense counsel's service rather than any agreement between the latter and the accused or defendant.

Fourthly, the accused or defendant who is a juvenile or handicapped can ask for a change of defense counsel; however, such right is not absolute. For example if the request comes from the adolescent and is not supported by their lawful representatives, the court may still proceed with the appointed defense counsel. This provision is fair and for the legitimate protection of the accused.

As mentioned above, the right to defense counsel generally belongs to the accused and it is therefore up to them to determine whether to exercise such right and the prosecuting authorities shall respect their determination. However, in the cases set forth in Article 57.2 of the CCP, such determination is subject to the Investigation Bodies, Procuracies and court's approval. The accused in such cases suffers from a more difficult situation and has greater need to exercise the right to counsel; is the help of the prosecuting authorities is also needed. Such a difficulty is also to be found when facing the risk of capital punishment or in cases of physical or mental illness or even economic difficulty. However, the guidance provided by Resolution 03 dated 2 October 2004 of the Judicial Council of the Supreme People's Court, says the rule is applicable to only two groups: juvenile and the handicapped. We share with opinion that this rule should be stated in the code and also that its scope be extended to cover detainees who are facing capital punishment. Doing so will

stress further the compulsory characteristic of the defense counsel and accentuate the meaningfulness of this provision.⁵⁵

The provision on compulsory defense counsel is a very humane provision of the CCP. The provision of a compulsory defense counsel in the absence of any demand from the accused or defendant boosts the guarantee of the right to defense counsel.⁵⁶ The right to defense counsel is necessary not only for the accused or defendant but also for the benefit of the prosecuting authorities, as he may help them determine the truth of the case, adjudicate correctly and punish the true perpetrator.

We are in full agreement with the opinion that the participation of defense counsel during the investigation phase would be beneficial for the prosecuting agency.⁵⁷ But why are the CCP's provisions on the participation of defense counsel still not enforceable in practice and, indeed, why do defense counsels usually face numerous obstacles? In my opinion, there are two reasons for that bad practice: inadequate recognition by the prosecuting authorities and shortcomings in the law itself. As for the first reason, it is clear that inexperienced investigators lacking in confidence would not want defense counsel involved in the investigation process to avoid embarrassing situations. There are also cases where investigators are not fully aware of their obligation to create favorable conditions for the accused, defendants or detainees thus allowing them to enjoy their right to defense counsel. As mentioned above, the right to defense counsel is so important to both the accused and the prosecuting authorities and the whole criminal procedure that it must be guaranteed by the state (Article 132 of the 1992 Constitution as amended).

The Code of Criminal Procedure has made this constitutional provision on the guarantee of the right to defense one of the fundamental principles of criminal procedure, (Article 11). This principle requires the prosecuting authorities, when making the decision to start a criminal case against a person or interrogating them, to inform and explain to them their rights and obligations including the right to defense counsel or to make their own defense (Article 126 and 131 CCP), this being coupled with the right to require the Bar or the Fatherland Front to provide defense counsel in accordance with Article 57.2 of the CCP.

⁵⁵ Nguyễn Thái Phúc, *supra* note 51.

⁵⁶ *Ibid.*,

⁵⁷ Ngọc Lan, *Quyết định bị xem xét lại vì thiếu luật sư: sự có mặt của luật sư là thuận lợi cho cơ quan bào chữa* (Judgement overturned for no lawyer: the presence of a lawyer is beneficial for investigating agency), HoChiMinh City Law Newspaper, issued on 23 July 2007, p. 11.

Once a matter has been prescribed as a legal obligation, the prosecuting authorities have no choice but to conform to it. The significance and importance of the principle of the right to defense counsel makes its infringement “a serious violation of procedural law”, which would lead to adverse legal consequence on the part of the prosecuting authorities. The specific legal consequence in this case is that what has been done so far by the authorities, as far as the violation is concerned, will be null and void so, for example the case file may have to be returned for further investigation or a verdict overturned. Subsequent activities must be conducted in accordance with the law. To be more precise, Articles 168, 179, 250, 287 of the CCP provide that upon the finding of severe procedural infringements, the procuracy is entitled to return the case file to the investigating agency, the court is entitled to return the case file to the procuracy, the appellate court is entitled to overturn the first-instance verdict, the *cassation* panel is entitled to overturn a final verdict or return it for reinvestigation or for retrial at the trial level or in the appellate courts. These legal consequences are what ensure the enforceability of the law. Once investigators are aware of the possible adverse impact imposed on them, they will have no choice but to follow the path of the law. It is the same thing with respect to the court. Even though the whole trial proceeds in accordance with the law, the lack of the signature of just one member of the adjudicating panel could result in the trial verdict being overturned by the appellate court. Similarly, the incorrect composition of the adjudicating panel, which must be composed of one judge and two assessors or two judge and three assessors in death penalty cases (Article 185), would also result in the trial verdict being overturned and sent to retrial.

Regardless of whether or not the procedural infringement is opposed by the accused, the procuracy and court are obliged to investigate the violation. For example, according to Article 241 of the CCP, the appellate court could overturn a trial verdict if it found out that compulsory defense counsel had not been appointed for the accused, regardless of whether such a violation is complained of by the accused. The only limitation on the court in such a case is that the review of non-appealed parts of the trial verdict must not work to the disadvantage of the defendant.

- *Question remains concerning when the defense counsel can participate in legal proceedings in Article 57.2 cases as well as when the obligation to guarantee the participation of the defense counsel of the prosecuting authorities starts in such*

cases? The code does not have direct answers to these questions. However, it could be inferred: in cases under Article 57.2(a), when the death penalty accusation is made known to the accused could be when the obligation of the investigating agency starts. To be more precise, this is when the decision initiating criminal proceedings which would lead to the death penalty is served. According to the law, such decision shall be immediately served on the accused.⁵⁸ From that moment on, the investigating agency is obliged to guarantee a defense counsel for the accused. All the fruits of investigational activities up to that point are still considered lawful even if made without the participation of defense counsel.

Another tricky question is whether mandatory defense counsel is required if the accused was an adolescent at the time of committing the crime but was not so at the time of accusation? The law, again, is silent on this question. Fortunately the answer is found in a guiding document of the code, Resolution 03 dated 2 October 2004 of the Judge Council, according to which the point in time at which to calculate the age of the accused is when the decision to initiate criminal proceedings is served. The date of birth of the accused must be noted down in such decision (Article 126 CCP). Thus if the investigating agency knows that the accused is adolescent, the obligation to guarantee defense counsel is on such agency. It could happen in practice that the investigating agency does not know or does not have information allowing him to determine the true age of the accused at the time of the decision to initiate criminal proceedings with the result that they do not make a request for compulsory defense counsel at that time. When the investigating agency discovers that the accused was an adolescent then, the obligation to request compulsory defense counsel is imposed on them. Investigative findings up to the point of compulsory defense counsel's participation are of course still legitimate. In case there are discrepancies between the accused's testimonies before and after the participation of counsel, it will be a matter of evaluation of the evidence rather than the legitimacy of the testimonies as such.

- *In relation to the remuneration paid to the defense counsels, it also has not been specifically provided.* This new issue has been only recognized in Decree No.28/2007/NĐ-CP issued by the Government dated 26 February 2007 providing guidelines for the implementation of the Law on Lawyers (2006). Accordingly, paragraph 1, Article 11 of this Decree provides: "The level of a lawyer's

⁵⁸ Art. 127 CCP

remuneration for participation in criminal legal proceedings at the request of the procedure-conducting body shall not exceed 120,000 VND per each working day of the lawyer.” This is for the lawyer participating in defense only. As for the legal representative and people’s advocates, the fact that whether the above remuneration is applied to has still not been provided by laws. In addition, some opinions consider this level of remuneration is improper.⁵⁹

In mandatory defense counsel cases, it is the State who pays for the counsel, so there need to be regulation on the minimum activities which the counsel must participate in. During the investigation phase, the accused usually need the presence of their defense counsel when (1) the decision to initiate criminal proceedings is served; (2) the first interrogation session is conducted; (3) a plea is made; (4) the arrest is made; (5) a search is carried out; and (6) the bill of indictment is served. The best case scenario would be that the defense counsel participates in all investigational activities related to the accused. This scenario would materialize only if two conditions were met: (1) the fee paid by the State is sufficient for the service of defense counsel and (2) the defense counsel is fully aware of his/her responsibility and the code of professional ethics.

Conclusion: These limitations of the above-mentioned regulations have partly affected the application of law and caused encumbrances and difficulties in defending and not ensured the legitimate rights and interests of the accused in criminal proceedings. The awareness of these shortcomings plays an important role in efficiently assessing the application of statutory regulations from which it is possible to recommend the direction to amend and supplement in a proper manner.

2.3.2.2. *Shortcomings in the application of the law*

Regarding the responsibility of the prosecuting authorities and officials

Despite the fact that the quality of the implementation of the rights of the accused has improved since the passing of Resolution 49/NQ/TW dated 2 June 2005 of the Politburo on “Judicial Reform Strategy until 2020”, 12,000 court decisions were reviewed under the *cassation* procedure during 2007, according to the annual review report of the Supreme People’s Court. A recent Supreme People’s Court’s report to the National Assembly of April 2010 also shows that in 2009 the *cassation*

⁵⁹ Opinion of Lawyer Phan Trung Hoai at an International Conference regarding “The right to defend in criminal proceedings of Vietnam” co-organized by the United Nations Development Program (UNDP) and Vietnam Bar Federation on 2nd and 3rd December 2010 in Ho Chi Minh City.

procedure was applied to 6,500 criminal decisions; this was due to serious violation of procedural law including violations of the right to defense counsel. 80 out of these 6,500 decisions were found to be wrongful and were overturned. The 6,500 decisions reviewed in 2009 was significantly less than the figure for 2007; however, compared to the total of 61,892 cases handled by the court in 2009, this number is still substantial and alarming.⁶⁰ This means that inadequate control of the prosecuting authorities is an urgent issue that needs to be rectified at once. This inadequate control is one of the reasons why protection of the accused's interests is inadequate.

There also problems in the way the prosecuting authorities conform to the law. An official comment made by the Committee of Legal Affairs of the National Assembly in its session on 26 October 2004 confirms the existence of a number of problems at investigation agencies, including inadequate collection and examination of evidence which led to investigative processes being suspended in many localities, thereby prolonged the detention of the accused. In addition, there existed huge backlogs of cases that severely affected the legitimate rights and interests of the accused, above all those detained. In September 2004, there were 262 overdue cases out of 741 on the docket of the Appellate Court of the Supreme People's Court in Danang City. The fact that the prosecuting authorities and officials also do not respect the role of defense counsel causes bias in the investigations and adjudications that do occur. It also seriously impairs the legitimate rights and interests of defendants and detainees.⁶¹

These violations of criminal procedural law by the prosecuting authorities and officials also cause difficulties for the participation of defense counsel. The latter usually face severe problems during all phases of the procedure. Investigators and prosecutors do not care about equality. Practice shows that the demands of the accused, defendants and defense counsel receive very limited attention from the prosecuting authorities. This leads to the fact that many good and useful provisions of the criminal procedure law are not enforced. The following points illustrate this:

First, obstacles resulting from investigating bodies:

⁶⁰ Report of the Chief Justice of the Supreme People's Court in the National Assembly session on 4 January 2009.

⁶¹ Nghĩa Nhân, *Liệu có tiếp tục làm khó luật sư?* (Will it continue to create troubles for lawyers?), HoChiMinhCity Law Newspaper, issued on 3 September 2004.

Article 58 of the CCP provides that “the defense counsel can participate in the procedure from the decision to initiate a criminal case against the accused. In case the offender is caught red-handed or arrested as a matter of urgency, the defense counsel can participate from the decision to arrest.” Despite this provision, according to a base-line survey on the guarantee of the democratic rights of the citizen and of social security conducted by the Institute of Legal Science of the Ministry of Justice in Hanoi in 1999, the percentage of criminal cases where the defense counsel could participate during the investigation phase was very low as compared to the total number of cases initiated as was the case in situations where the defense counsel participated only after that phase. Among 28 investigators interviewed, only 42.86% thought that the participation of the defense counsel was necessary, while 57.47% thought otherwise. As a reason of this, 86.67% of the investigators interviewed thought that the participation of defense counsel in the investigation phase obstructed the investigation process and 13.3% deemed that such participation was of no help to the accused. A decade later, the situation has shown some improvement. Only 3.6% of authorities conducting proceedings in 9 provinces (including Lang Son, Phu Tho, Ha Noi, Hai Phong City, Da Nang City, Dak Lak Province, Ba Ria - Vung Tau, Can Tho and Ca Mau City) said that the involvement of lawyers obstructs proceedings when they were asked about this.⁶²

It is not an uncommon practice for “advice” to be given to the accused to that he should plead guilty and get a lighter sentence rather than procuring him defense counsel. Understandably, the accused, who is in a worried state, with limited knowledge of the law, tends to follow this advice.⁶³ In practice, defense counsel participation is found mostly in first-instance trial

Article 58.2(e) of the CCP provides that “defense counsel can meet with defendants who are being detained”. To meet the client, a defense counsel has to present a number of documents such as his lawyer’s badge, a letter of introduction from the Bar and a defense counsel certificate for the case in question. In some places the defense counsel is also asked to present a letter from the accused or defendant asking for his/her service. In many cases the defense counsel can only meet with the client during a limited time period etc.⁶⁴ This is a major disadvantage for the

⁶² Report of Ministry of Justice, *supra* note 39.

⁶³ Nguyễn Hoàng, *Nguyên nhân tiêu cực trong hoạt động bào chữa của luật sư (Causes of malpractices of the defending service of lawyers)*, HoChiMinh City Law Newspaper, issued on 27 May 2008.

⁶⁴ NgọcLan, *Cơ quan Điều tra làm khó Luật sư (Investigation agencies trouble lawyers)*, HoChiMinh City Law Newspaper, issued on 20 December 2009.

defense counsel. When meeting with the client, the defense counsel has the opportunity to discover facts about the case, prepare defense strategy and argument and also help the accused with both legal and psychological issues. Thus, for the defense to be effective, defense counsel must be allowed to meet their clients without any limitation on the time or frequency of meetings.

It can basically be said that criminal proceedings are an area where the defense counsel usually faces difficulties. Up to 47% (highest ratings) of the total number of lawyers acknowledged this difficulty when asked. Further, an investigation's result of the Vietnam Bar Federation show that there are 79% of the 24 lawyers interviewed⁶⁵ (including five lawyers who are leaders of the Bar Associations, 7 heads of lawyer practicing organizations, and 12 other lawyers) considered that the investigation stage is the stage where defense lawyers have the most difficulty. Three out of seven prosecutors agreed with this opinion. The difficulties that defense counsel have most often encountered during investigation activities are: the issue of the defense certificate happens after the time limit prescribed by law (15% of comments); defense counsel not allowed to contact accused persons in detention (31% of comments); and they have not received the cooperation of the investigating bodies (33% of comments).⁶⁶ The lawyers have also said that the investigating bodies often refuse to cooperate with counsels results for the following reasons: to ensure the confidentiality of the investigation (38%); to exploit the testimony of the defendants so as to be able to find them guilty prior to the presence of defense counsel (53%); persons in detention hearing comments of or being affected by the investigator and then refusing to use lawyers (34%).⁶⁷ These figures show that the investigators' awareness of their responsibility for guaranteeing the right of the accused to have a defense is poor and they might even regard it as opposed to the general principles of criminal proceedings. This is a major challenge for defense counsel.

Secondly, obstacles resulting from the Procuracies

The prosecution stage commences at the end of the investigation and when dossiers are brought to the Procuracies for a decision on whether to prosecute. By the

⁶⁵ Report of the Survey on "The Right To Defense Counsel under the Vietnamese Criminal Procedure Laws" conducted by experts of the United Nations Development Program (UNDP), Hanoi, August 2010.

⁶⁶ The Vietnam Bar Federation, *Report on the result of the evaluation of guaranteeing of the rights and interests of lawyers at the local Bar Associations (Báo cáo kết quả đánh giá thực trạng vấn đề bảo vệ quyền và lợi ích của Luật sư tại các Đoàn Luật sư địa phương)*, Hanoi, December 2009.

⁶⁷ The Vietnam Bar Federation, *supra* note 65.

provisions of the Law on Criminal Proceedings, within 3 days of the date on which the Procuracies give the decision to prosecute, they must notify the accused and defense counsel and deliver the indictment to the accused. The defense counsel shall be entitled to read the indictment, to record and copy documents in the case files relating to the defense as prescribed by law and put forward request.⁶⁸ Further, within 3 days of giving an indictment, the Procuracies must submit documents and the indictment to the court of competent jurisdiction and thus initiate the prosecution.⁶⁹

Under the above provision of the Law on Proceedings, the time during which the defense counsels have access to case files in the prosecution stage is very short. In fact, most lawyers who were asked said that they refrained from accessing case files during the prosecution stage and would only access them after the case was brought to Court.⁷⁰ This directly affects the quality of the defense.

Additionally, most lawyers have said that although their involvement in proceedings in the prosecution stage is somewhat easier than in the investigation stage, there remain some difficulties resulting from the Procuracies and prosecutors. Some recurring difficulties are: the issue of the defense certificate goes beyond the time limit prescribed by law (9% of comments); not being allowed to contact accused persons in detention (9% of comments of lawyers); and not receiving the cooperation of the investigating bodies (15% of comments of lawyers).⁷¹ The reasons for this lack of goodwill are similar to what lawyers face in the investigation stage.⁷²

Thirdly, difficulties in judgment

Judges do not pay adequate attention to the adversarial nature of their trials. It is a old tradition that during a trial, the judge usually spends most of the time on inquiries rather than on hearing arguments between the parties. It has even happened that participants were entirely deprived of their right to speak.⁷³ In many cases, the presence of defense counsel is seen as “a luxurious decoration” for the

⁶⁸ Art. 166(1) CCP

⁶⁹ Art. 166(3) CCP

⁷⁰ The Vietnam Bar Federation, *supra* note 66.

⁷¹ *Ibid.*,

⁷² See Ngọc Lan, *supra* note 57.

⁷³ See Nguyễn Hoàng, *supra* note 63.

trial.⁷⁴ The reason might be that judges do not have the right mind-set toward defense counsel, even denying that the latter has a role to play, thereby obviously creating obstacles for them. The defense argument is rarely taken seriously by the adjudicating board. Bearing in mind the general prejudice that the accused is always presumed guilty, the impact of the defense arguments on the adjudicating panel is very limited. There also exists a court system practice called “the sentence is at the case file”, which basically means that the adjudicating panel has already made up its mind about the case and the sentence. The principle of oral trial thus becomes not very meaningful in practice. One could share the hesitation of the prosecuting authorities and officials concerning the presence of defense counsel in criminal proceedings; however, their participation is a legal right clearly laid down in the law and it must be respected. To act otherwise must be considered an infringement of the law. After all, the above mentioned malpractices could easily be rectified if all parties implemented their rights and conformed to their obligations in accordance with the law and on the basis of mutual respect.

On the defense counsel’s sense of responsibility

As of late 2009, the number of lawyers in the country is about 5,700 and 2000 of them are practicing lawyers. Of these, about 28.5% are involved in litigation in the broad sense, which here includes criminal law.⁷⁵ This body of lawyers has made a considerable contribution to the defense of criminal cases.

Accordingly, there have been significant improvements on the defense side of criminal procedure during the last five years. However, there still exist shortcomings, many of which are caused by the lack of defense counsels’ professional ethical standards.⁷⁶

There are lawyers who take advantage of their clients’ limited knowledge to ask for high fees or contingency fees; for example a lawyer from the Cantho Bar asked his client to pay a contingency fee of 50% of what he could win for the client.⁷⁷ They are also lawyers who advise their clients to give false testimony to the prosecuting authorities in order to escape justice; some lawyers even meet clients in a detention

⁷⁴ This metaphor was suggested by Dr. Phạm Hồng Hải, the former chairman of the Hanoi Bar at the Seminar on *Vietnamese lawyers and International integration* in Hanoi organized by the Bar on 14th October 2006.

⁷⁵ The number of lawyers practicing in the consultancy field accounts for 50% and 20,8% of the remaining lawyers practice in other legal areas. *Source*: Report of Ministry of Justice, *supra* note 39.

⁷⁶ Report of Ministry of Justice, *Ibid.*,

⁷⁷ Thanh Tâm, *Một vụ luật sư đòi thân chủ “cưa đôi” ở Cần Thơ* (A case where lawyer asked client “to cut in half” in Cantho), HoChiMinhCity Law Newspaper, issued on 11 October 2004.

facility and lure them into giving false testimony for the benefit of other accused persons in the same case.⁷⁸ There are yet other lawyers who falsify the facts of the case, give advice to the accused enabling them to escape a criminal charge or help them to conspire to cheat the prosecuting authorities and justice.⁷⁹

The usual practice of defense counsel, particularly which of compulsory defense counsel, is also worth mentioning. Compulsory defense counsels are usually too dependent on the criminal file supplied by the prosecuting authorities. The time they spend on investigating the case and collecting their own evidence on it is very limited. As a consequence, their defense argument is not well prepared, their service is thus of very limited quality and the legitimate rights and interests of the accused are not effectively protected. It has even happened in a trial that the defense counsel did not care about putting forward persuasive arguments to protect the accused but engaged in trivial tit-for-tat fighting with the prosecutor to the detriment of the client. Some lawyers are so greedy that they take too many cases at the same times, causing them to be always working on something else and not able to come to the trial; and thereby all they can do to defend their clients is to send their written arguments to the court. Some lawyers do not understand that the tasks of a lawyer are not only to protect the rights and legitimate interests of the accused in accordance with the law but also to serve truth and the law. These two tasks always come together and are never apart. Because of this misunderstanding, they “*have purposely defended illegitimate rights and neglected the interests of the accused, contrary to the truth of the case in question and the law, giving rise to distrust on the part of the adjudicating panel and losing the support of the trial audience.*”⁸⁰

All the above malpractices have caused great harm to the defense in criminal procedure and given rise to a negative picture of the role and reputation of defense counsel.

Further, comments from the authorities conducting proceedings have shown that although they appreciate the role of lawyers, when assessing the current status of their professional activities, they consider that not all lawyers are qualified. Only 8% of these authorities have assessed all lawyers as being of a good standard, 23.1% assessed them as in general of average ability while 62.7% considered that

⁷⁸ Hoàì Linh, *Xúi giú c bị can khai bá o gian dói (Inciting the accused to give false testimonies)*, HoChiMinhCity Law Newspaper, issued on 10 October 2004.

⁷⁹ Report of Ministry of Justice, *supra* note 39.

⁸⁰ Nguyễn Văn Tuấn, *Lawyers and the professional ethic issue (Luật sư và vấn đề đạo đức nghề nghiệp)*, Journal of Democracy and Law, Issue No. 8/2000.

only a few lawyers are good.⁸¹ This observation may be based on a variety of reasons, but it does show that the activities of lawyers in general and defense counsel in particular today need to enhance the quality of their activities when acting as defense counsel and involved in legal proceedings.

On the state of knowledge of the accused

Although criminal proceedings is an area which attracts a large number of lawyers⁸² and the number of criminal cases involving defense counsels has been increasing,⁸³ it seems that the demand of the accused to be helped by counsel has not been fully satisfied. The number of cases involving defense counsel compared with the total number of cases brought to judgment is very low,⁸⁴ the cases involving lawyers from the start of legal proceedings making up less than 10% of the total.⁸⁵ As for cases where the lawyers are instructed by the accused, the number of lawyers involved the beginning is very low, their involvement is mainly in the prosecution and trial stage, after completion of the investigation.⁸⁶ This is not only a disadvantage for the accused but actually also makes things difficult for counsel.

Studying this issue, we have found that one reason why the right of the accused to defense counsel has not been utilised comes from the accused themselves. There are even cases where the accused are wrongly convicted but they do not know what to do prove their innocence.

This fact results from the following considerations:

First, the accused person's knowledge of procedural law is not high, and is in fact very low. This leads to a lack of awareness or misunderstanding of the rights granted to them by the law. This not only causes disadvantages for the accused but also creates difficulties for the prosecuting authorities trying to determine the truth of a criminal case, eventually giving rise to incorrect decisions not to be. But it is the accused who suffers.

Secondly, another cause of this is an incorrect perception of defense counsel. People tend to put their trust in the hand of the prosecuting authorities rather than seek assistance from defense counsel. According to survey results, the proportion of

⁸¹ Report of Ministry of Justice, *supra* note 39.

⁸² See *supra* note 43.

⁸³ See *supra* note 44, 45.

⁸⁴ *Ibid.*,

⁸⁵ Report of Ministry of Justice, *supra* note 39.

⁸⁶ *Ibid.*

citizens never using the services of lawyers is generally quite high.⁸⁷ Besides, most people search for information about lawyers mainly through friends and acquaintances (accounting for 46.85%) and through the mass media (accounting for 33.53%).⁸⁸ This is because the majority of people since an introduction from their acquaintances and feel they are much more to be trusted. On the other hand, it has also been shown that initiatives to provide objective information about lawyers and practice organizations are very limited and ineffective.

Consequently, many accused do not know how to present their views to the adjudicating panel. It is well known that a balance between defense and prosecution is critical for a productive argument session. An accused with limited knowledge of the law, lacking the ability and the conditions to study the case file and without materials properly prepared for defense purposes will suffer and their legitimate rights and interests will not be guaranteed and may even be infringed.

In brief, the responsibility of the authorities conducting proceedings in ensuring the rights of the accused and those of the defense counsel involved in the proceedings plays a very important role. The practical end result is that the accused's right to a defense has not fully guaranteed for the following reasons:

Firstly, in recent years, a number of the authorities conducting proceedings have not been fully aware of the position and role of the defense counsel in the process of settling the case. They consider that the involvement of lawyers in legal proceedings will make things difficult and hinder the proceedings and correspondingly they are also afraid that lawyers will discover mistakes in investigations, prosecutions or judgments.

Secondly, there is no close and regular cooperation between Bar Associations and the authorities conducting proceedings.⁸⁹ This hinders the timely provision of information between authorities conducting proceedings and defense lawyers and also harms the management of practicing lawyers' activities. It is thought that cooperation between the Bar Associations, the Vietnam's Fatherland Front and other authorities conducting proceedings should be built on to improve the efficacy of the defense in criminal cases.

⁸⁷ *Ibid.*,

⁸⁸ *Ibid.*,

⁸⁹ *Ibid.*,

Thirdly, under the provisions of the 2003 Code of Criminal Proceedings, the right of defense counsel to be involved in proceedings has been significantly expanded. However, the documents guiding the implementation of this Law, especially the documents guiding the involvement of the defense counsel have not been issued in a timely manner. The late arrival of such guiding documents on the application and implementation of the law has caused many difficulties not only to the lawyers involved in proceedings but also to the authorities conducting them.

Fourth, defense counsel has not been comprehensively trained in the required skills and, therefore, they are still weak in performance and the experience needed in proceeding. Compliance with rules and professional conduct has not been regarded as important and too few lawyers are fully conscious of this. Some lawyers have no proper conception of the role and responsibility of lawyers to defend the accused and to protect his legitimate rights and the interests of related parties. It is still too common a practice that lawyers make unrealistic promises to clients to get high fees and that some lawyers even “take bribes” (“chạy án”) is still sadly the case.⁹⁰

These matters should be remedied in the near future which will further guarantee the rights of the accused in general and the rights relating to the defense counsel in particular.

CONCLUSION: On the basis of the study and analysis as presented in Chapter 2, some main contents relating the right to have defense counsel in laws on criminal proceedings of Vietnam can be summarized as follows:

- The right to defense counsel is a constitutional right and it has been recognized by the Code of Criminal Procedures as a basic principle directing proceeding activities of procedure-conducting bodies.⁹¹
- The time of which the right to defense counsel has been stipulated in a very limited manner. This right is only applied when a person receives the decision to initiate criminal proceedings against the accused.⁹² In case of arresting persons, defense counsels shall participate in the procedure from the time on which the

⁹⁰ *Ibid.*,

⁹¹ Art. 11 CCP

⁹² Article 126(1) and Article 126(4) regulates: the decisions to initiate criminal proceedings against the accused is enacted by the Investigating Body or Procuracies when having sufficient grounds to determine that the accused have committed acts. The decision to initiate criminal proceedings against the accused is a legal basis that the Investigating Body can conduct their investigating activities. In case where a person has not been subject to the decision to initiate criminal proceedings, the Investigating Body shall have no right to conduct any procedures under its authority to the accused.

custody decisions are issued.⁹³ To the crime of infringing upon national security, the defense counsel may participate in the procedure from the time of termination of investigation.⁹⁴ The right to have defense counsel is ensured in stages of pre-trial, court of first instance and court of appeal.

- The accused is not warned of the right to keep silent.
- The participation of the defense counsel relies on the will of the accused. The defense counsel is chosen by the accused by hiring one or more persons to defend them.
- The appointment of defense counsel is considered as a compulsory obligation with respect to the procedure-conducting bodies in the two following cases: the accused or defendant charged with offenses punishable by death penalty; or the accused or defendant being juvenile or persons with physical or mental defect. However, it would not be compulsory if the accused or defendant have themselves asked for the help of the defense counsel. In this case, the accused may request to change or refuse the defense counsel appointed by the procedure-conducting bodies.
- Fee paid for the defense counsel in case of appointment shall be paid by the State. The accused are those poor and not subject to the right to appoint the defense counsel.

It is likely to say that the right to defense counsel under the laws of Vietnam has been quite sufficient and in line with contents provided in international Treaties regarding the human rights. In particular regulations, however, there is an existence of many unclear and inconsistent points that has led to the fact that the application of laws in reality has faced many difficulties. The regulations on the right of the accused as participating in criminal proceedings can be taken as an example. These difficulties should be amended and supplemented soon for the purpose of better ensuring rights of the accused. Chapter 2 presented unsound regulations in laws and practical application of the right to defense counsel and also pointed out causes of

⁹³ Under Vietnamese Code of Criminal Procedure, custody (tạm giữ) is different from temporary detention (tạm giam). Custody may be applied to a person after being arrested (Art. 86, paragraph 1, CCP). The custody time limit must not 3 days, counting from the time the investigating bodies receive the arrestee and shall not exceed 9 days in case of extension (Art. 87 CCP). Accordingly, a person after being in custody, if the Investigating Body does not have sufficient grounds to determine that he/she has committed, it is obliged to release him/her. Whereas, temporary detention is a measure applied to the person who had received the decision to initiate criminal proceedings (see supra) regarding the crime sentenced by two years of imprisonment or more (Art. 88 CCP). The time of temporary detention depends on the seriousness of crime.

⁹⁴ In this case, the defense counsel shall only have right to participate as the Investigating Body issues an investigation conclusion which shows crime and proposed the Procuracies to prosecute (Art. 176.2 CCP).

such difficulties. Along with the study of respective contents in law of German (Chapter 3) and law of the United States (Chapter 4), the contents presented in Chapter 2 shall be a basis that the author can recommend specific solutions to perfect laws on criminal proceedings of Vietnam in relation to the right to defense counsel in the final Chapter of this thesis.

CHAPTER 3: GUARANTEE OF THE ACCUSED PERSON'S RIGHT TO DEFENSE COUNSEL UNDER GERMAN CRIMINAL PROCEDURE LAWS

Selecting German legislation for comparison with Vietnamese legislation in relation to the guarantee of the accused's right to defense counsel is a critical issue for this thesis. From his research, the writer has found significant similarities and very few differences between German and Vietnamese criminal procedure both in general and regarding the specific provisions on the guarantee of the accused's right to defense counsel in particular.

This Chapter focuses on two main points. *First*, to study statutory provisions on the guarantee of the accused's right to defense counsel in German criminal procedure in a way that will reflect the extent of the similarity between the German legislation and the contents of Article 6.3(c) of the European Convention on Human Rights (ECHR) and relevant judgments of the European Courts of Human Rights. As such, the writer will also be able to point out similarities to and differences from Vietnamese criminal procedure law. *Second*, to study the actual situation regarding the guarantee of the right to defense counsel in German criminal procedure. As is the case with Vietnamese and US criminal procedure,¹ German criminal procedure has retained certain limitations in guaranteeing the right to defense counsel. Furthermore, the German criminal procedure system has been experiencing challenges from the standards established by the ECHR.² Generally, the existing difficulties that the German system has to confront will lead to urgent calls for the further extension of the ambit of the right to defense counsel.³ This will also suggest the impact, similar changes will have on Vietnamese legalization as it undergoes reform.

¹ In detail, see *infra* Chapter 2 (section 2.3) and Chapter 4 (section 4.3).

² Many assume that, in general, the German criminal justice has not attained the standards on procedural rights guaranteed in Article 6 of the European Convention on Human Rights. See Klaus Rogall, *Germany Principles of Criminal Procedure and their application in disciplinary proceedings*, International Review of Penal Law (Vol. 74), 2008.

³ See general Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Effective Criminal Defence in Europe - Executive Summary and Recommendation*, Intersentia: Antwerp – Oxford – Portland, 5/2010, <http://www.soros.org/initiatives/justice/articles_publications/publications/criminal-defence-europe-20100623/criminal-defence-europe-summary.pdf>.

3.1. Overview of the German criminal procedure

3.1.1. Sources of law

Germany is officially the Federal Republic of Germany and consists of 16 states (the 16 *Länder*).⁴ Nevertheless, in terms of criminal justice, federal law and jurisdiction is applied throughout the country. The main source of German criminal procedure is thus the Code of Criminal Procedure (*Strafprozessordnung - StPO*) issued in 1877 and related documents. This Code has been repeatedly amended; however, the general structure has been retained. The German criminal procedure contains 495 Articles (sections) and is divided into 8 Parts. The contents related to the accused's right to defense counsel is provided for in Chapter XI of Part 1, from Article 137 to Article 150. Article 137 (1) recognizes that the accused may have the assistance of defense counsel at any stage of the proceedings. The right to defense counsel is thus guaranteed during all stages of the proceedings, from pre-trial to trial.⁵

Inevitably, the German Constitution (the *Grundgesetz - GG*) is considered as the legal document having the highest effect and governs all aspects of legislation, criminal procedure being naturally included. The Constitution, which was established in 1949, contains certain provisions directly related to criminal procedure which have, however, more of the nature of general principles. For example, the right to be judged by a court,⁶ the right not to be tried or punished twice in criminal proceedings for the same criminal offence⁷ and the like, the right to defense counsel being also explicitly recognized by the Constitution as a fundamental right of the accused.⁸ Hence, the Federal Constitutional Court (*Bundesverfassungsgericht - BVerfG*)⁹ has a considerable role in the interpretation of the legislation on criminal procedure.¹⁰ Judgments of the Federal Court of Appeal (*Bundesgerichtshof - BGH*), however, have the most important influence.

⁴ Germany has a federal constitution (unified nationwide legislation) comprising 16 states. This is the result of the unification of the Federal Republic of Germany (West Germany) and the Democratic Republic of Germany (East Germany) in 1990.

⁵ Christian Fahl, *The Guarantee of Defense Counsel and the Exclusionary Rules on Evidence in Criminal Process in Germany*, *The German Law Journal*, <http://www.germanlawjournal.com/pdfs/Vol08No11/PDF_Vol_08_No_11_1053-1067_Articles_Fahl.pdf>.

⁶ Art. 103(1) GG

⁷ Art. 103(3) GG

⁸ See *supra* note 6.

⁹ The Federal Constitutional Court performs the function of settling any matters violating fundamental rights of citizens provided for in the Constitution other than those involving the interpretation of state laws or federal laws.

¹⁰ Craig M. Bradley, *Criminal Procedure - A worldwide Study*, Carolina Academic Press, 2007, p. 243.

Unlike the BverfG, decisions of the BGH (*Entscheidungen des Bundesgerichtshofes* - BGHSt) consisting of 5 (five) judges in criminal cases have the highest value in the interpretation of the criminal law and criminal procedure code. As a result, even though courts of junior jurisdiction are not strictly speaking bound by the BGHSt, they are effectively obliged to comply with such judgments since any contrary opinions and views on the legal provisions are likely to be struck down by this Court.¹¹ We can hereby recognize that even though precedents in the strict sense do not exist, German legislation acknowledges the value of the interpretations of federal courts. These judgments must in practice be taken into consideration by the lower courts. Reference to the interpretations of the BGH at lower levels are ubiquitous in the German criminal procedure system.

The process of resolving criminal cases is governed by several relevant laws, such as the Criminal Code (*Strafgesetzbuch* - StGB), the Court Organization Act (*Gerichtsverfassungsgesetz*-EGGVG) and the Juvenile Justice Act (*Jugendgerichtsgesetz* - JGG).

It is notable that German criminal procedure has been substantially under the influence of international criminal procedure.¹² The European Convention on Human Rights (ECHR) and the judgments of the European Court of Human Rights (ECtHR) must be considered when reviewing German law¹³ as, in practice, precedents of the ECtHR prevail there. This follows from cases of the ECtHR which interpret the obligation on member nations of the Convention to comply with the ECHR.¹⁴ Accordingly, the procedural rights of the suspect and the accused are twice guaranteed. Under the ECHR, defense counsel plays an important role as a supervisor of all procedural processes. The government acting as one side and the defense counsel acting as the other side in protecting the rights and interests of his client.¹⁵ This is a fundamental criterion governing all legislation and law enforcement within member nations of the ECHR.

¹¹ *Ibid.*,

¹² Richard Vogler, Barbara Huber, *Criminal Procedure in Europe*, Max Planck Institute, Duncker & Humblot, Berlin, 2008, p. 277.

¹³ Article 46 of the ECHR obliges member nations to comply with judgments of the ECtHR in all cases to which they are a party.

¹⁴ Mireille Delmas-Marty, Mark A. Summers, *The Criminal Process and Human Rights – toward a European Consciousness*, Martinus Nijhoff Publishers, 1995, p. 37.

¹⁵ It is the judgment of the European Commission on Human Rights, (previous name of the European Court of Human Rights) in 1987 in the case of *Esslin, Baader I Raspe v. Germany*, Dec.of July 1987, Appl. No.7572, 7586 I 7587/76, D&R 14, §64.

Currently, the Treaty of Lisbon,¹⁶ effective on 1 December 2009, has unified issues relating to European Union (EU) legislation. The Treaty of Lisbon has created a path enabling the EU to join the ECHR. This means that the EU will be liable to the ECtHR with respect to matters provided for in the ECHR.¹⁷ In 2009, the European Council also issued the Stockholm programme which aims to set out the strategic plans of the European Union regarding freedom, security and justice for the period of 2010-2014. In this, the extension of the guarantee of basic procedural rights is one of the most critical matters. Accordingly, European nations need to further improve provisions guaranteeing the right to defence counsel, a fundamental procedural right demonstrating the fairness of the legislation.

The above has indicated that for an EU member state, law enforcement is in the first instance covered by the common legislation of the EU: The European Convention on Human Rights is a substantial source of law. Accordingly, when studying matters relating to the guarantee of the rights of the accused in general and the right to defense counsel in particular in German law, one must consider judgments of the ECtHR on the application and interpretation of the ECHR. This shows that the legal foundation of the guarantee of the right to defense counsel in German legislation has two levels: first, international legal instruments; second, the Constitution, Code of Criminal Procedure and other national legal documents.

3.1.2. The stages in the procedure and the role of defense counsel

3.1.2.1. The Stages in the Procedure

Studying German criminal procedure regarding the guarantee of the right to defense counsel, we can already recognize that the nature of the promulgating of rules that guarantee the rights of the accused is drastically different where the traditionally inquisitorial model of criminal procedure - which results in the positive role of judges in the proving of crimes - is concerned.

Germany is considered to be a typical Civil Law system with the standard characteristics of the traditional inquisitorial model. Provisions governing German criminal procedure first appeared in 1532. These provisions set out the nature of the

¹⁶ The Lisbon Treaty came into being and unity on European Union Treaty (TEU) and the Treaty on functioning of the European Union (TTEU).

¹⁷ See general, Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Effective Criminal Defence in Europe*, Antwerp-Oxford-Portland, Intersentia 2010, p. 12, ISBN 978-94-000-0093-3.

inquisitorial model of criminal procedure and have retained their historical value until now.¹⁸

However, like other countries in Europe, Germany is better described as a country having a mixed model of criminal procedure which contains various features originating from different traditional models of criminal procedure.¹⁹ Some signs have shown that the adversarial model of criminal procedure has been applied to the settlement of criminal cases in Germany.²⁰ Taking the following as an example, the Court has reduced its active role in evidencing crimes; the presentation of proof is fairly balanced between prosecutors and defense counsel;²¹ the trial is based on the practice of an adversarial court which requires the presence of the defense counsel, etc.²² Nevertheless, generally, German criminal procedure has retained the characteristics of the traditional model of inquisitorial procedure.²³ The following contents will reflect this.

Under German law, the process of solving criminal cases include the following basic stages: investigation stage (*vorverfahren* or *ermittlungsverfahren*); the intermediate stage (*zwischenverfahren*); trial stage (*hauptverfahren*) and appeal stage (*Rechtsmittelverfahren*).

The Investigation stage is governed by Articles 151 to 177 of the StPO. Investigative activities are conducted primarily by police and prosecutors. The intervention of the judge is limited to supervising the legality of coercive measures which the public prosecutor can order to be used against the suspect.²⁴ The procedure commences as police authorities discover crimes or as public prosecutors receive a report of an offense.²⁵ This stage is designed to investigate and discover whether an offence can be attributed to the suspect, and if so, to institute a prosecution. Prosecutors in Germany play an important role in investigating and

¹⁸ Clause Roxin, *Strafverfahrensrecht*, Textbook, Chapter 15. As quoted by Antje Pedain, *German Criminal Procedure*, 2006, <<http://law.cam.ac.uk/faculty-resources/download/german-criminal-procedure/6368/pdf>>.

¹⁹ Harry R. Dammer, Erika Fairchild, *Comparative Criminal Justice System*, Thomson Wadsworth, 2006, pp. 143-47.

²⁰ Recharge Vogle, Barbara Huber, *Criminal Procedure in Europe*, Max-Planck Institute, Dunker&Humblot, Berlin, 2008, p. 283.

²¹ *Ibid.*,

²² Mireille Delmas-Marty, J. R. Spence, *European Criminal Procedures*, Cambridge University Press, 2002, p. 304.

²³ Harry R. Dammer, Erika Fairchild, *supra* note 19, p. 143.

²⁴ Art. 162 StPO

²⁵ After summarizing the statements taken and the evidence found, the police transmit a final report (*Schlußbericht*) to the public prosecutors (Art. 163 StPO).

prosecuting criminal offenses.²⁶ For that purpose, they have fairly broad investigatory authority; they can summon suspects, witnesses and expert witnesses.²⁷ Thus, they have the right to end the investigation stage with the prosecutorial decision to either (1) file a writ of indictment;²⁸ (2) drop the charge due to the low probability of a conviction;²⁹ (3) move for alternative sanctioning modes³⁰, or for an alternative discontinuance of the proceeding.³¹ At this stage, any suspect must be informed of his right to remain silent.³² He/she may also have the assistance of a defense lawyer if he/she has been notified of charges held against him/her.³³ However, the presence of defense counsel in this period is very limited. In fact, the defense counsel is only allowed in after the transfer of the file to the public prosecutor.³⁴

The intermediate phase is controlled by the trial court as it decides whether to accept the prosecutor's indictment. The aim of this stage is the consideration of the decision to prosecute taken during the investigation phase. If there is a *legitimate suspicion* that an offence has been committed, both in law and in fact,³⁵ the trial phase will be opened. In this stage, the presiding judge informs the accused of the contents of the indictment. He may also appoint a defense counsel for the defendant.³⁶ The court can dismiss, confirm or amend the indictment. Where the indictment is refused, criminal proceeding will be halted.

The public (and oral) main trial is controlled by the trial court with a view to making a finding of guilt and sentencing. The trial starts with the indictment being read out by the public prosecutor. Thereafter, the defendant is interrogated by the bench and the parties (prosecutor and defense counsel). It should be noted that the defendant is still entitled to remain silent. The interrogation only takes place if he/she declares that he/she is willing to make a statement. However, if he/she is willing to testify, he must undergo a complete interrogation about the facts. This is followed

²⁶ Art. 160 (2) StPO. The Code states that the prosecutor shall investigate exonerating as well as incriminating circumstances.

²⁷ Art. 161(a) StPO

²⁸ Art. 170(1) StPO

²⁹ Art. 170(2) StPO

³⁰ Such as the written summary sanctioning order (see Art. 407 StPO), or a summary fine (see Art. 153a StPO).

³¹ Art. 153 StPO (dismissal due to the insignificance of the case).

³² Arts. 136, 163a StPO

³³ Art. 137 StPO

³⁴ Mireille Delmas – Marty, J. R. Spencer, *supra* note 22, p. 313.

³⁵ Art. 203 StPO

³⁶ Art. 140 StPO

by the investigation of the case. The Court will review and accept the evidence by way of the questioning together with expert testimony and documentary evidence presented at the trial.³⁷ When the investigation has been completed, the presiding judge allows the public prosecutor to present his views on the charge, followed by counsel for the defence. The principle of an adversarial hearing must be respected. The accused and their defence counsel have the right to participate in the proceedings on an equal footing with the public prosecutor. The hearing comes to a conclusion with the closing statements of the parties and the final words of the accused.³⁸ The judgment of the court can only be based on what has been presented and debated at the hearing.³⁹ German law requires an exhaustive written judgment in which the court must describe in detail how it evaluates the evidence and which facts it finds to be true.⁴⁰ This requirement serves as an additional control mechanism against irrational convictions or acquittals. Any misapplication of the law appearing from the written judgment can lead to reversal on appeal.⁴¹

After the main trial, both the defendant and the prosecutor have the right to appeal.⁴² Defence counsel may file an appellate remedy on behalf of the accused, but not against the latter's express will.⁴³ The appeal stage is controlled by the appellate courts. The process begins again at the starting point as in the court of first instance. The appellate court is obliged to collect and evaluate all the evidence necessary to arrive at the judgment.⁴⁴ The appellate court can reject the appeal and uphold the judgment of the first instance court if it comes to the same conclusion. If the appeal on fact and law is held to be well-founded, the court hearing the appeal shall quash the judgment and decide on the merits.⁴⁵

As mentioned above, the trial is conducted by the presiding judge. Under German law, there is no jury; instead, lay judges participate as members of the criminal panel.⁴⁶ With respect to the judgment, lay judges have a strong position. Lay judges are in the same legal position as professional judges, which means that in the trial they have to decide on all matters, with their vote weighing the same as that of their

³⁷ The collection of evidence at the trial is governed at Arts. 244 - 257 StPO.

³⁸ Art. 258 StPO

³⁹ Arts. 261, 264 StPO

⁴⁰ Art. 267 StPO

⁴¹ Art. 337 StPO

⁴² Art. 296 StPO

⁴³ Art. 297 StPO

⁴⁴ Art. 323 StPO

⁴⁵ Art. 328 StPO

⁴⁶ Art. 31(2) StPO

professional counterparts. Decisions require a two-third majority of the vote of the lay judges.⁴⁷ There is only one exception to this rule: lay judges have no right to inspect the files; their only source of information has to be the hearing, i.e. the trial. A major difference as against common law countries is that German judges are not bound by precedent; there is no *stare decisis* doctrine and any judge at any district court (*Amtsgericht*) may deviate from the consistent jurisprudence of the BGH (German Federal Court of Appeals) and even of the BverfG (German Federal Constitutional Court), unless the latter's decision has the force of an Act of Parliament under § 31 BverfGG (Federal Constitutional Court Act).⁴⁸ This applies equally to professional and lay judges.⁴⁹

In the light of the above procedure for resolving criminal cases, it is likely that German and Vietnamese criminal procedure have many similarities when it comes to the method of handling a criminal case. The court, at trial, is to continue investigating evidence collected by police authorities and prosecutors in the pre-trial stage. This fact indicates that the role of a defense counsel at trial is relatively fuzzy. Even though both German and Vietnamese legislation have recently made improvements to the role of the defense counsel, the specific characteristics of the inquisitorial procedure can be seen as a crucial factor in the manner of presenting evidence in criminal cases. This can also be seen in the various specific regulations guaranteeing procedural rights of the accused, among which is the right to defense counsel.

The right to defense counsel in criminal proceedings is granted by Article 137 (1) of the StPO, which gives a person the right to obtain legal advice in criminal proceedings whenever he or she wishes, or as the law states: “*in jeder Lage des Verfahrens*” (at any stage of the proceedings). As described above, there are different stages of criminal proceedings, which are to be distinguished under German Law (see *supra*), but Article 137 StPO governs the whole process and is not limited. It should be noted that, depending on the stage at which a (potential) offender finds himself in the process, he is given a different name. Before the prosecution indicts a person, he is called the suspect (*Beschuldigte*). After

⁴⁷ Art. 263 StPO

⁴⁸ Richard S. Frase and Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. Int'l & Comp. L. Rev. 317 (1995), <<http://lawdigitalcommons.bc.edu/iclr/vol18/iss2/2>>.

⁴⁹ The latter has been enshrined in Art. 97(1) of the German Constitution : Judges shall be independent and subject only to the law.

indictment, but before admission of the indictment, he is called the accused (*Angeschuldigte*), and after the admission of the indictment, his name is the defendant (*Angeklagte*).⁵⁰ The use of the terms is apparent from the provisions of the StPO covering the different stages of the proceedings.⁵¹ Difference in procedural capacity at each procedural stage has somehow influenced the scope of the guarantee of the right to defense counsel. As an example, for the suspect, the right to defense counsel is limited during the investigation by the police.⁵²

Nevertheless, generally, the fundamental procedural rights of the accused are respected and consistently guaranteed by the German government in compliance with constitutional principles.⁵³ Among these rights, as in other legislations, compliance with the principle of a fair trial is considered as a foundation ensuring both the interests of justice and the legitimate rights and interests of citizens. The right to a fair trial, which covers many different aspects of criminal proceedings and is in a way the basic right, underlying almost all others, is guaranteed by Article 20(3) of the *Rechtsstaat* principle (state based on the rule of law) together with the general personal freedom right in 20(1) GG (Basic Law).⁵⁴ Its underlying rationale is to ensure that a person is not made a mere object of the proceedings but retains a way to engage in them actively.⁵⁵ Therefore, the court must ensure that there is “equality of arms” (*Waffengleichheit*) between the accused and the public prosecutor.⁵⁶ Another important area of application is the right to the assistance of

⁵⁰ According to Article 157 StPO, the indicted accused shall be an accused person against whom public charges have been preferred; the defendant shall be an accused person or indicted accused in respect of whom there has been a decision to open the main proceedings.

⁵¹ The translation is relatively straightforward without causing too much potential for confusion. See Michael Bohlander, *Basic Concepts of German Criminal Procedure - An Introduction*. This paper is a modified version of the chapter on basic concepts in the author’s forthcoming book *Principles of German Criminal Procedure*, Hart Publishing, 2011,

<http://www.durhamlawreview.co.uk/files/Bohlander_Durham_Law_Review.pdf>.

⁵² Although the StPO states that the right to defense counsel is guaranteed “in every phase of proceeding” (Art. 137.1), in fact, the majority view does not recognize a right of the suspect to have (even retained) defense counsel present during police interrogation. The minority view points out that the right to have defense counsel is guaranteed not only in Art. 137 (1) StPO but is also part of the due process (*Rechtsstaat*) principle of the Basic law. See Craig M. Bradley, *supra* note 10, p. 258.

⁵³ The process of resolving criminal cases must comply with many of the common basic principles, including: *Judicial independence* Art. 97(1) GG, *The right to a predetermined judge (Gesetzlicher Richter)* Art. 101(1) GG, *The right to be heard (Rechtliches Gehör)* Art. 103(1) GG, *The right to a fair trial (Rechtsstaat)* Art. 20(3) GG, etc. See Michael Bohlander, *supra* note 51.

⁵⁴ The Basic law recognizes: “The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.” And “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”

⁵⁵ The *Federal Constitutional Court’s decision of 7th June 1977*, 63 BVerfGE, 45. English excerpt provided in Mauro Cappelletti and William Cohen, *Comparative Constitutional Law: Cases and Material*, The Bobbs-Merrill Company, Inc. Publisher, 1979. See also Michael Bohlander, *supra* note 51.

⁵⁶ Mireille Delmas - Marty, J. R. Spencer, *supra* note 22, p. 315.

counsel.⁵⁷ At any specific level, the procedural rights of the accused person are guaranteed by a system of specific rules.⁵⁸ Among them, the inquisitorial principle (*Ermittlungsgrundsatz*) is considered as a fundamental method influencing the practice of collecting the evidence of crimes.

The major feature that justifies calling Germany an inquisitorial system is the rule that the aim of any investigation and trial is the ascertainment of the material truth (*materielle Wahrheit*), not the truth based on facts adduced by the prosecution and defence. The court is not bound by any declarations of the parties and investigates the facts on its own motion.⁵⁹ This is a very particular characteristic of the German criminal procedure.⁶⁰ This has strongly influenced the role of defense counsel in criminal procedure.

3.1.2.2. Role of defense counsel

The role of a defense counsel in Germany has been compared to a person “presenting a case” rather than that of a person protecting the fairness of criminal procedure as a whole.⁶¹ There is a wide body of opinion that the special nature of the inquisitorial model has limited the positive role of defense counsel at trial.⁶² Nowadays, the role of the defense counsel in Germany has improved.⁶³ As mentioned above, German trials are conducted by the presiding judge, but the parties may still play a fairly active role. The presiding judge conducts the hearing, examines the defendant and takes the evidence.⁶⁴ The defense counsel is entitled to

⁵⁷ The right to defense counsel is also constitutionally warranted. Both the fair trial and rule of law principles embodied in Arts. 2(1), 20(3) GG, and the right to a fair hearing, Art. 103(1) GG, guarantee the right to defense counsel. See further The *Federal Constitutional Court's decision of 8 October 1974*, 38 BVerfGE 105, English excerpt provided in Mauro Cappelletti and William Cohen, *supra* note 55.

⁵⁸ The proceedings must comply with specific rules, such as: Accusatory Principle (Anklagegrundsatz), Principle of public prosecution (Offizialprinzip), Principles of mandatory and discretionary prosecution (Legalitätsprinzip and Opportunitätsprinzip), Inquisitorial principle (Ermittlungsgrundsatz), Principle of oral presentation of evidence (Mündlichkeitsprinzip), Presentation of evidence before the deciding judges (Unmittelbarkeitsprinzip), Concentration and speedy trial principles (Konzentrationsprinzip and Beschleunigungsgrundsatz), Free evaluation of evidence (Freie Beweiswürdigung), Open justice (Öffentlichkeitsgrundsatz). See also Michael Bohlander, *supra* note 51.

⁵⁹ Arts. 155, 244 StPO

⁶⁰ This is similar to Vietnamese Criminal Procedure and different from that of the US in terms of finding the truth. This principle heightens the positive role of the judge when considering the evidence of a crime.

⁶¹ Justus R. G. Warburg, *Die anwaltliche Praxis in Strafsachen*, (Stuttgart: Verlag W. Kohlhammer, 1985), p. 6. As quoted by Devin O. Pendas, *The Frankfurt Auschwitz trial, 1963 – 1965: genocide, history, and the limit of the law*, Cambridge University Press, 2006, ISBN 0-521-84406-1, p. 95.

⁶² *Ibid.*,

⁶³ Devin O. Pendas, *Ibid.*, p. 97.

⁶⁴ Art. 238(1) StPO

call witnesses or to present evidence in a fair manner in opposition to the accusations of the prosecutors contained in the formal indictment, and so on.⁶⁵

Who can be a defense counsel? The German Criminal Procedure Code promulgates a wide range of provisions on the subject participating as defense counsel in the criminal procedure. However, not more than three defense counsels may be chosen.⁶⁶ Attorneys-at-law admitted to practice before a German court as well as professors of law at German universities may be engaged as defense counsel. Lawyers (*Rechtsanwälte*) are those mainly participating in the activity of providing legal advice and in court proceedings. In Germany, every lawyer is required by law⁶⁷ to become a member of one of the 28 regional bar associations (*Rechtsanwaltskammern*), which are in turn united under the Federal Bar Association (*Bundesrechtsanwaltcommer* - BRAK). At the end of 2010, there were 153,251 lawyers in Germany.⁶⁸ Under German law, the criminal defense lawyer is an independent ‘organ of the criminal justice system’.⁶⁹ Defense lawyers provide their clients with legal assistance. They advise the accused on issues concerning both substantial and procedural law.

Other persons may be admitted only with the approval of the court. The other persons here include the spouse of a defend and/or the defendant's statutory representative.⁷⁰ Under Article 137 (2) StPO, the legal representative may also “engage defense counsel independently.” However, in preliminary proceedings the admission of such assistance shall be left to judicial discretion.⁷¹

At the pre-trial stage, defense counsel in Germany has the right to conduct an independent investigation before trial, but is not granted any means of compulsion. Counsel can also request the prosecutor to take certain evidence, but the prosecutor need not honor such a request unless he or she deems it relevant to the investigation.⁷² The most important right of the defense counsel in the pre-trial phase is the right to inspect the entire prosecution file, including both favorable and

⁶⁵ Art. 240 StPO

⁶⁶ Art. 137 StPO

⁶⁷ This is due to sections 6(2) and 12(3) and 60(1) Federal Lawyers’ Act (Bundesrechtsanwaltsordnung).

⁶⁸ Source: < <http://www.brak.de/seiten/pdf/Statistiken/2010/FA2010.pdf>> (Webpage of the German Federal Bar Association). Last visited 2nd March 2011.

⁶⁹ Sections 49(2), 48(2) of the German Federal Lawyers’ Act.

⁷⁰ Art. 138 StPO

⁷¹ Art. 149 StPO

⁷² Art. 163a(2) StPO

unfavorable evidence.⁷³ Although the recently added Article 147 (7) of the StPO⁷⁴ which allows an accused who does not have counsel to be informed about the content of the prosecution's files, it is still true that only defense counsel are entitled to full inspection. A German commentator express his view that, this provision shows that defense counsel do not derive their rights only from the defendant but are true "organs of justice" as it is stated in section (1) of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*).⁷⁵ And there is no corresponding right of the prosecution to discover defense evidence. The defense inspection right is unconditional with respect to transcripts of interrogations of the defendant, statements of expert witnesses, and protocols of judicial acts of investigation.⁷⁶ With respect to all other parts of the file, the prosecutor can deny inspection until the investigation is closed if earlier inspection would endanger the purpose of the investigation.⁷⁷

At trial, the defense counsels have the right to question both witnesses and expert witnesses after they have been interrogated by the presiding judge.⁷⁸ Attorneys can also make oral requests of proof which generally oblige the court to hear additional evidence as suggested by the party. After the main hearing, defense counsel may file an appellate remedy on behalf of the accused, but not against the latter's express will.⁷⁹

The above has demonstrated a number of fundamental features of German criminal procedure and offers some indication of how the laws of Germany guarantee the procedural rights of the accused in general and the right to defence counsel in particular. The following will give further details of specific legal issues relating to the right to have defense counsel.

⁷³ Art. 147 StPO

⁷⁴ Art. 147(7) of the StPO reads "Where an accused has no defence counsel, information and copies from the files shall be given to the accused upon his application, provided that this is necessary for an adequate defence, cannot endanger the purpose of the investigation...".

⁷⁵ Christian Fahl, *supra* note 5.

⁷⁶ Art. 147(3) StPO

⁷⁷ Art. 147(2) StPO

⁷⁸ Art. 240 (2) StPO

⁷⁹ Art. 297 (2) StPO

3.2. Aspects of guaranteeing the right to defense counsel in German criminal procedure

3.2.1. Time of guaranteeing the right to defense counsel

Although Article 6.3(c) of the ECHR expressly recognizes that the accused has the right to defend himself or do so through a lawyer, the German Criminal Procedure Code seems not to mention the general right to self - defend in the proceedings. However, the procedural rights of the accused have been recognized and guaranteed by other laws such as the right to present evidence during the investigation,⁸⁰ the right to bring general motions during trial,⁸¹ the right to personally question witnesses and experts during the trial,⁸² etc. Conversely, the StPO stresses that the accused has the right to defense counsel at every stage of the proceeding.⁸³ In case of mandatory legal counsel,⁸⁴ the accused must not to self-defend and without defense counsel. Accordingly, the appointment of a defense counsel must be guaranteed in the investigation phase in the case of the accused charged with felony crimes, or when the accused is held in provisional detention,⁸⁵ and at any appellate trial.⁸⁶ Besides that, the suspect has to be informed about the right “to consult with defense counsel of his choice” and the right to remain silent during all stages of the proceeding, including upon first examination by the police.⁸⁷ However, while the ECtHR stresses that domestic legislation may provide for the right to defense counsel immediately on arrest,⁸⁸ and the defense counsel are entitled to be present during the interrogation by the police,⁸⁹ there is no corresponding law in Germany that allows defense counsel to be present during the first examination of the accused by the police.⁹⁰ The German Code of Criminal Procedure has only recognized the role of defense counsel at the later phases of investigation before prosecutors and judges and seemingly missed the phase of investigation by the police. According to the StPO, Article 168c(1) gives defense counsel the right to be present during a judicial examination of the accused and Article 163a(3) grants the same right to

⁸⁰ Art. 163a(2) StPO

⁸¹ Art. 166 StPO

⁸² Art. 240(2) StPO

⁸³ Art. 137 StPO

⁸⁴ Art. 140 StPO

⁸⁵ Art. 140 (1) (2), Art. 141(3) StPO

⁸⁶ Art. 297 StPO

⁸⁷ Arts. 136 and 163a StPO

⁸⁸ ECtHR, 8 February 1996, *John Murray v. the United Kingdom*, No. 18731/91 and ECtHR, 6 June 2000, *Magee v. the United Kingdom*, No. 28135/95.

⁸⁹ ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No.36391/02, para. 54-55.

⁹⁰ Christian Fahl, *supra* note 5.

defense counsel during an examination conducted by the public prosecutor. When a suspect is interrogated by a prosecutor or a judge he has a right to defense counsel and, in this case, the defense counsel must be informed of the time and location of the interrogation.⁹¹ On the other hand, the suspect has no duty to appear before the police, whereas he or she is obliged to appear before the public prosecution office upon being summoned under Article 163(3) of the StPO. Most German scholars have assumed that the lack of any right to defense counsel during the police interrogation is a weakness of the German criminal procedure and is not consistent with the common spirit of the ECHR.⁹² One study shows that, in the case of appointed counsel, the presiding judge will, as a rule, only appoint defense counsel after a formal charge has been filed, i.e., when the investigation has been completed (Article 141(1) StPO).⁹³ Thus suspects do not have the right to have appointed defense counsel during the investigation stage of the criminal proceeding; this is true even for indigent defendants.⁹⁴ This fact is also seem to be conflict with the terms of Article 136 of the StPO. Under this article, a suspect must be informed of his right to “counsel of his choice” and that he or she must be allowed to talk to counsel, if he or she wishes “even prior to his examination.” Furthermore, also within the scope of this article, the accused has the right to remain silent during all stages of the proceedings. Police officers are supposed to inform the suspect that he may be silent and does not have to present any evidence against himself and that he or she also has the right to defense counsel during the interrogation. However, German law does not contain a strict rule that questioning must stop once the suspect has asked to talk with defense counsel or has declared that he wishes to remain silent.⁹⁵

To conclude, under German law, the right to defense counsel is basically guaranteed at all stages of the proceeding. However, similar to the situation in Vietnam, the application of the law in Germany shows that the right to defense counsel is not fully ensured during interrogation by the police. The classification of someone as either a suspect or an accused indicates the scope of the procedural rights that they will be allowed. When police conduct an interrogation, lawyers are not allowed to be

⁹¹ Arts. 168c (1)(5), 163a(3) StPO

⁹² See general Craig M. Bradley (*supra* note 10), Recharge Vogle, Barbara Huber (*supra* note 12), Mireille Delmas-Marty, J. R. Spence (*supra* note 22), Harry R. Dammer, Erika Fairchild (*supra* note 23), Christian Fahl (*supra* note 5).

⁹³ Craig M. Bradley, *supra* note 10, p. 258.

⁹⁴ *Ibid.*,

⁹⁵ *Ibid.*,

present, unless the accused refuses to answer any questions without a lawyer present. Is it not surprising that, under German law, certain defense rights in the investigation phase are only enjoyed by accused persons (*Beschuldigter*), not by a mere suspect (*Tatverdachtiger*).⁹⁶ Compared with the general spirit of the ECtHR,⁹⁷ this is a shortcoming of the German law on the right to defense counsel.

3.2.2. Mandatory appointment of defense counsel

3.2.2.1. Mandatory defense counsel

As mentioned above,⁹⁸ in contrast to the regulations in Article 6.3(c) of the ECHR, although the German Criminal Procedure Code seems to pay considerable attention to the presence of defence counsel at critical stages of the proceedings, there is no recognition of the right to defense counsel while the police interrogate suspect (see *supra*). In the following cases (listed in Article 140 para. 1 of the StPO), the defense counsel must however be present:

- The trial at first instance is before the Higher Regional Court (Oberlandesgericht) or the Regional Court;
- The accused is charged with a felony offence;⁹⁹
- The proceedings may result in the accused's being prohibited from exercising a profession;
- The accused is deaf or dumb;
- The accused has been interned for at least three months by order or with the approval of a court and has not been released at least two weeks before the opening of the trial;
- The question arises whether the accused should be detained for mental examination;

⁹⁶ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 259.

⁹⁷ ECtHR hold that the absence of defense counsel in the process of verification by the police will create detrimental prejudices to the suspect (the suspect). See detail ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No.36391/02 para. 54-55 and ECtHR 11 December 2008, *Panovits v. Cyprus*, no. 4268/04. The ECtHR has also assumed that the absence of defense counsel during investigation by the police will cause unfavorable prejudice to the suspect.

⁹⁸ See more detail *supra* section 3.2.1.

⁹⁹ German law provides for three degrees of infractions: felonies (*Verbrechen*) are criminal offenses punishable by at least one year of imprisonment; misdemeanors (*Vergehen*) are all other criminal offenses, punishable by either a fine or with imprisonment; petty infractions (*Ordnungswidrigkeiten*) are not deemed to be criminal (in the sense of carrying moral blame or stigma) and can only be punished by a fine and the temporary loss of driving privileges. (Article 12 of the German Criminal Code - StGB).

- The case concerns preventive detention proceedings (Sicherungsverfahren);
- A decision has been taken prohibiting the previous defence counsel from taking part in the proceedings.

In addition, mandatory defense counsel is required for juveniles and any persons having mental vulnerability.¹⁰⁰ They also have the right to defense counsel in all phase of the proceedings. In order to ensure the rights of juveniles, their legal representative¹⁰¹ or their legal guardian¹⁰² can appoint a hired defense counsel for them.

In the above cases, the wishes of the accused can be ignored and the presence of a defense counsel is mandatory. The mandatory nature is also indicated by provisions giving the Court the authority to make appropriate appointments in case where defense counsel is absent during trial.¹⁰³ In a case where defense counsel is mandatory, the court (the presiding judge) shall immediately appoint another defense counsel for the defendant or may decide to suspend the hearing if defense counsel fails to appear at the main hearing. The hearing shall be interrupted or suspended if the newly appointed defense counsel declares that he does not have the time needed to prepare the defense. If a suspension becomes necessary through the fault of defense counsel, he shall be charged with the costs caused thereby.

It can thus be said that, under Article 140 of the StPO, the accused must be defended, even if it is against his or her will. According to the view of several scholars in Germany, defense counsel play an important role in ensuring the effectiveness of criminal justice, and this is clearly recognised as the context for Article 140 of the StPO.¹⁰⁴

3.2.2.2. *Appointement defense counsel*

Under the provision of Article 141 of the StPO, if the accused has not chosen a defense counsel, the trial court will appoint one in the cases listed in Article 140 (1) of the StPO (see *supra*). An appointment will also be made in other cases, either by the court of its own motion or at the accused's request, if such a step appears necessary on account of the seriousness of the act in question, the factual or legal

¹⁰⁰ Art. 140(2) StPO

¹⁰¹ Art. 137 (2) StPO

¹⁰² Art. 67 (3) Juvenile Court Act

¹⁰³ Art. 145 StPO

¹⁰⁴ Christian Fahl, *supra* note 5.

complexity of the case, or if it is obvious that the accused cannot conduct his own defense (Article 140.2). The appointment of a defense counsel shall be implemented by the public prosecution at the pre-trial phase and by the presiding judge at the trial phase.¹⁰⁵ It can thus be seen that the appointment of a defense counsel is, unsurprisingly, linked to cases where defense counsel is mandatory. Accordingly, where the accused does not himself/herself (or cannot afford to) hire a defense counsel, the authority conducting the proceedings is obliged to appoint a defense counsel for him or her.

In practice, the right to defense counsel appointed is sometimes violated. Such cases of violation have been accepted and considered by the ECtHR. For example, in the case of the applicant *Pakelli*,¹⁰⁶ the ECtHR referred to the provisions of German law to give specific interpretations of key provisions regarding the appointment of a defense counsel, particularly:

- The official appointment of a lawyer by the trial court covers not only the proceedings before that court but also the written stage of any appeal on a point of law. If necessary, the trial court will make a special appointment for the latter stage.
- An accused who is in custody does not have an enforceable right to attend hearings in an appeal on a point of law – whether before the appeal court or the Federal Court (Articles 121 and 135 of the Courts Organization Act - EGGVG), but he may be represented thereat by a lawyer (Article 350 (2) of the StPO). If he has not chosen a lawyer and is not brought to the hearing, the President of the court having jurisdiction will appoint one for him if he so requests (Article 350 (3) of the StPO).

An accused who is at liberty may appear in person or be represented by a lawyer at the appeal hearing (Article 350 (2) of the StPO). According to the case-law of the Federal Court, defense counsel can be assigned to him only under Article 140 (2) of the StPO (see above), since Article 140 (1) of the StPO does not apply to hearings in an appeal on a point of law. (BGHSt, vol. 19, pp. 258-263).

Furthermore, the Federal Constitutional Court has held that defense counsel is to be appointed by the court of its own motion and at the expense of the State in serious

¹⁰⁵ Art. 141(3)(4) StPO

¹⁰⁶ ECtHR, 25 April 1983, *Pakelli v. Germany* (Application no. 8398/78).

cases if the accused cannot pay for a lawyer of his own choosing (BVerfGE, vol. 46, pp. 202-213).

It is a critical aspect of the right to defense counsel appointed that the appointment must ensure both the continuance of the case and the principle of a fair trial. In a case involving defendant Croissant, the ECtHR assumed that the German court violated Article 6.3(c) of the ECHR since the court appointed a defense counsel against the wishes of the accused and this was viewed as not ensuring a fair trial.¹⁰⁷ The ECtHR argued as follows: “An appointment that is contrary to the accused’s wishes with regards to number and person of defence attorneys is incompatible with the notion of a fair trial. However, a court may appoint additional counsel for the interests of justice. For example, if the appointment of an additional lawyer prevents any interruptions or adjournments of a trial or ensures that a defendant was adequately represented throughout the trial.” With the foregoing judgments of the ECtHR, the right to defense counsel appointed becomes more fully comprehensive.

3.2.3. Legal aid

It can be shown that the responsibility to pay legal costs has given rise to many problems in Germany.¹⁰⁸ Obviously, if the accused himself/herself hires a defense counsel, the costs must be paid by the accused. However, in cases where defense counsel is appointed by the State, who should pay?

The German Criminal Procedure Code (the StPO) has stipulated that in cases of mandatory defense counsel, the legal costs shall be paid by the State budget.¹⁰⁹ But this is not an absolute rule. In the opinion of most authors in Germany, legal aid is available in limited circumstances only, based on the seriousness of the offence and the vulnerability of the accused, and not on financial need.¹¹⁰ As far as costs are concerned: Article 465(1) states that the convict has to bear the costs if he is found

¹⁰⁷ ECtHR, 25 September 1992, *Croissant v Germany*, No. 13611/88. The facts were that the applicant, a German national, faced criminal charges in connection with his activities as the lawyer of various members of the 'Red Army Faction' or RAF. He was initially represented by two lawyers of his choice and then added another three lawyers. A court however, appointed another lawyer to his team. The applicant objected to that lawyer largely because he was not confident of his abilities. Eventually the applicant was convicted and he was ordered to pay fees to all three. The applicant appealed the fees to higher courts but the appeal was rejected. The applicant filed this suit alleging violation under Article 6(1) and (3)(c) of the ECHR. The court found that ordering the applicant to pay fees to the other lawyers did not violate Article 6 (1) and (3) (c) of the ECHR.

¹⁰⁸ See *supra* note 92.

¹⁰⁹ According to Article 140 of the StPO, if the assistance of counsel is mandatory (and not voluntary) the accused has to have a legal counsel.

¹¹⁰ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 3, p. 8.

guilty, otherwise the State does, including the cost of counsel (Article 464a (2)). Accordingly, the burden on the State will be very heavy if the defendant is charged with felony crime, proceeds to the appellate court and is there acquitted.¹¹¹

It can be said that the main difference between counsel engaged by the accused and counsel appointed by the judge is the method of appointment. Another difference is the source of counsel's payment. Whereas the accused has to pay the lawyers he or she engages, where a judge appoints defense counsel, the State has to pay the bill. The financial resources of the accused, however, do not play a role in determining whether the assistance of counsel is mandatory or not and only this is decisive for the question whether the presiding judge appoints counsel or not. It also does not make any difference to the question of who has to bear the costs in the end. If the accused is found guilty, he or she assumes the costs; if not, the State does.

One important point to be noted is the fact that in the German criminal procedure, there is no requirement to provide a defense counsel without charge for an indigent person unless he falls under the cases where defense counsel is mandatory. As such, no public defense service exists in Germany.¹¹² In the German criminal procedure, however, there is a form of legal aid provided for accused indigents which is known as 'legal aid equivalent' policy.¹¹³ It means that the state will share the burden of fees with such accused by a court appointment of defense counsel. After a conviction, the state is liable for his or her fees. The state will try to reclaim the fees from the convicted person but the burden of repaying the fees may be waived if the accused is acquitted. In this case, the 'legal aid equivalent' policy is applied. The fees payable to defense counsel shall be based on the provisions on the ordinary fees for defense services.¹¹⁴ The state authorities may be required to give information about the possibility of having a counsel appointed by the court and of

¹¹¹ The assistance of counsel under German StPO can be mandatory in certain cases listed in Article 140, if the main hearing is held at first instance at the Higher Regional Court or at the Regional Court - manslaughter and murder and other serious offences - or if serious criminal offences are brought before a lower court (Art.140(1)). Special attention has to be paid to Art. 140(2) concerning the lower courts, under which the presiding judge must appoint defence counsel, if assistance appears necessary because of the seriousness of the charge, or because of the difficult factual or legal situation, or if the accused simply cannot defence himself.

¹¹² Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 261.

¹¹³ *Ibid.*, pp. 261-65.

¹¹⁴ Defense activities are generally paid ordinary fees as provided by the state. For instance, the fee for explaining the case to the accused is 132 Euro; the fee for legal representation during the investigation stage is 112 Euro. The fee for legal representation during trial hearing at district court is 184 Euro per day. If the trial lasts more than 5 hours, the additional fee is 92 Euro. If the trial lasts more than 8 hours, the additional fee is 184 Euro. As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 262, (Information is last updated by these writers on 29 April 2010 at <http://bundesrech.juris.de/rvg/anlage_1_80.html>).

being supported by defense emergency services.¹¹⁵ Appropriate “urgent” defence services have been created jointly by regional lawyers and regional bar associations, particularly in heavily populated locations.¹¹⁶

German legal scholars assume that the aim of the “legal aid equivalent” policy is to guarantee that the accused shall immediately have access to defense counsel without first having to decide who will pay the fees. The determination whether the accused is indeed indigent shall be finally conducted.¹¹⁷ It is also notable that this is a support attached to the appointment of a defense counsel as such and is not restricted to the indigent alone. I believe that the indigent in the German criminal procedure does not have the absolute right to the assistance of the state. This point indicates that the spirit of Article 6.3(c) of the European Convention on Human Rights is not fully realized in Germany.

Article 6.3(c) of the ECHR states that if the accused has not sufficient means to pay for legal assistance, he or she is to be given it free when the interests of justice so require.¹¹⁸ In relevant verdicts of the ECtHR, the refusal to provide legal aid for the indigent at procedural phases has been held to be contrary to the spirit of the ECHR.¹¹⁹ Further, the ECtHR has also suggested certain ways of determining the level of poverty of the accused which are also linked to: (1) the severity of the offense and the possibility of severe penalties, (2) the complexity of the case; and (3) the social and moral context of the person charged.¹²⁰ However, in practice, the German procedures for determining whether there should be free defense counsel for an indigent person are very complicated and the rights of the indigent accused are still not completely in accordance with the spirit of the ECHR.¹²¹ This is a limitation existing not only in Germany but also in many other European countries. A recent survey has indicated that legal aid-related issues are viewed as a weakness (“*Achilles heel*”) of various criminal systems in Europe. Few countries have an excellent system for providing legal aid and the methods for evaluating indigent status vary significantly. The application of procedures is usually less regulated and

¹¹⁵ German Federal Court of Appeals (BGHSt, StV, 2006, pp.566-67). As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 279.

¹¹⁶ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Ibid.*,

¹¹⁷ *Ibid.*, p. 262.

¹¹⁸ This is emphasized in many ECtHR cases. See for instance, *Croissant v. Germany* (Series A, No 237-B, Application No 13611/88), where the ECtHR held that: “Free legal assistance is to be provided under Article 6.3(c) only if the accused has insufficient means to pay counsel.”

¹¹⁹ ECtHR, 14 January 2003, *Lagerblom v. Sweden*, No. 26891/95, §54.

¹²⁰ ECtHR, 24 May 1991, *Quaranta v. Switzerland*, No. 1274/87, §35.

¹²¹ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 3, p. 8.

it may not even be clear that the competent authorities can make decisions on the matter.¹²²

3.2.4. Selection and Waiver of defense counsel

As mentioned above, during any interrogation held while the accused is in custody, the police, the public prosecutor or the judge must inform him that he has at all time the right to defense counsel of his choice.¹²³ In line with Article 6.3(c) of the ECHR, the accused has the right to select a defense counsel if he can himself pay the fees for employing a lawyer. In a relevant ECtHR case, the right to select a defense counsel can be limited if the payment of legal aid is in charged by the State.¹²⁴ Similarly, the right to select a defense counsel under German law is covered in a very limited manner. This results from the determination of the responsibility to pay legal aid. As already mentioned, where the assistance of counsel is mandatory, the accused can either choose an attorney-at-law or a professor of law at a German university as counsel (Article 138.(1)). If he or she does not know a lawyer, Article 141(1) states that the court will subsequently choose one for the accused from the number of attorneys-at-law admitted to practice before a court within the court district (Article 142(1) sentence 1). The accused shall be given the opportunity of naming an attorney-at-law within a time limit to be specified and the presiding judge must appoint the counsel named by the accused unless there are significant reasons not to do so (Article 142 (1) sentences 2 and 3).

With regard to the right to refuse a defense counsel, no provision in the German Criminal Procedure Code mentions this. It can be said that this is a basic difference compared to Vietnamese¹²⁵ and American laws.¹²⁶ Under the ECHR, the wording of the clause granting the right to an adequate defense (Article 6. 3(c)) gives rise to some ambiguity, in that the use of the disjunctive “or” might suggest that the defendant has an entitlement to a choice: a right to defend himself in person “or” through a lawyer. So an accused who lawfully chooses to defend himself in person waives his right to be represented by a lawyer.¹²⁷ But under German law, defence by a lawyer may be made mandatory, so that the accused is deprived of the option of defending himself/herself as well as the right to waive defense counsel. I share

¹²² Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, pp. 40-41.

¹²³ Arts. 136, 163a StPO

¹²⁴ ECtHR, 14 January 2003, *Lagerblom v. Sweden*, No.26891/95, §54.

¹²⁵ See more detail *supra* Chapter 2 (section 2.3.2.1).

¹²⁶ See more detail *infra* Chapter 4 (section 4.2.2.2).

¹²⁷ *Melin v France* (1993) 17 European Human Rights Report (EHRR) 1.

the view that, by virtue of Article 6.3(c) of the ECHR, the authorities cannot force an officially appointed counsel on an accused who can procure legal assistance for himself/herself.¹²⁸ German law should adopt a policy that will guarantee the common interests of the State and not, at the same time, cause any damage to the legitimate rights of the accused.

3.2.5. *Effective defense*

After the Lisbon Treaty came into force on 1 December 2009, the EU nations have been seeking to establish a harmonised system in the field of criminal justice.¹²⁹ One of the key points is to establish a regime that guarantees the procedural rights of the accused including the right to an effective defense. It can be understood that the fundamental content of the right to an effective defense is to guarantee that the accused and his defense counsel shall have the most favorable conditions to protect his rights and interests against the accusations of prosecutors in a fair manner. It is virtually certain that¹³⁰ the judgments of the ECtHR on the right to defense counsel have expanded on the contents of Article 6.3 (c) of ECHR in the following respects: the right to effective defense must be guaranteed on the basis of equality of arms between the prosecution and the defence;¹³¹ the right to silence must be guaranteed;¹³² the right to an adversarial trial must be guaranteed¹³³ and the accused should be able to exercise ‘effective participation’ in criminal procedure.¹³⁴ The ECtHR also stressed that defense counsel must be effective and the State is under an obligation to ensure that the lawyer has the information necessary to conduct a proper defense;¹³⁵ if the appointed lawyer is ineffective, the State is obliged to provide the suspected with another one.¹³⁶

¹²⁸ Paul Mahoney, *Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R.*, The Irish Judicial Studies Institute Journal, Vol.4, No.2, 2004, <http://www.jsijournal.ie/html/Volume%204%20No.%202/4%5B2%5D_Mahoney_Right%20to%20a%20Fair%20Trial%20in%20Criminal%20Matters.pdf>.

¹²⁹ In 2009, the European Council adopted the Stockholm Programme, setting out EU strategy in the area of freedom, security and justice for the period 2010-2014. One of the areas highlighted for action was procedural rights.

¹³⁰ This is derived from the survey results of authors as Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, pp. 23-63.

¹³¹ ECtHR 15 May 2005, *Öcalan v. Turkey*, No.46221/99, §140.

¹³² ECtHR 25 February 1993, *Funke v. France*, No.10828/84 and ECtHR 19 March 2009, *Bykov v. Russia*, No.4378/02.

¹³³ ECtHR 28 August 1991, *Brandstetter v. Austria*, No.11170/84.

¹³⁴ ECtHR 26 May 1988, *Ekbatani v. Sweden*, No.10563/83 and ECtHR 23 February 1994, *Stanford v. the United Kingdom*, No.16757/90.

¹³⁵ ECtHR 9 April 1984, *Goddi v. Italy*, No. 8966/80 and ECtHR 4 March 2003, *Öcalan v. Turkey*, No. 63486/00.

¹³⁶ ECtHR 13 May 1980, *Artico v. Italy*, No. 6694/74.

The above elements constitute the fundamental contents of ‘the right to effective defense’ - the contents that the EU wants respected and complied with in particular legislation systems. It is thereby clear that a critical factor in the right to an effective defense is the role of the defense counsel. From this angle of approach and by comparing the EU position to existing German legislation, we have found that generally, German criminal procedure has fully adopted the spirit of the ECHR and the ECtHR. Nevertheless, German criminal procedure still retains its special features, especially regarding the provisions on the right to a defense counsel. During this research, we have seen that like Vietnamese, German criminal procedure does not use the concept of “effective defense counsel” as is done in US criminal procedure.¹³⁷ However, the German guarantee of the right to effective defense counsel has been covered to some extent in the provisions guaranteeing the rights of the defense counsel as can be seen from the following:

3.2.5.1. Right of access to the Case File

As explained by the German Federal Court of Appeals (BGH), the *case file* covers all pieces of incriminating or exonerating evidence that are relevant to the case. Under German law, the defense counsel is allowed to involve him or herself in the investigation of matters related to the accusations of police and prosecutors. The current regulations indicate that this right has been recognized in respect of an accused who is in provisional custody. Both constitutional provisions and statute created rules of procedure have provisions ensuring that requisite and timely information be submitted to the accused and his defense counsel so that they can actually exercise their right to defend. Article 104 of the German Basic Law provides the corresponding constitutional protection under German law, essentially requiring: (1) that a person's freedom be restricted only pursuant to a formal law; (2) that the legitimacy and prolongation of detention be determined by a judge without delay; (3) that a provisionally detained suspect be brought before a judge, no later than one day following the arrest, in order to be informed of the nature of the accusation and to permit the suspect to object to his or her detention; and (4) that a relative or confidant of the detainee be immediately informed of the detention.

The Ninth Chapter of the StPO (Articles 112 - 131) establishes the specific terms of the broad protections outlined in Article 104 of the Basic Law. Article 114 of the StPO requires that a detained suspect must be informed (at three separate points -

¹³⁷ See *infra* Chapter 4 (section 4.2.2.3).

immediately upon arrest, by a judge at a hearing and in writing) of the facts establishing a "strong suspicion of the act" and the existence of one of the statutory "reasons for confinement," the two elements that must be met in order to justify detention. According to Article 114(b) of the StPO¹³⁸ the accused person under arrest is to be informed in writing and in language he/she understands about (1) the right to remain silent; (2) the right to consult counsel; (3) the right to inform a relative, as long as this does not jeopardize the investigations. Pursuant to Articles 117, 118 and 118(a), a suspect may challenge his or her on-going (judicially ordered) pre-trial detention at any time at a full judicial hearing. In the case of such a challenge, defense counsel must be appointed if the detention has lasted longer than three months. (Article 117(4) StPO). In any event, defense counsel may be appointed earlier if the court concludes that the complexity of the proceedings and/or seriousness of the accusation necessitate it or if the prosecution so moves. (Articles 140(2) and 141 StPO).

Article 115(3) of the StPO requires that a suspect be given the opportunity at his or her detention hearing to "present those facts which are in his favor." This right, of course, can only be enjoyed if the suspect and/or defense counsel have been given the chance to become aware of any favorable evidence that happens to be in the prosecution file. In acknowledgment of this reality, Article 147 of the StPO grants defense counsel the right to inspect the prosecution file upon request.

It is also notable that access to the case file is guaranteed at post-investigation stages; however, it is limited at the pre-trial stage.¹³⁹

In addition to the provisions of the Constitution (GG) and the StPO, the judgments of the ECtHR and the competent federal courts have expanded on the right to have access to and investigate the case file of the defense counsel in the following ways:

- During the process of investigation, if the accused is detained, the defense counsel is entitled to access the case file related to the arrest warrant. This is the conclusion of the ECtHR in a case claimed to be breaching Article 5 of the ECHR.¹⁴⁰ This

¹³⁸ This provision as amended entered into force on 1 January 2010.

¹³⁹ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 273.

¹⁴⁰ In 2001, the German applicants in two cases (ECtHR 13 February 2001, *Garcia Alva v. Germany*, No. 23541/94, para. 39 and ECtHR 13 February 2001, *Schops v. Germany Case*, No. 25116/94, para.44) were either not given access to prosecution files, or not given full access to prosecution files, to aid and inform their challenges to pre-trial detention. Two of the applicants were denied access pursuant to Article 147(2) of the StPO, which permits the prosecution to deny access if a suspect's review of the files "can endanger the purpose of investigation." (Applicants Garcia Alva). The second applicant was not given access to the prosecution files because of the ambiguity and inconsistency of his request for access. (Applicant Schöps).

content had been confirmed by the German Federal Constitution Court (BverfG) in 2006.¹⁴¹ Nevertheless, the defense counsel may still be refused access to the case file if such access might jeopardize the investigation.¹⁴²

- It should be noted that when the accused is represented by defense counsel, he himself does not have the right to access the case file. In cases where such access is necessary to ensure an effective defence, the defense counsel is entitled to provide his client with copies of documents related to the case file. According to some commentators, this limitation is aimed at asserting the important and independent role of the defence counsel in the criminal justice system and, normally, the defence counsel has the responsibility of informing his client of the contents of the case file.¹⁴³

- In cases where the accused is without defence counsel, his right of access to the case file shall be limited to information or excerpts/copies from the file, and only if this does not jeopardize the investigation, or does not go against the interests of third person (for example, witnesses).¹⁴⁴

It can be seen that defense counsel is vested with rights enabling him to best assist the accused once the accused is detained. These provisions are similar to the common standards in the ECHR.¹⁴⁵ In practice, however, the guarantee of this right has not been absolutely protected and has even been violated. The results of recent

The ECtHR found that German authorities violated Art. 5(4) of the ECHR when the applicants (at the relevant time, detained criminal suspects) failed to gain access to prosecution files that contained information and evidence relevant to court challenges to their pre-trial detention. In all these cases mentioned, the ECHR returned to the principle of "equality of arms" central to the Convention's conception of a just and fair criminal process, and applied this principle to ensuring the procedural rights of the defense counsel and their client. The ECtHR stressed that the proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. These requirements are derived from the right to an adversarial trial as laid down in Art. 6 of the ECHR, which means, in a criminal case, that both the prosecution and the defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In own judgments in those cases, the ECtHR held that, while national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon". Source: <<http://hudoc.echr.coe.int>>.

¹⁴¹ BverfG, New magazine for criminal (NStZ- neue zeitschrift fur strafrecht), 2006, 459. As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 274.

¹⁴² Art. 147 (7) StPO

¹⁴³ Synthesis, assessment and conclusion of the Higher Region Court (Oberlandesgericht) in Köln, StV, 1999, p. 12; and case comment (Donath & Mehle, p. 1399). As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 274.

¹⁴⁴ Art. 147 (7) StPO; and see also ECtHR 17 February 1997, *Fourcher v. France*, No.10/1996/629/812.

¹⁴⁵ *European Court of Human Rights Finds Violations of the European Human Rights Convention in German Pre-trial Detention Procedures*, German Law Journal Volume 2 (2001), <<http://www.germanlawjournal.com/index.php?pageID=11&artID=56>>.

surveys have shown that most criminal defense lawyers were in broad agreement that, in complex cases, provisional detention is often used as an investigative measure to ‘motivate’ the accused to give a (partial) confession and that the grounds for provisional detention are interpreted broadly and liberally.¹⁴⁶

In brief, the first element of an effective defense must be allowing the defense counsel to fully and correctly access the information in the case. In the context of the ECHR, this key involvement of defense counsel is a factor reflecting the principle of “equality of arms”. However, the ECHR does not contain any specific provision allowing the defense counsel to have the right to seek evidence, to investigate the truth, to interview the witnesses or to summon the experts who will give evidence. This matter is subject to the member state’s legislation only. According to assessments of many experts, in certain countries, of the giving of information to the accused and/or his defense counsel is usually limited by the investigating agencies.¹⁴⁷ Nevertheless, in the most recent case, the ECtHR emphasized that from the start of the police investigation stage, the accused must have access to the evidence, particularly that potentially in his or her favor.¹⁴⁸ This may be regarded as the strongest legal standard established to date.

3.2.5.2. *The right to adequate time and facilities for preparation of the defense*

It is obvious that the defense will be more effective if the defense counsel is provided with a reasonable period and adequate conditions to prepare for the defense. This is not only to guarantee the rights and interests of the accused but also to ensure equality of arms in criminal procedure. As the police and prosecutors are fully equipped with both legal and investigative skills, ensuring that the defense counsel has the same conditions is necessary to ensure objectiveness and fairness. This has been recognized in the ECHR: “*Everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his defence.*” (Article 6.3(b)).

Nevertheless, the corresponding provisions in the German Criminal Procedure Code do not contain any clear recognition of this. The right to have an adequate period to prepare for the defense during the investigation is not mentioned at all.¹⁴⁹ In practice, the time defense counsel has to prepare for the defense depends on the

¹⁴⁶ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 271.

¹⁴⁷ *Ibid.*, p. 45.

¹⁴⁸ ECtHR 13 October 2009, *Dayanan v. Turkey*, No. 7377/03, § 32.

¹⁴⁹ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 295.

time requiring the appearance of the accused before the police, prosecutors or investigative judges for interrogation.¹⁵⁰ Requesting such an appearance is entirely subject to the whim of the police, prosecutors or investigative judges as the case may be, without any specific regulations on the time needed for implementation. During the trial stage, the presiding judge also has a discretion on when to start the trial.¹⁵¹ However, the initial summons must be issued within a minimum period of one week.¹⁵² This is considered as a timeline guaranteeing the defense counsel time to prepare for his defense.¹⁵³ Nevertheless, a survey indicates that German lawyers find that the period provided by law is too short.¹⁵⁴ In addition, the time period of twenty-four hours for the summons¹⁵⁵ is also very short.¹⁵⁶ Commentators have assumed that these time periods should be further extended to be in line with Article 6.3 (b) of the ECHR.¹⁵⁷

Generally, German law can be said not to provide an adequate time period for defense counsel. In practice, defense lawyers usually have to take advantage of any period suspending or adjourning the trial court if they wish to prepare the defense dossiers.¹⁵⁸

3.2.5.3. *Communication between defense counsel and client*

Preventing the defense counsel from communicating with his client when the latter is in provisional custody will be a factor affecting the quality of the defense and may adversely affect the accused. By Article 6.3(c) of the ECHR, being entitled to communicate with the client held in custody is an important fundamental right of the defense counsel and it is an aspect determining the defense's effectiveness. This

¹⁵⁰ *Ibid.*,

¹⁵¹ Art. 213 StPO reads that: "The date for the main hearing shall be set down by the presiding judge".

¹⁵² Under Article 216 of the StPO, a defendant who is at liberty shall be summoned in writing with the admonition that he shall be arrested and brought before the court if he fails to appear without excuse. A defendant who is not at liberty shall be summoned by being notified of the date of the main hearing. The defendant shall then be asked what applications, if any, he wants to make for his defence at the main hearing. A time limit of at least one week must elapse between service of the summons and the day of the main hearing (Art. 217 StPO).

¹⁵³ Commentator Gmel 2008a, marginal No.1. As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 296.

¹⁵⁴ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Ibid.*,

¹⁵⁵ Art. 418(2), (3) StPO stipulates that the accused shall be summoned only if he does not appear at the main hearing of his own volition or is not brought before the court. He shall be informed in the summons of the charges against him. The time limit set in the summons shall be twenty-four hours.

¹⁵⁶ Comments of German lawyers. See Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 296.

¹⁵⁷ Meyer-Goßner 2008, §418 marginal No.4b. As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Ibid.*,

¹⁵⁸ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Ibid.*, p. 295.

content has been emphasized in several ECtHR cases. For instance, the defense counsel is not limited merely to contacting his client. They must be able to meet and converse without being monitored by a third party.¹⁵⁹ In general, preventing the defense lawyer having contact with the accused is a violation of one of the basic requirements of a fair trial in a democratic society.¹⁶⁰

In general, German law has provided a guarantee in line with the ECHR on defense counsel's right to communicate with the accused. In accordance with the StPO, the accused has the right to be represented by the defense counsel in all procedural stages, including the investigation stage.¹⁶¹ The federal court of appeal held that the state authorities have a responsibility to assist the accused in contacting his or her defense counsel.¹⁶² In cases where the accused is indigent, the state will assist the accused in contacting the defense counsel through defense emergency services.¹⁶³

Concerning the rights of defense counsel, Article 148 (1) of the StPO prescribes that in cases where the accused is kept in provisional detention, he/she and her/his defense counsel have the right to communicate freely, in order to talk and prepare the defense in private, and without state supervision.¹⁶⁴ The communication can be conducted orally or in writing. Telephone communication can also be accepted if it is allowed by the judge or prosecutor.¹⁶⁵ For the purpose of protecting privacy between the defense counsel and his client, the laws also prohibit any form of infringements of the right to communication between the defense counsel and his client, for example the use of wire tapping devices or correspondence reader devices.¹⁶⁶ Additionally, defense counsel has the right to refuse to testify regarding correspondence and other evidence passing between him and the client and such correspondence and the like shall not be subject to seizure.¹⁶⁷

Communication, however, can be refused if the accused is accused of crimes of infringing upon national security, for example terrorism as provided for in Article

¹⁵⁹ ECtHR 27 November 2007, *Zagaria v. Italy*, No 58259/00 § 30.

¹⁶⁰ ECtHR 20 June 1988, *Schönenberger & Durmarz v. Switzerland*, No. 11368/85.

¹⁶¹ Art. 137 StPO

¹⁶² 42 BGHSt, p. 15. As quoted by Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 279.

¹⁶³ See *supra* section 3.2.3.

¹⁶⁴ This content was also noted in Section 37 (1) of the Regulations of Provisional Detention (Untersuchungshaftvollzugsordnung - UVollzO), <<http://www.gesetzesguide.de/uvollzo.html>>.

¹⁶⁵ *Ibid.*,

¹⁶⁶ *Ibid.*,

¹⁶⁷ Article 53(2) StPO stipulates that defence counsel may also refuse to testify regarding information that was entrusted to them or became known to them. Besides, Art. 97(1) (sentence 1) StPO holds that written correspondence between the accused and defense counsel shall not be subject to seizure.

129(a) of the German Code of Criminal Law (StGB). In these cases, all communication via correspondence must be closely supervised by the judge. The judge shall have the right to provisionally impound documents [and/or] letters and at the same time shall have the obligation of keeping secrets that became known by him during his supervision.¹⁶⁸ If there is any indication that the communication may cause danger of bodily harm, any oral or written communication between the accused provisionally detained with other inmates and the outside world will be suspended (provisions of *Kontaktsperrgesetz*).¹⁶⁹

In conclusion, in order to better guarantee the right to defense counsel and to improve the effectiveness of the defense, the defense counsel needs to be provided with the necessary guarantees that they will be able to perform their defense functions effectively. German scholars have always assumed that the effectiveness of the defense does not only depend on the rights vested in the defense counsel but is also subject to his or her ability to apply such rights in practice and also, be it said, to the independence, professionalism and practicing skills of the defense counsel.¹⁷⁰ Currently, however, no common standards have been set forth for assessing the skills of lawyers, even though the basic professional requirements has been to some extent improved.¹⁷¹ The quality of the defense is sometimes also dependent on the financial capacity of the accused.¹⁷² This is a limitation that will be hard to eliminate.

¹⁶⁸ Art.148a (1) StPO

¹⁶⁹ *Kontaktsperr* literally means “Blocking of Contacts” and “Gesetz” may be translated as the legislative Act or Statute, so that *Kontaktsperrgesetz*, literally translated, means “Act concerning the blocking of contacts”, an Act introducing the possibility of incommunicado detention in the case of imminent terrorist threats. This form of incommunicado detention was adopted in 1977, by introducing a new section (section 4, Sections 31-38) to the Introductory Act to the Courts Organization Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz*, so called EGGVG). See Anna Oehmichen, *Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences*, German Law Journal, Vol.09, No.07, 2008,

< <http://www.germanlawjournal.com/article.php?id=973>>. And see also Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, p. 280.

¹⁷⁰ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 3, p. 8.

¹⁷¹ *Ibid.*,

¹⁷² *Ibid.*

3.3. Actual status of the guarantee of the right to defense counsel¹⁷³

In addition to the illustrations and analyses of the legal provisions concerning the guarantee of the right to defense counsel provided above, the author will now generalize on the overall shortcomings of the German criminal procedure system. The comments will be based on surveys conducted by German authors and researchers seeking to further clarify the actual situation of the right to defense counsel.¹⁷⁴ The results of the surveys have indicated that, although Germany's existing legal framework guarantee, to a large extent, the right to a fair trial, a number of problems remain.

At the investigation stage, a competent investigation body determines the procedural capacity of a person who is either suspected or accused of the crime in question. In practice, a suspect does not have the same rights as the accused and lacks, for example, the right to defense counsel or the right to be informed of the nature of the accusation. A suspect does have the right to be provided with legal aid during interrogation by the police; however, there is no consistent mechanism to assist him in obtaining such defense counsel. The police have often encouraged suspect that it is not necessary to expect the help of defense counsel.

As a result, an accused person can be interrogated and detained for a long period without the assistance of counsel. Similarly, counsel can be refused access to the case file related to his/her client in the pre-trial stage and may not allowed to exercise the right to take excerpts from the case file needed for the preparation of the defense. This may happen even though the investigative body finds it will have no influence on the investigation nor create any risks for witnesses.

Legal aid has been provided in a limited way, purely depending on the seriousness of the offence without considering the financial status of the person in need of assistance. All that matters when an indigent accused is involved is determining whether he/she is obliged to reimburse counsel's fees advanced by the State. In addition, the procedures for determining indigence are still very complicated and a burden on the accused seeking to demonstrate his/her situation.

¹⁷³ From the start, the author has faced difficulties in researching German laws, especially legal comments of German scholars themselves by virtue of the language and sources of documents as. Therefore, in order to have an exact assessment of the practice regarding the guarantee of the right to defense counsel in German criminal procedure, this content is mainly based on the research results presented in the book "*Effective Criminal Defense in Europe – Executive Summary and Recommendations*", *supra* note 3.

¹⁷⁴ *Ibid.*,

Surveys have revealed major discrepancies in implementing legal aid policy. Even where there are sufficient funds for legal aid, especially at the pre-trial stage, many expenditures related to the investigative activities of defense counsel are not reimbursed. This does not motivate defense counsel to conduct their defense properly! Furthermore, payments to defense counsel are not made promptly. Appointed defense counsel therefore often fall below the highest standards of capacity and professional morality. The results in cases where the defense counsel are appointed are very different from those where the client's hired counsel are involved.

Another important factor which is recognized as affecting the quality of the defense is the perspective of those in charge of the procedure regarding the role of defense counsel in criminal procedure as a whole. Defense counsel in Germany are often not backed up by those in charge and they are not actually considered as an "organ of the criminal justice system". Both judges and prosecutors tend to doubt the results of investigations by defense counsel. As a result, defense counsel has no opportunity to take an independent role in investigations and find evidence for the defense. Survey results have shown that many judges have tended not to accept evidence provided by defense counsel for the reason that such evidences does not have a sound legal basis. This has an influence on the conduct of the majority of the defense counsel; many amongst them have been discouraged and have even discontinued their defense due to the uncooperative attitude of the judges.

Facing with such shortcomings, German researchers have put forward some solutions for improving the criminal procedure laws. Such recommendations focus on the three following aspects:

1. First, change the awareness of the persons in charge of the procedure and have them recognize that the capacity of the accused may be affected by criminal procedures (and they may even lose their right to freedom). Whether they are suspects or accused persons, they must be entitled to the same rights, that is, they must be fully and clearly informed of their rights for the purpose of being able to apply such rights in an effective manner.

2. Next, carry out research and introduce simple and effective measures to help the indigent entitled to legal aid during all procedural stages.

3. Continue improving the standards of criminal defense counsel teams, develop high quality and effective training, create favorable mechanisms allowing counsel to be fully able to participate in defense activities; ensure reasonable payment for legal aid activity and, especially in the pre-trial stage, ensure payments are made within a reasonable time period.

The above solutions would serve as an indication that German criminal procedure can improve its mechanisms and guarantee the right to defense counsel while concurrently guaranteeing consistency with the standard guarantees of the European Convention on Human Rights.

To conclude, German criminal procedure is typical of inquisitorial proceedings, which is not a procedure that puts the parties directly in opposition to one another.¹⁷⁵ The burden of proof does lie on the public prosecutors. The way to find the truth is by interrogation. According to the assessments of German scholars, trial activities constitute the key phases of the proceedings and where the court continues expanding the investigation before making its judgment.¹⁷⁶ These features have influenced the role of defense counsel and created certain restrictions on the accused's right to defense counsel. However, today, courts and public prosecution accept defense counsel as members of the profession and independent "organs of justice."¹⁷⁷ In addition, German criminal procedure has taken over some of the strong points of the adversarial system, especially those concerning proceedings at court. Accordingly, the defense counsel now has many opportunities to argue with the public prosecutors and also has the right to inspect the entire prosecution file. Generally, German legislation complies with the spirit of the ECHR, save for the very few situations in breach of Article 6.3 (c), which have been discussed above.

Similar to that of Vietnam, German criminal procedure has retained certain limitations, for example, it does not recognize a right to defense counsel present during any investigation by the police; the accused does not have the right to refuse defense counsel in cases where the appointment is mandatory; the policy on legal aid is not the most supportive for the accused and the role of defense counsel has not always been correctly recognized and assessed. These limitations, in addition to the many advantages of German criminal procedure provide lessons that Vietnam

¹⁷⁵ Mireille Delmas-Marty, *supra* note 22, p. 326.

¹⁷⁶ *Ibid.*,

¹⁷⁷ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 17, pp. 281, 304.

can follow as it seeks to improve the legislation guaranteeing the accused's right to defense counsel.

CHAPTER 4: GUARANTEE OF THE ACCUSED PERSON'S RIGHT TO DEFENSE COUNSEL UNDER AMERICAN CRIMINAL PROCEDURE LAWS

Having dealt with the motivation for this dissertation, the author now selects the United States (US) criminal justice system which will be studied and compared with Vietnamese legislation with respect to the guarantee of the accused person's right to defense counsel. Chapter 3 has indicated that there are many striking similarities between Vietnamese and German criminal procedure. The US criminal procedure will be seen to be different in many respects, most of which are linked to the adversary system of justice prevailing in the US. This makes different distinctions in the roles of the public prosecutors, the accused and the judges in criminal proceedings. The defense counsel in criminal procedure play a very important role in US criminal procedure and the right to defense counsel is a constitutional right that must be protected. In the case of *McMann v. Richardson*, 397 U.S. 759, 771 (1970), the Supreme Court has also recognized the role of the trial court as a protector of a defendant's right to counsel: "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of the incompetent counsel, and ... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their court...". The whole manner of making laws is quite different from that used in those nations with an inquisitorial system in general and Germany and Vietnam in particular. Nevertheless, looking at the most basic features, we will still find fundamental similarities when we study the US rules guaranteeing the right to defense counsel. The studies presented in Chapter 4 will show the fundamental differences and the significant similarities between US and Vietnamese (and German) criminal procedure. This will provide a basis with the help of which the author will be able to pose questions regarding and recommend solutions for the improvement of Vietnamese legislation on the right to defense counsel.

4.1. An overview of US Criminal Procedure

Studying US criminal procedure, we recognize that there are many factors governing the formation and development of the mechanisms which ensure the right to defense counsel. This section of Chapter 4 will present these features.

4.1.1. Sources of law

United States is a federal republic composed of fifty states. Different systems of criminal procedure are in place in each state and in the federal courts. Each system is controlled by several overlapping bodies of law. Most states have enacted codes of criminal procedure to replace the earlier patchwork of statutes and judicial decisions that defined the process of criminal justice. To supplement these codes, the states supreme courts often exercise their authority to adopt rules of criminal procedure that further specify how the criminal process is to be conducted. Similarly, criminal cases in the federal courts are conducted in accordance with statutory requirements set by Congress and the Federal Rules of Criminal Procedure adopted by the United States Supreme Court. However, all state and federal criminal justice system are alike in one respect: they all are required to adhere to the requirements of the federal Constitution. To put it another way, in the United States, most of the law of criminal procedure comes from the United States Supreme Court's interpretation of the Constitution, in particular the Fourth, Fifth and Sixth Amendments.¹

The rights and interests of the accused have also been guaranteed by the Constitutions and laws of the states even if they also have to adhere to the guarantees recognized in the federal Constitution. Most provisions in state Constitutions are drafted in a way similar to the Bill of Rights. The Federal Supreme Court still has the responsibility of explaining or objecting to judgments of state Supreme Courts concerning issues related to rights recognized in the Bill of Rights or the guaranteed rights of the accused.² Judgments of the federal Supreme Court are considered as the foundation for setting forth rights (including the rights required to be guaranteed in criminal procedure). However, the states Supreme Courts also have their independent right to set their own standards. In view of the judge, representing of the accused in a specific case at state level required having sufficient basic knowledge of Constitution and by-laws of state, from which all issues related to state law, can be described on the basis of arguments of federal

¹ The federal courts have always been subject to constitutional requirements. These amendments on their face apply only to the federal government, but during the 1960's, the Supreme Court applied the due process guarantees of the Bill of Rights to the States and interpreted those guarantees in a more expansive manner than it had done previously. See LaFave, Israel and King, *Criminal Procedure*, 2nd Ed., 1999, West Publishing, p. 148.

² Russell L. Weaver, Leslie W. Abramson, John M Burkott, Catherine Hancock, *Principle of Criminal Procedure*, Thomson West, 2004, p. 2.

constitution.³ This shows a typical characteristic of the laws of the United States generally and the law-making role of judges in particular. Lawyers in the United States rely on different sources of law (see supra), however, the most important judgments are those made by the supreme court of the United States. These awards are key judicial precedents and lay the professional ground for defense counsel and prosecutors practicing at local, state and federal levels.⁴ This is considered as the first point of reference in most works systematizing criminal procedure.

Regarding the right to defense counsel, the Sixth Amendment states: “*In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense*”. Based on this fundamental provision, legislative acts of the United States and the Federal Rules of Criminal Procedure have specified provisions regarding the order of proceedings in the settlement of criminal cases. However, as stated above, the specific guarantee of the right to defense counsel in general has been determined by precedents of the Supreme Court of the United States. In order to study the guarantee of rights in a more specific way, it is advisable to study specific judicial precedents related to rights recognized as contained in the Sixth Amendment.

From the foregoing analysis, it is clear that the first basic difference between US criminal procedure, Vietnamese criminal procedure and German criminal procedure is the application of the sources of law relating to the settlement of criminal cases.⁵ The role of the courts and the validity of precedents, among other things, are key differences. It is understandable that this depends on the traditional manner of the application of the common law. Another point of difference relates to the presentation of the evidence for crimes, which is a function of the adversary system of justice as discussed below.

³ *Ibid.*,

⁴ *Ibid.*,

⁵ For Germany, even though there is a commitment to comply with the case law of the European Court of Human Rights as a member of the European Convention on Human Rights, there is also a Civil law and Continental law tradition, and in reality, the settlement of cases still has to comply with national Constitutional provisions and Status. This is similar to the case of Vietnam, where the sources of applicable laws are based on Constitution and Codes. The decision of the Supreme Court is viewed more as an orientation for settlement activity and lacks binding validity.

4.1.2. Adversary system of Justice

One point that cannot be missed when discussing the US criminal procedure is the specific feature of the adversary system of justice. This can also be understood as a feature of the traditional common law. In terms of guaranteeing rights, personally, I consider this feature of the US criminal procedure is an outstanding strength since it upholds fairness and efficiently guarantees the legitimate rights and interests of the accused.⁶

The American system takes the view that there is no better method for the termination of controversies which cannot be settled by negotiation than resolving them in the courtroom.⁷ Considering the viewpoint of lawmakers, the Court in *Herring v. New York*, 422 U.S. 853, 862 (1975) stressed that: “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will promote the ultimate objective that the guilty be convicted and the innocent go free.” However, US legal researchers stress the role of defense counsel in upholding and improving the adversary system of justice. They note that when the defense does not measure up to the prosecution, there is a heightened risk of the system making egregious mistakes.⁸ Accordingly, an American criminal trial must be conducted on the basis of equality between the parties concerned in finding the truth.⁹ This system has as an outstanding characteristic that it emphasizes the activity of cross-examination by both defense counsel and prosecutor. In a jury trial, the cross-examination is to be conducted before the jury and the jury shall make the decision on whether the accused is guilty or not guilty.¹⁰ Based on such reasoning, an experienced police officer might even think that when he makes an arrest, he will not need to be worried about the preliminary investigation and may not be too diligent in the seizure of evidence.¹¹ Under US law, the success of the trial system is dependent upon both sides being represented by contentious opposing

⁶ As mentioned above, both Vietnam criminal procedure and Germany criminal procedure have inquisitorial model. Judges and (public prosecutors) play the main roles in the accusation and the presentation of evidence. The role of defense counsel is slight. As such, fair argument can hardly be said to be respected, especially at trial. See more detail *supra* Chapter 2 (2.1) and Chapter 3 (3.1).

⁷ Ronald L. Carlson, *Criminal Justice Procedure*, Fourth Edition, Anderson Publishing co., 1990, ISBN: 0-87084-131-9, p. 388.

⁸ Report of the National Right to Counsel Committee on April 2009 (Hereinafter Report of 2009) is available at <<http://www.constitutionproject.org>> and <<http://www.nlada.org>>.

⁹ Ronald L. Carlson, *supra* note 7, p. 1.

¹⁰ A jury trial is only conducted if the prosecutor refuses a guilty plea. In the United States, the procedure of plea bargaining is considered a special feature. The judge has the right to pass a judgment on the result of such bargaining without summoning the jury.

¹¹ Ronald L. Carlson, *supra* note 7, p. 2.

advocates (the defendant as well as the state).¹² In a larger sense, in the US adversary system, fairness is obtained if both sides are represented by lawyers who are evenly matched in areas such as available time to devote to the case, training, experience, and resources.¹³

Along with other scholars, I believe that fairness will not be upheld when the role of the defense counsel is not respected.¹⁴ If the accused and the defense counsel are not well equipped with opportunities and other conditions necessary for their struggle against the prosecution, it will be hard to get a fair result and at the same time the court may have difficulty in finding out the truth.

It is necessary to mention another point relating to the specific characteristics of the adverse system of justice, namely the assumption, for the benefit of the accused of “reasonable doubt”. As mentioned above, one manifestation of fairness between the state and the accused is the fact that the state guarantees the accused the right to a defense through defense counsel. Another manifestation is also contained in the fact that any charge made by the state must be demonstrated beyond any reasonable doubts. To prevent mistaken convictions and to respect the dignity the accused is presumed to be legally innocent. The state must meet a heavy burden to overcome this presumption, and it must follow all the rules in doing so.

This has long been the standard for conviction in criminal cases, and the Supreme Court has held that it is a constitutionally required element of due process.¹⁵ The reasonable doubt standard is not always used in every stage of a criminal prosecution, but it is the main standard of proof used in criminal trials. At any stage of the trial, a reasonable doubt is any doubt about guilt that remains after the jury has weighed all of the evidence and seriously considered the matter. In the view of American lawyers, consideration on the basis of reasonable doubt will provide further protection against government oppression.¹⁶ The burden is entirely on the prosecutor, and his burden of proving guilt must be discharged on a beyond a reasonable doubt standard. If the prosecutor fails to carry that burden, an acquittal is

¹² Jerold H. Israel, Yale Kamisar, Wayne R. LaFave, *Criminal Procedure and the Constitution*, Thomson West, 2004, p. 25.

¹³ *Ibid.*,

¹⁴ Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford, 2005, pp. 94-99.

¹⁵ Reasonable doubt is required in criminal proceedings under the DUE PROCESS CLAUSE of the Fifth Amendment to the US Constitution. In *IN RE WINSHIP*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), the US Supreme Court ruled that the highest standard of proof is grounded on "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

¹⁶ Jerold H. Israel, Yale Kamisar, Wayne R. LaFave, *supra* note 12.

required. Reasonable doubt is a much higher standard than the burden of proof called for elsewhere in the law. As such, reasonable doubt becomes a characteristic of the adversary procedure. This is the basic difference between the criminal procedure of the United States in comparison with the criminal procedure of Germany and Vietnam where the seizure of evidence and cross-examination in pre-trial stage are considered as burdens imposed on the investigating bodies. The most critical point of the US adversary system of justice is that it determines the truth during adjudication with the prosecution and defense counsel competing against each other while the judge ensures fairness and adherence to the rules. This demonstrates the importance of the activity of defense counsel in rebutting the accusations made by the prosecutors which is a basic difference from the inquisitorial system, as used in Vietnam is among other countries.

The prosecutor

As in Germany and Vietnam, the prosecutor in the US is an agent of the government and by obtaining a conviction the prosecutor serves the government's interest: punishing the criminal and preventing future crime. The prosecutor has a unique role in the criminal justice system. According to the American Bar Association (ABA) Standards Relating to the Administration of Criminal Justice, "The prosecutor is an administrator of justice, an advocate, and an officer of the court etc. The duty of the prosecutor is to seek justice, not merely to convict."¹⁷ Because the prosecutor is an agent of the government, his task is to do justice. Doing justice means that the prosecutor should attempt to convict only those who actually are guilty, not simply those against whom a conviction can be obtained. It also means that the prosecutor is required to uphold the law, including all of the laws that make it difficult to obtain a conviction. Prosecutors enjoy great discretion in the exercise of their duties. Prosecutors can decide which cases and defendants to charge, what charges to bring, and how serious a sentence to seek. Beside that, the Supreme Court has held that the prosecutor has a constitutional duty to disclose evidence to the defense, particularly evidence that tends to exculpate the defendant.¹⁸ At trial, the prosecutor has a duty to represent the government in their prosecutions while during the investigative phase of trial, a prosecutor may also be responsible for supervising the work of police and investigators. This may require

¹⁷ ABA Standards Relating to the Administration of Criminal Justice, Prosecution Standard 3-1.2 (b) - (c)

¹⁸ John H. Langbein, *The origins of Adversary Criminal*, 2002, Oxford, pp. 26-36.

the prosecutor to prepare search warrants, issue subpoenas, and supervise grand jury proceedings.

However, under the US accusatorial system, the prosecution has the burden of proving its case through its own efforts, not through any forced inquisition of the accused.¹⁹ It seems that this constitutes a considerable difference from the role of the prosecutor in the laws of Vietnam and Germany. This is, in the view of many, a weakness of the US criminal procedure because it violates notions of fair play, the balance between the individual and government, and the dignity of the individual.²⁰ If a defendant were compelled to speak, he/she would be faced with what has been called the “cruel trilemma of self accusation, perjury, or contempt” - being forced to choose between confessing a crime, lying and being punished for perjury, or keeping silent and being punished for contempt.

The defense counsel

The defense counsel obviously plays an important role in the US criminal procedure and this stems from the nature of the adversary system of justice. According to American lawyers, “It would be convenient if we could only protect the rights of innocent people, but we can’t, so we use an adversary process that empowers a defense attorney to assert the rights of any defendant.”²¹ The absence of effective counsel undermines faith in the proper functioning of the adversary process.²² Thus, defense counsel in the US justice system is not only the representative of the accused but also serves to check the application of government power, by ensuring that the defendant’s rights are protected. In their role as the client’s advocate, they put the government to proof, requiring that the case against the defendant be proved beyond a reasonable doubt.²³

To cite views of judges, “[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and

¹⁹ *Ibid.*,

²⁰ Harry R. Dammer and Erika Fairchild, *Comparative Criminal Procedure Justice Systems*, 3th Ed., 2006, Thomson Wadsworth, p. 136.

²¹ John H. Langbein, *supra* note 18.

²² John N. Fedico, *Criminal Procedure for the Criminal Justice Professional*, Thomson Wadsworth, 2005, p. 28.

²³ John H. Langbein, *supra* note 18.

liberty...” The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.²⁴

Under US law, defense counsel represents defendants in criminal actions. Unlike prosecutors, who must serve the “interests of justice” regardless of whether doing so entails convicting or acquitting a defendant, “the basic duty defense counsel owes to the administration of justice and as...officer(s) of the court is to serve as defendants’ counselor(s) and advocate(s) with courage and devotion and to render effective, quality representation.”²⁵ Many defendants cannot afford a lawyer, and a lawyer is critical to having a fair adversarial process.²⁶ Accordingly, the Supreme Court has recognized a right to the assistance of counsel in all cases in which the defendant faces incarceration.

With regard to the rights of the accused, the right to a lawyer (whether hired or provided) is probably the most important for preventing wrongful convictions and harassment.²⁷ Under US law,²⁸ a lawyer aids in investigation of the facts, negotiation with the prosecutor, examination of the witnesses, presentation of legal and factual arguments to the judge and jury, and presentation of an appeal. A lawyer also provides psychological support to the defendant and an air of objectivity which the defendant himself could not provide. On the other hand, besides protecting the innocent, the right to counsel has further important effects on the legal system. The American adversary system presumes that both sides will be vigorously represented so that the neutral judge can arrive at the truth (which presumably lies somewhere between the two positions); but if only one side is represented, the system may not function effectively. This indicates that, if the poor lacked lawyers when prosecuted, their respect for the law would be likely to decrease. Counsel for the poor and other alienated groups can also help to bring about orderly reform of the law as an alternative to disorderly or violent change. In addition, the widespread availability of counsel can serve to educate by way of counselling those who otherwise would be without counsel, and such education may prevent them from

²⁴ Johnson v. Zerbst, 304 U.S. 458, 462 (1938). To the same effect, see Avery v. Alabama, 308 U.S. 444 (1940), and Smith v. O’Grady, 312 U.S. 329 (1941).

²⁵ American Bar Association (ABA) Standards Relating to the Administration of Criminal Justice, Defense Standard 4-1.2(b).

²⁶ Marc Miller, Ronald F. Wright, *Criminal Procedure – Cases, Statutes and Executive Material*, 3th Ed., Aspen Publisher, 2007, p. 776.

²⁷ Stuard S. Nagel, *The Rights of the Accused*, Sage Publications, Beverly Hills, London, 1972, p. 17. As quoted by John H. Langbein, *supra* note 18, p. 44.

²⁸ Erwin Chemerinsky, Laurie Levenson, *Criminal Procedure Investigation*, Aspen Publishers, 2008, p. 2.

getting into legal trouble with the law.²⁹ In my opinion, this is a common feature in all criminal justice systems. However, the implementation and respect for the role of counsel are different in each country. Within a model of adversarial criminal procedure, defence counsel in the US seems to be more active.

Who is the counsel for the defense? Being a lawyer is the main professional qualification for participating in criminal defense actions; all or most of them are members of the ABA or part of a legal aid group within a defender organization.³⁰ The representation of indigent defendants is provided for through a number of different types of service-delivery systems: public-defender programs; contract-attorney programs; or simply by means of an appropriate judge or judicial officer assigning the indigent's defense to a private attorney by an order of appointment.³¹ Beside that, US law also recognizes other kinds of assistance to the accused beyond giving them a defense lawyer. The *Ake* decision (*Ake v. Oklahoma*, 470 U.S. 68, 1985) has been invoked by federal and state courts to require that other kinds of assistance, both expert and non-expert, are provided to indigent defendants, thereby helping to ensure that the accused receives meaningful legal representation.

This kind of defender may be compared to the statutory representative under Vietnamese law.³² They may not be professional lawyers but are accepted by the authorities as entering the case to protect the accused. However, there is not any information on who can be a defense counsel except lawyer, and it is not clear whether it should be a parent or a relative or any one? Regarding this matter, German law is more specific. The statutory representative is anyone who is fully capable under the law and is accepted by the appropriate agencies.³³

4.1.3. Legal Foundation of Due Process of law

In my research on the US criminal procedure and the right to defense counsel, I have learned that this right is established on a long history of judicial reasoning and practice. That relates to the fact that citizens must be guaranteed *due process*, a principle originating from England.³⁴

²⁹ John H. Langbein, *supra* note 18, p. 44.

³⁰ See: §3006, Chapter 201, Part II, Title 18 of the United States Code.

³¹ Russell L. Weaver, Leslie W. Abramson, John Burkoff, Catherine Hancock, *supra* note 2, p. 33.

³² See *supra* Chapter 2 (section 2.1.3.3).

³³ Arts. 137-148 StPO

³⁴ See more detail *supra* Chapter 1. The concept of due process has its roots in early English law. The British King John in 1215 conceded in the Magna Carta (which is the first document forced onto an English king by his subjects in an attempt to limit his power by law) as follows: "No free man shall be taken or imprisoned or

The phrase 'due process of law' is most familiar in the context of the United States Constitution but it has origins in the early history of English law. In the early United States, the terms *law of the land* and *due process* were used somewhat interchangeably.

The words "*due process of law*" expresses the fundamental ideal of American justice. They are found in both the Fifth and Fourteenth Amendments of the Bill of Rights.³⁵ The Fifth Amendment is now thought to protect an individual from action by the federal government while the Fourteenth Amendment extends the same protection with respect action by state governments. While the Bill of Rights was originally construed as providing restraintson the federal government only, later interpretations by the US Supreme Court, based on the Fourteenth Amendment, have established that the restraint is similar applicable to the states. These two due process clauses provide that the government must act fairly, according to established legal procedures, with regard to a person's rights to life, liberty, and property. Due process means, for example, that an individual accused of a crime is guaranteed certain legal procedural rights, such as the right to know the charges against him, to confront his accusers in court, to have legal counsel, and to have a jury trial.³⁶ These and other rights of the accused are specified in the 4th, 5th, 6th, and 8th Amendments to the Constitution.

By the middle of the 19th century, "due process of law" was interpreted by the US Supreme Court to mean that "it was not left to the legislative power to enact any process which might be devised. The [due process] article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."³⁷

disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." Magna Carta itself immediately became part of the "law of the land". However, it merely required the monarchy to obey the law of the land where nobles were concerned. In the year of 1354, under the reign of Edward III of England, the phrase *due process of law* first appeared in a statutory rendition of Magna Carta in A.D. These words were used to explain the protection set fourth in Magna Carta, as follows: "No man of what state or condition he is, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."

³⁵ Ronald Banaszak, Sr., *A documentary history - Fair Trial Right of the Accused*, Greenwood Press, 2002, Introduction section.

³⁶ *Ibid.*,

³⁷ David J. Bodenhamer, *Fair trial – Rights of the accused in American History*, Oxford University Press, 1992, p. 98.

The concept of due process is thus the foundation for the protection of human rights in criminal procedure. On such a basis, the right to a defense in US criminal procedure is firstly guaranteed by the overall guarantee of due process. Most cases of the US Supreme Court have referred to the content of *due process of law* and the principle of *fair trial* for the purpose of asserting the obligations and responsibilities of the state courts to guarantee the right to counsel for the accused.

Initially, in the case of *Powell v. Alabama*, 287 U.S. 45 (1932) the Court indicated the principle of fair trial to assert the right to appointed defense counsel. On that basis, the Court declared that “the right to the aid of counsel is of this fundamental character.” This continued in *Gideon V. Wainwright*, 372 U.S. 335 (1963) which is seen as a landmark in US criminal procedure. In this case, Justice Hugo Black stressed the basic principle that guaranteeing o the right to counsel is essential to a fair trial. The judge stated that:

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

Furthermore, the US Supreme Court recognized the fundamental role that legal representation plays in a fair criminal justice system. In this case, the Justices unanimously concluded that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide lawyers to people who can't afford them. According to the decision, "[t]he right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment."

The practical judgment of the US Supreme Court has shown that, traditional due process analysis often employs a case-by-case evaluation.³⁸ That was the approach adopted in the pre-*Gideon* cases dealing with the right to counsel at trial, when that issue was governed by a “fundamental fairness” standard rather than the Sixth Amendment.³⁹ It was also the approach later applied in *Gagnon*,⁴⁰ dealing with

³⁸ The relationship between the principle of due process and the right to defense counsel will be analysed in the subsequent sections of this Chapter.

³⁹ *Powell v. Alabama*, 287 U.S. 45, 68 (1932), *Bett v. Brady*, 316 U.S. 455 (1942).

⁴⁰ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

counsel in probation and parole revocation proceeding. On the other hand, in *Evitts*,⁴¹ the Court adopted a flat due process requirement for counsel on a first appeal as a matter of right.

It is apparent that the right to defense counsel is guaranteed in most Constitutions. This right, even if established in different ways, has one common characteristic which is that it evolves from respect for fairness in criminal procedure. Similarly, the right to counsel is now accepted as a fundamental precept of American justice.⁴² The scope of rights guaranteed by the Constitution has increasingly been extended,⁴³ but all arguments to this effect are firstly aimed at guaranteeing the fairness of legal proceedings. This shows that there is an intimate connection between the guaranteeing of the fairness of the legal procedures and the guaranteeing of the legal rights of the parties to the legal proceedings, the accused being one such. The purpose of ensuring that *due process* is considered as the root of the US criminal procedure is to ensure the rights of the accused in general, of which the right to defense counsel is one among others. As a result, the right to defense counsel in the criminal procedure of the United State is guaranteed in many ways.⁴⁴ In all cases, however, this right is consider to have evolved from the principle of the due process and the right to fair trial.

4.2. Guarantee of the accused person's right to defense counsel under US criminal procedure

4.2.1. Generality of the guarantee of the right to defense counsel in US criminal procedure⁴⁵

One of its highly interesting features, though also a difficulty for writers studying the US criminal procedure regarding the guarantee of the right to defense counsel, is the fact that the writers must always follow the law-making process of the US Supreme Court through a chain of precedents.⁴⁶ Hence, in this section, using a historical methodology, the writer traces the process of forming and developing the

⁴¹ *Evitts v. Lucey*, 469 U.S. 387 (1985).

⁴² Ronald Banaszak, *supra* note 35, Introduction section.

⁴³ Extension with effectiveness enhancement-driven with respect to rights of the accused. See This content will be explained in the following parts of the dissertation.

⁴⁴ Jerold H. Israel, Yale Kamisar, Wayne R. LaFave, *supra* note 12.

⁴⁵ See general Ronald Banaszak (*supra* note 35); Israel, Kasmisar, LaFave (*supra* note 12); Joseph G. Cook, Paul Marcus, Melanie D. Wilson, *Criminal Procedure*, LexisNexis, 2009.

⁴⁶ As mentioned above, most awards of the US Supreme Court are based on the principle of *Due Process*. As such, summarized notes of precedents will express the conjunction between the aforesaid principle and the guarantee of the right to defense counsel.

right to defense counsel in US legislative history via key representative precedent cases. This must be the initial basis if a writer is to consider and assess at which level this right is guaranteed in US criminal procedure. This will be further explained in the following sections of the thesis.

Following the colonial period, the Declaration of Independence of 4 July 1776 was a political instrument declaring the break-away of the 13 colonies in North America from England. The States then promulgated their own Constitutions. Formerly, criminal procedure in the United States had been influenced by progress in the rights provided by the criminal procedure of England. After the Constitution 1787, the right to defense counsel appeared but its development was still based on the laws of England during the colonial period. This right has been supplemented and perfected by the Constitution and judicial precedents of the United States.

1787 - 1790: The Constitution of the Federated United States was adopted in 1787 and included 7 clauses. After being approved, the Constitution became the supreme law of the United States. However, the right to a defense was not recognized in these Clauses of the Constitution. At the time, the Judicial Act of 1789 provided that in federal courts parties could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. This guideline only recognized that the accused had the right to defense counsel if the accused could afford to employ them. The right to have appointed defense counsel was further recognized in an Act of 30 April 1790 stating that: “Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law, and the court before which he is tried, or some judges thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours.” These were the only legal instruments describing the right to defense counsel at that time. However, these two acts were replaced by the Sixth Amendment in 1791.

1791: this year marked the adoption of the 10 first Amendments.⁴⁷ The 5th and 6th Amendments provided basic contents in relation to trial rights, among which the right to defense counsel was included. These rights are believed to have been previously recognized in state constitutions and to have their roots in the history of England and the colonies.⁴⁸ As per the Sixth Amendment, the accused shall be

⁴⁷ The Constitution of the United States comprises 27 Amendments.

⁴⁸ Ronald Banaszak, *supra* note 35, p. 47.

entitled to the assistance of the defense counsel. From this period till the beginning of 20th century, however, the right to defense counsel was not further extended. This meant that this right is narrowed in one aspect of which the accused shall have right to defense counsel if he may desire and have afford to hire a lawyer. The right to have appointed defense counsel shall not be applied in all cases but only in felony crimes subject to death penalty.

1932: In the case of *Powell v. Alabama*, 287 U.S. 45, 68 (1932),⁴⁹ the court considered the right to a defense to be a “fundamental right” and this right “has always included the right to have the aid of counsel when desired and provided by the party asserting the right”.⁵⁰ However, for the purpose of underlining its arguments, the court did not cite the contents of the Sixth Amendment and did relate to the due process right provided in the Fourteenth Amendment. Arguments in the court pointed out that the right of defense is a part of the *due process of law* and is guaranteed by the Fourteenth Amendment. Accordingly, the accused is basically guaranteed the right to counsel employed by him for his defense. The right to have appointed defense counsel was initially applied in special cases and in felony crimes where the accused might be subject to the death penalty only; if he was incapable of employing defense counsel, the court is obliged to appoint defense counsel for him.

⁴⁹ Ozzie Power and six other African American young men were convicted in Scottsboro, Alabama, in 1931 for the rape of two white girls. Ozzie and others came from neighboring states and were travelling through Alabama. The crime so outraged the white community that within six days of the arrest, the youths were put on trial. The trial lasted one day and they were sentenced to death. The trial occurred so quickly that the young men did not have time to contact their families and were too poor to afford a lawyer. The judge vaguely appointed members of the Alabama bar to represent them. Their conviction was appealed to the Alabama Supreme Court, which upheld the conviction. The chief justice, however, dissented strongly, stating they had not received a fair trial. Powell’s lawyer argued that their client had been denied a fair trial and that a fair trial should be guaranteed in every state because the Fourteenth Amendment promises due process. The lawyers built their hope on a series of Supreme Court decisions that required states to honor the First Amendment rights of freedom of speech, press, religion, and assembly. Each right was ruled as necessary for due process. Thus, through the due process clause of the Fourteenth Amendment, states were required to honor the First Amendment rights. The Supreme Court agreed. It ruled that the youth indeed did not have a fair trial. The Court recognized the hostile atmosphere in which the trial occurred, the quickness of the trial, and the systematic exclusion of African Americans from juries. But the Court focused its decision on the absence of counsel for an adequate defense. The Court stated that the trial court has an obligation to make sure defendants are adequately represented by counsel. The Court limited its decisions to capital cases that involved those who cannot afford an attorney or are unlikely to be able to defend themselves. For the first time, the Court applied the due process clause of the Fourteenth Amendment to a trial rights case. See Ronald Banaszak, *supra* note 35, p. 82.

⁵⁰ In relation to this right, in the case of *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), Judge Warren clarified the difference between retained counsel and court-appointed counsel: “*Regardless of whether petitioner would have been entitled to the appointed counsel, his right to be heard through his own counsel was unqualified*”, however, the Judge also underlined that “*even when a person is entitled to a appointed counsel, he has the right to be considered via the counsel employed by himself without any limitation.*”

1938: Following *Powell v. Alabama*, the court faced many difficulties in dealing with the application of the Sixth Amendment in cases where the accused was indigent and could not afford to exercise his right to defense counsel albeit he desired to have counsel appointed for his defense. Therefore, the case of *Johnson v. Zerbst*, 304 U.S. 458 (1938)⁵¹ has been considered as an extension of the previous judicial precedent of *Powell v. Alabama*. Accordingly, the federal court must guarantee the right to defense counsel of the accused in any criminal cases. Only when the accused refuses, it is permissible to revoke this right of the accused. For the time being, the right to represent of the defense counsel has been cited on the basis of the Sixth Amendment. This right, however, has been only applied to cases occurring at federal level.

1942: The case of *Bett v. Brady*, 316 U.S. 455 (1942)⁵² has been considered a backward step with regard to previous precedents in relation to the right to defense counsel as applied at state level. Formerly, state courts only guaranteed the right to employ counsel as the federal court did in the case of *Powell*. In the case of *Bett*, the defense continued citing the Sixth Amendment in relation to the due process right used in *Powell v. Alabama* in order to support its argument that any court could appoint defense counsel upon request and in the interest of fairness. After this case, however, state courts only had the right to have appointed defense counsel in cases where the accused was proved to be in “special circumstances” and not in all cases.

1945 - 1961: the judicial precedent of *Bett* was applied in this period. This meant that state courts were not obliged to appoint defense counsel in all cases. We could

⁵¹ In this case, Judge Black set forth the right to appoint counsel for indigent person. He underlined: “*The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional right... Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty... If the accused however is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty*”.

⁵² *Betts* was arrested and tried for robbery in the state of Maryland. He could not afford an attorney and requested that one be appointed. The judge refused, saying that counsel was not appointed, except for cases of murder and rape. He was convicted in a trial by judge without a jury and sentenced to eight years. *Betts* appealed to the Supreme Court claiming his denial of an attorney violated the due process guaranteed him by the Fourteenth Amendment. The Supreme Court determined that *Betts* was not denied due process. The Court reasoned that the due process court does not bind states by the specific rights contained in the Sixth Amendment. Due process is violated in state courts when the proceedings constitute a denial of fundamental fairness shocking to a civilized country’s sense of justice. Thus the circumstances of the particular case will determine whether due process is violated. In their dissent, Justice Black, Douglas, and Murphy disagreed. They argued that any procedure “which subjects innocent men to increased dangers of conviction merely because of their poverty” was unfair. They preferred an unequivocal application, rather than the Court’s case-by-case process. See Ronald Banaszak, *supra* note 35, p. 97.

mention a number of cases in this period to demonstrate the fact that if there were a lack of counsel, the accused would be unfairly judged under the Fourteenth Amendment, and, as a result, the court must appoint counsel in “special circumstances”. The case of *Butte v. Illinois*, 333 U.S. 640 (1948) and the case of *Hamilton v. Alabama* 368 U.S. 52 (1961) extended the right to defense counsel appointed at state courts in cases subject to death penalty.

1963: *Gideon v. Wainwright* 372 U.S. 335 (1963)⁵³ is a landmark case and a turning-point for the right to defense counsel in the United States. This case overruled the case of *Bett* and stated that the right to defense counsel is a fundamental aspect of the fair trial principle recognized in the Sixth Amendment. Accordingly, the accused whether in a capital or non-capital case and whether in state court or federal court shall have right to counsel appointed. If the accused is indigent, the court is obliged to appoint counsel for him. Only when the accused intentionally refuses is the court not bound by this obligation. By comparison with *Powell v. Alabama* (1938), the right to defense counsel appointed has thus been extended to noncapital cases. Following this, in the case of *Miranda v. Arizona*, 384 U.S. 486 (1966), the court gave a list of points that must be made by the police (the Miranda Warning) to a person being questioned or charged, among which notification of the right to have defense counsel is one.

1967: *In Re Gault*, 387 U.S. (1967)⁵⁴ continued affirming the judicial precedent of *Gideon* in relation to the cases in which the accused is a delinquent child. The Court held that juveniles in delinquency proceeding were to be afforded the same

⁵³ *Gideon*, a Florida indigent, was tried and convicted for breaking into a poolroom with intent to commit a misdemeanor. This crime is a felony in Florida. He requested and was denied counsel since Florida required the appointment of counsel only in capital cases. *Gideon* acted as his own lawyer, was found guilty, and sentenced to five years. From jail, he appealed his case claiming due process protection of the Fourteenth Amendment. The Court appointed Abe Fortas, later a Supreme Court Justice himself, to represent *Gideon* before the Supreme Court. In this case, the Court reversed itself, overruled *Betts v. Brady*, and required the state court to appoint a lawyer. The decision was written by Justice Black, who had earlier written dissents. This decision of the Court was consistent with the reasoning of his earlier dissents. The state retried *Gideon*, and he was found innocent. This case is an important step in the “nationalization” of the Bill of Rights. Every defendant in state courts has the right to an attorney in capital and noncapital cases. The Court reasoned that having an attorney in U.S. adversary system of criminal justice is “fundamental and essential to a fair trial.” See Ronald Banaszak, *supra* note 35, p. 122.

⁵⁴ *Gerald Gault* was a 15-year-old charged with making obscene phone calls. He was removed from his home by police without notice to his parents, questioned, and held. Shortly thereafter, he was charged with being a “delinquent minor”. At his hearing, the complaining witness did not appear. He was judged to be delinquent and sentenced to the State Industrial School for the rest of his minority, six years. Had he been an adult, the maximum penalty permitted would have been \$5 to \$50 and imprisonment for not more than two months. *Gault*’s parents filed petitions and appeals that led to the Supreme Court. It ruled that *Gault* was denied due process guaranteed under the Fourteenth Amendment. This decision revolutionized the treatment of minors in juvenile courts throughout the nation. It listed specific due process rights that must be incorporated into juvenile procedures. See Ronald Banaszak, *supra* note 35, p. 160.

procedural due process that was applicable in criminal trials, including the assistance of counsel (*Gault*, at 42). It affirms that the delinquent person must be also guaranteed the due process right in accordance with the Fourteenth Amendment. Any activity relating to a charge must be conducted in the presence of the representatives of the accused (parent, guardian and defense counsel). Soon after, in *Heryford v. Parker* 369 F.2d 393 (10th Cir. 1968), the Court of Appeal for the Tenth Circuit relied on the reasoning in *Gault* to hold that an individual with a mental disability has the right to counsel in a proceeding to civilly commit him to a state training school. The Court stressed that it is the possibility of involuntary incarceration, without regard to the purpose of the detention, which requires that an individual be afforded due process protections at every step of the proceeding, including the right to counsel.

1972: *Argersinger v. Hamlin*, 407, U.S. 25 (1972)⁵⁵ extends the case of *Gideon* by regarding the right to defense counsel appointed as applicable to misdemeanors which may be subject to imprisonment.⁵⁶ What is crucial is that the accused may be subject to any penalty of imprisonment notwithstanding how short or long it is.

1979: *Scott v. Illinois*, 440, U.S. 367 (1979) re-affirmed the case of *Argersinger* that the right to have defense counsel appointed at the state court has been extended to all cases subject to imprisonment. However, the Court declared that only misdemeanors resulting in “actual imprisonment” would require appointed counsel. Practically, the right to defense counsel appointed has been widely applied by states, and is required for any defendant charged with a misdemeanor penalty that may result in 6-month imprisonment or a fine of more than \$500. See *Commonwealth v. Thomas*, 507, A. 2d 57 (Pa.1986).

Conclusion: One can conclude that the right of the accused to defense counsel has been increasingly extended in terms of its scope of application (state court and

⁵⁵ *Argersinger* was indigent and charged with carrying a concealed weapon. His request for an attorney was denied because his potential penalty was six months or less. In *Gideon v. Wainwright*, the Court had ruled that in every trial involving imprisonment of six months or more, the accused was entitled to be represented by counsel. In this decision, the Court expanded the *Gideon v. Wainwright* requirement of an attorney to include any trial where the accused could be sentenced to any period of confinement, no matter how short. The Court reasoned that trials involving short prison terms can be as complex as trials resulting in long prison terms. The very essence of a fair trial is to be represented by an attorney in US adversarial system. See Ronald Banaszak, *supra* note 35, p. 184.

⁵⁶ In this case, the court underlined that if the refusal of the right to defense counsel appeared to be completely rejected, no one would be subject to imprisonment regardless of any crimes (petty, misdemeanor, felony) committed by him unless his defense counsel participated in defending at the trial. See Joseph G. Cook, Paul Marcus, Melanie D. Wilson, *supra* note 45.

federal court) and content. On the basis of cases of the US Supreme Court, the right to defense counsel is guaranteed in two ways: *first*, the defense counsel is employed by the accused himself/herself; *second*, the defense counsel is appointed by the court.

In the first situation, if he can afford to employ a defense counsel it is the inherent right of the accused to do so. In the second, the scope of application is limited as it is a mandatory obligation of the court to appoint a defense counsel in certain cases only: where the accused in the case is indigent and he/she is accused of any crime charged with a penalty of imprisonment;⁵⁷ or the accused is a juvenile facing proceedings or a person suffering from mental illness or a similar disability.

On studying the US criminal procedure, we find that the appointment of defense counsel in criminal cases accounts for the majority of all cases involving defense counsel. These results from the fact that many people involved in criminal cases are indigent.⁵⁸ If, historically, the right to defense counsel originated as merely the right to retain a lawyer,⁵⁹ it now assures a defendant legal assistance in almost all criminal cases. The Federal Rules of Criminal Procedure⁶⁰ has many general provisions on the appointment of counsel. Rule 44 stipulated:

- ***Right to Appointed Counsel.*** A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

⁵⁷ It is notable here that the right to appoint defense counsel and the right to be represented by defense counsel at no charge are two different matters. The court is obliged to appoint defense counsel in the above cases. However, in order to have the right to defense counsel at no charge, the accused must be those who are indigent. As a result, the federal government and state government in the United States have to set up modes of practice in order to determine the “indigent” status of the accused. This content will be analyzed in the following parts of the thesis.

⁵⁸ Marc Miller, Ronald F. Wright, 2007, *supra* note 26, p. 759.

⁵⁹ William M. Beaney, *The right to counsel in American Court*, University of Michigan Press, 1955, pp. 164-88 (summarizing all fourteenth amendment assistance of counsel claim that Supreme Court heard between 1942 and 1950). Beaney argued that the Framers intended merely to guarantee the accused the right to hire counsel for his defense. Thus, for criminal proceeding, the assistance of counsel clause constitutionalized the Judiciary Act of 1789, ch.20, §35, 1 Stat.73 (1789), which provided that “in all the court of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorney at law as right the rules of the said court...”.

⁶⁰ The Federal Rules of Criminal Procedure, as amended to December 1, 2009. The rules have been promulgated and amended by the United States Supreme Court pursuant to law, and further amended by Acts of Congress. This document has been prepared by the Committee in response to the need for an official up-to-date document containing the latest amendments to the rules. These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States. When a rule so states, it applies to a proceeding before a state or local judicial officer.

- ***Appointment Procedure.*** Federal law and local court rules govern the procedure for implementing the right to counsel.
- ***Court's Responsibilities in Cases of Joint Representation.*** The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

In comparison with the key precedents, this clause clearly makes one notable point, namely that both state courts and federal courts have the obligation to appoint defense counsel for the accused who cannot afford to employ defense counsel in all procedural stages up to the court of appeal. The fee for the appointed defense counsel, however, is not set. This will be considered below.

The judicial precedents mentioned above have been considered as setting the fundamental standards guaranteeing the rights of the accused. However, specific aspects of this guarantee will be further studied and analysed in the following sections of this thesis.

4.2.2. Aspects of the guarantee of the right to defense counsel

4.2.2.1. Time for the application of the right

In previous chapters, considering when the right to defense counsel is applied for is a significant issue for the accused in both Vietnamese and German criminal procedure. The determination of the time when the accused has the right to implement his/her constitutional rights is among the matters most in need of being amended.⁶¹ This proves that the role of the defense counsel is very important. The absence of defense counsel in any procedural stage is deemed to be prejudicial to the accused.

Studying this point, we see that US criminal procedure specifies the responsibilities of the government in guaranteeing the right to defense counsel in critical stages of

⁶¹ This right was extended in 2003 where the accused had the right to defense counsel at the time of detention. Previously, this right was applied in a limited manner after the investigative body gave its decision on prosecution with respect to the defendant. Currently, many recommendations have been given as to how this right must be guaranteed upon the arrest and how the suspect must have the right to silence. The National Assembly, however, has not recognized this right so far.

the proceedings. We shall see that the right to defense counsel is granted at 3 stages: at pre-trial, at trial and sentencing and on appeal.

Guaranteeing the right to defense counsel at pre-trial

The Sixth Amendment provides that “[i]n all criminal prosecution, the accused shall... have the assistance of counsel for his defense”. This language has raised the question: what is a “criminal prosecution”? And when the right will be provided? Cases of the US Supreme Court interpret this as follows:

Even though in the cases of *Powell v. Alabama*, 287 U.S. 45, 68 (1932) and *Gideon v. Wainwright*, 372 U.S. 335 (1963), the judge considered that “*the right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated*”, these comments have not set any clear criterion for determining the time at which the right to have defense counsel is applied and guaranteed.

In 1964, in the case of *Escobedo v. Illinois*, 378 U.S. 478 (1964),⁶² the court found that the accused had the right to defense counsel during the inquisitorial stage since incriminating statements could be made then and later used in the trial. In this case, although the court gave a more precise explanation than in previous cases, the specific time at which the accused is guaranteed a right was still not given. Only in 1966, in the case of *Miranda v. Arizona*, 384 U.S. 486 (1966), regarding the *Miranda Warning*,⁶³ the Supreme Court laid down the standard points which must be notified by the police to a suspect before conducting any interrogation. The Supreme Court said that “*when an individual is taken into custody or otherwise*

⁶² Escobedo was questioned extensively by police regarding the fatal shooting of his brother-in-law. He asked to speak to his lawyer, but his request was refused. His lawyer, aware of his questioning, went to the police station and requested to see his client. His request was refused. The lawyer persisted, talking to various officers and supervisors, but he was not allowed to see Escobedo. During questioning, Escobedo made incriminating comments that were introduced at his trial. He was convicted of murder. The Supreme Court decided that the denial of access to his lawyer during questioning was a violation of the Sixth Amendment guarantee to counsel. Previously, that guarantee existed only during the trial. The Court reasoned that when the investigation focused on a person about to be charged with a crime, that person needed the assistance of counsel. To deny counsel when incriminating statements are made, undermined the effectiveness of counsel at trial. The Court also ruled any incriminating statements made without the presence of a lawyer could not be admitted at any subsequent trial. Further, this requirement applied to the states, since the right to counsel was applied through the Fourteenth Amendment in *Gideon v. Wainwright*. See Ronald Banaszak, *supra* note 35, p. 134.

⁶³ That warning made this case one of the most famous in the history of the Court. Every TV and movie depicting an arrest includes the statement that police need to make before any interrogation of a suspect. The Court’s reasoning was consistent in including both self-incriminating statements and the right to an attorney. Thus the protections of the Fifth and Sixth Amendments were extended to pre-trial investigations and required of states. The Court added that Congress and the states could find other remedies to protect the rights of accused, but the warning was a minimum and an essential ingredient in any other remedy. The Court also ruled that any evidence gained in violation of this ruling could not be admitted at trial. See Ronald Banaszak, *supra* note 35, p. 149.

deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege.” Those safeguards which require that the suspect be advised prior to any questioning are as follows: (1) the suspect has the right to remain silent; (2) anything the suspect says can be used against the suspect in a court of law; (3) the suspect has the right to the presence of an attorney; and (4) if the suspect cannot afford an attorney, one will be appointed prior to any questioning if the suspect so desires.⁶⁴ Accordingly, one of these warnings to the suspect is that he has the right to counsel, including the right to have counsel appointed. These warnings must, according to the Court, be given to every individual as soon as the police start questioning him or her. It is likely that this is a standard delineation of the basic rights of the accused in US criminal procedure.⁶⁵ Furthermore, the warning about the right to silence is meaningful to the suspect as they assist the right to have defense counsel; if the warning about the right to silence did not exist, the suspect would still be at risk when there were no defense counsels.⁶⁶ The *Miranda Warning* directs police to inform suspects of their right to an attorney. This right is available even before being charged with a crime. Accordingly, as noted in the section on the right to silence, the *Miranda* decision has two elements: the defendant has a right to be notified upon arrest not only of his right to silence but also of the right to have counsel.⁶⁷ This pretrial right to counsel is rooted not in the Sixth Amendment right to counsel (which is triggered only after formal proceedings begin) but rather in the due process clause.⁶⁸ Accordingly, the defendant has a right to an attorney during custodial interrogation and, unless a defendant waives this right, interrogation must cease until an attorney is provided.⁶⁹

However, as mentioned above, in practice, the time of the application of the right to have defense counsel is still not consistently provided for. Judges in certain cases may to some extent dissent. Taking the cases of *United State v. Wade*, 388 U.S. 218 (1967) and *Kirby v. Illinois*, 406 U.S. 682 (1972) as examples, argument mainly focused on when the right to have defense counsel is guaranteed, at the lineup, before or after the indictment or during all these stages?

⁶⁴ *Miranda v. Arizona*, 384 U.S. 486 (1966).

⁶⁵ Ronal Banzak, *supra* note 35, Introduction section.

⁶⁶ *Ibid.*,

⁶⁷ *Ibid.*, p. 150.

⁶⁸ See Joseph G. Cook, Paul Marcus, Melanie, *supra* note 45.

⁶⁹ *Miranda v. Arizona*, *supra* note 64.

In *Wade*, the judge wrote that: “*the rule applies to any lineups... whether before and after indictment...*” In order to explain its own view, the Supreme Court in this case affirmed that a proceeding would be a critical stage of a criminal prosecution when “potential substantial prejudice to the defendant’s rights inheres in the particular confrontation,” and “the ability of counsel [can] help avoid that prejudice.” In application to specific proceedings, the Court has found the right to counsel to apply, for example, when a criminal defendant appears at a sentencing proceeding, and when the defendant appears at his /her preliminary hearing. In addition, in *Kirby v. Illinois*, 406 U.S. 862, 689 (1972), the Supreme Court has held that the right to appointed counsel attaches prior to trial, at any “critical stages of the criminal prosecution” after the “initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”. In the light of the foregoing explanations, it is clear that the right to have defense counsel should be guaranteed as soon as possible. The apparent standard after *Kirby* is that the right to counsel attaches upon “the commencement of any prosecution” or upon the commencement of “adversary judicial proceedings”. This returns to earlier opinions as was acknowledged in the cases of *Powell* and *Gideon*.

An interpretation which has been considered comprehensive can be found in the case of *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008). The Court here rendered its most recent decision on the subject, holding that the right to counsel attaches at a criminal defendant’s initial court appearance where he learns of the charges against him and his liberty is subject to restriction regardless of whether the prosecutor is aware of the proceedings. In *Rothgery*, the Supreme Court did not actually decide that the initial court appearance at issue in the case was a “critical stage” at which a lawyer had to be offered to the accused. As the Court explained: “*Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings; what makes a stage critical is what shows the need for counsel’s presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself... Our holding is narrow... We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant’s initial appearance before a judicial officer, where he learns the charges against him and his liberty is subject to restriction, marks the start of adversary*

judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.” This seems the most complete explanation on the time when the right should be applied. State Constitutions are generally interpreted in accordance with the federal viewpoint expressed above. Certain states have even agreed to appoint defense counsel at early stages, at the initial appearance, without deciding if such an initial appearance is a “critical stage” bringing into play the constitutional right to counsel. See *McCarter v. State*, 770 A. 2d 195 (Md. 2001).

Many US scholars and lawyers assume that with the above-mentioned explanations of the court, the federal constitution’s right to counsel applies only when two preconditions are met: *first*, the right attaches only after the initiation of an “adversarial proceeding”; *second*, even after the initiation of the adversarial proceedings, the government must allow a defense attorney to participate only during a “critical stage” of those proceeding.⁷⁰ This judgment has been effectively legalized in the cases of the US Supreme Court. Accordingly, a person is entitled to the assistance of counsel, however, only at a “critical stage” of the prosecution “where substantial rights of a criminal accused may be affected.” *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The US Supreme Court has accorded this right at: pre-indictment preliminary hearings (*Coleman v. Alabama*, 399 U.S. 1 (1970)); post-indictment pretrial lineups (*United States v. Wade*, 388 U.S. 218 (1967)); post-indictment interrogations (*Massiah v. United States*, 377 U.S. 201 (1964)); arraignment (*Halminton v. Alabama*, 368 U.S. 52 (1961)), and first appeal (*Douglas v. California*, 372 U.S. 353 (1963)).

Guaranteeing the right to have defense counsel on trial sentencing hearing

US criminal procedure also indicates that the right to defense counsel is guaranteed not only at pre-trial but must also be guaranteed at trial. In *Mempa v. Rhay*, 398 U.S. 128 (1967), the US Supreme Court held that the government must provide the defendant with a legal attorney at the sentencing hearing.

Nevertheless, the practical judgment of state courts has indicated that this guaranteeing is limited in the case where the accused is under sentence imprisonment, however, enjoying probation.⁷¹ This led to a circumstance that the court, in order not to be alleged to violate the obligation of guaranteeing the right to

⁷⁰ Marc Miller, Ronald F. Wright, *supra* note 26, p. 783.

⁷¹ This limitation derives from the case of *Scott v. Illinois*, 440, U.S. 367 (1979) which held that the obligation of appointing defense counsel is extended to cases where the crime can lead to imprisonment (see *supra*).

have defense counsel for the accused, had to revoke the decision on applying probation and then transfer to imprisonment as initial accusation since the accused violated the conditions for enjoying probation. See *Gagno v. Scarpelli*, 411 U.S. 778 (1973). This reality caused certain difficulties to judges as announcing the sentence of probation since they were unable to determine the limit of their duty to guarantee to have defense counsel at trials with the annulment of application of the probation.⁷² This content has been later interpreted in the case of *Alabama v. Shelton*, 535 U.S. 654 (2002). The Court declared that a defendant who receives a suspended sentence in a misdemeanor case may not later be imprisoned for a probation violation unless counsel was afforded when the defendant was initially prosecuted.

Guaranteeing the right to defense counsel on appeal

The right to appeal is equally a basic one for the convicted defendant. However, do convicted defendants, especially those who are indigent, have the right to be continuously represented by defense counsel on appeal or not when the right to enjoy assistance by the defense counsel may be paid by the government costs? This right has not been recognized in any case before Supreme Court since the case of *Powell* in 1932 (see *supra*) because it is considered that criminal prosecution ends with a conviction and sentence. If the defendant appeals the case, the government is defending the judgment rather than “prosecuting” the case.⁷³ As such, in many cases, the right to have defense counsel has been refused on appeal.⁷⁴

After quite a time, the right to have defense counsel on appeal has been officially recognized. The Court in *Griffin v. Illinois*, 351 U.S. 12 (1956) held that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.” Once again, the Court in *Douglas v. California*, 372 U.S. 353 (1963) reaffirmed that the federal constitutional right to counsel on first appeal is based on both due process and equal protection principles.

In both the foregoing cases, the courts have referred to the principal of equal justice in order to acknowledge the right to have defense counsel at the appeal court.

⁷² Marc Miller, Ronald F. Wright, *supra* note 26, p. 785.

⁷³ John N. Ferdico, *supra* note 22, p. 26.

⁷⁴ *Ibid.*,

Subsequently, the Supreme Court established the right to appointed counsel for indigents (in both federal and state courts) convicted at trial. Accordingly, a convicted defendant has the right to assistance of counsel on a first appeal. This means that convicted defendants are guaranteed “an adequate opportunity to present their claims fairly within the adversary system.”⁷⁵

At present, the ABA Standards for Criminal Justice about the Defense Function⁷⁶ has indicated that: counsel should be provided at every stage of proceedings, including sentencing, appeal, certiorari, and post-conviction review. In capital cases, counsel also should be provided in clemency proceedings. Counsel initially provided should continue to represent the defendant throughout and preserve the defendant’s right to appeal, if necessary. (Standard 5-6-2, duration of representation).

In conclusion, the Sixth Amendment to the US Constitution holds, in part, "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." This clause grants to all defendants the right to an attorney from the moment they are taken into police custody. The decisions of the US Supreme Court have also construed this Right to Counsel Clause to mean that an indigent defendant has the constitutional right to the presence of a court-appointed attorney at critical stages in the criminal proceedings. These critical stages include custodial interrogation, post-indictment lineups, preliminary hearings, arraignment, trial, sentencing, and the first appeal of a conviction.

By way of the foregoing cases of the US Supreme Court, the right to have defense counsel is guaranteed in almost every pre-trial proceeding and at the appeal court. However, in certain cases, this right is not guaranteed, particularly:

1. Under federal law, a defendant has no right to counsel when he produces a handwriting sample, even after issuance of a formal charge, because the taking of such a sample is not a “critical stage” of the proceeding. See *Gilbert v. California*, 388 U.S. 263 (1967).
2. Does this right take place after the defendant has been arrested? The federal constitution right to counsel does not begin with arrest, but of course, the accused must be informed of his right to have a defense counsel following the Miranda

⁷⁵ Russell L. Weaver, Leslie W. Abramson, John Burkoff, Catherine Hancock, *supra* note 2, p. 59.

⁷⁶ 1980 by American Bar Association.

Warning.⁷⁷ In the state law, however, this right to defense counsel has been recognized, in a very recent case, to arise upon arrest. See *Lattimore v. State*, 598 So.2d 192 (Miss. 2007).

Additionally, according to a group of experts, a certain number of limitations to the guarantee of the right to have defense counsel still exist.⁷⁸ Thus, in order to secure fair treatment for the indigent, the Supreme Court has required that lawyers be provided pursuant to the Sixth Amendment in the vast majority of criminal and juvenile delinquency cases absent an intelligent and knowing waiver of counsel. However, the Court has not extended the right to counsel to all kinds of cases in which the assistance of a lawyer could be helpful. See e.g., *Ross v. Moffitt*, 417 U.S. 600 (1974) (right to counsel applies to an indigent defendant's first appeal as of right but does not extend to subsequent discretionary appeals or to applications for review to the United States Supreme Court); *Murray v. Giarrantano*, 492 U.S. 1 (1989) (right to counsel does not extend to state post-conviction proceedings in a capital case); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (right to counsel does not extend to state post-conviction proceedings in a non-capital case). Nor is there a right to counsel if a defendant is only subject to a fine. See *Scott v. Illinois*, 440, U.S. 367 (1979). A defendant also does not have the right to an attorney when seeking to show that he or she was wrongfully convicted and thus entitled to exoneration.

4.2.2.2. Selection and Waiver of the right to defense counsel

Selection of defense counsel

The facts show that, although the government may have an obligation to offer an attorney to most criminal defendants, not all defendants accept the offer. Some will insist on representing themselves, while others will be unhappy with the assigned lawyer and will ask for another attorney.⁷⁹ Regarding this right, in the case of *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), Judge Warren clarified the difference between retained counsel and court-appointed counsel: “*Regardless of whether petitioner would have been entitled to the appointed counsel, his right to be heard through his own counsel was unqualified*”. However, the Judge also underlined that

⁷⁷ Marc Miller, Ronald F. Wright, *supra* note 26.

⁷⁸ Report of 2009, *supra* note 8.

⁷⁹ Marc Miller, Ronald F. Wright, *supra* note 26, p. 786.

“even when a person is entitled to a appointed counsel, he has the right to be considered via the counsel employed by himself without any limitation.”

However, in the event that the accused is indigent and needs assistance of the appointed defense counsel, does he/she have the right to select the defense counsel? It is clear that poor defendants do not have the legal right to select which attorney will represent them.⁸⁰ The assessments of expert law professors is that the courts have not acknowledged any right to select the defense counsel attaching to the accused who is indigent and selection is the concern of public defender organizations.⁸¹ This is considered as a limitation to the practical guarantee of Constitutional rights under Sixth Amendment regarding the right to have defense counsel in US criminal procedure.

Waiver of the Right to Defense Counsel

Like many other criminal procedure systems, among them Vietnam and Germany, the US criminal procedure has recognized that the accused has the right to waive the constitutional rights regarding the right to defense counsel. Waiver of the right to defense counsel, however, is applied in a limited manner in US criminal procedure. This limitation evolves from two purposes: firstly, respecting the right of self-defense; secondly, acknowledgement that the waiver of the right to defense counsel is done for the purpose of ensuring an effective defense.

As for the meaning of respect for the right of self-defense, in Faretta v. California 422 U.S. 806 (1975), the Court relied on the Sixth Amendment and held that the right to defend oneself in person is one basic to the US adversary system of criminal justice and it is a part of the “due process of law”. Researchers have pointed out that, initially, the writers of the United States Constitution (the Framers) acknowledged the right of self-defense as a matter of course and associated it with the accused.⁸² The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction: therefore he must be free personally to decide whether in his particular case having counsel is to his advantage. Based on that, the right to defend himself in person is the accused’s own choice and must be honored out of “that respect for the individual which is the life of the law.”⁸³

⁸⁰ *Ibid.*,

⁸¹ *Ibid.*,

⁸² Joseph G. Cook, Paul Marcus, Melanie, *supra* note 45, p. 412.

⁸³ *Ibid.*,

The judgment of the US Supreme Court in the case of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) has shown the relation between the right of self-defense and the right to have defense counsel coupled with the right to waive the latter right. The court hold that, before the right to defend oneself in person can be exercised, the defendant must make “an intentional relinquishment or abandonment of” the right to counsel. Hence, in the case of court-appointed defense, the waiver of defense counsel, if available, must be first considered in terms of respect for the right to self-defense of the accused. In *Faretta* (see supra), the accused was charged with grand theft, and he could be sentenced to prison if found guilty. At arraignment, the Superior Court Judge assigned to preside at the trial appointed the public defender to defend Faretta. However, before the trial, he requested that he wanted to defend himself and did not want counsel. Justice Stewart delivered the opinion of the Supreme Court that, a State may not constitutionally hale a person into criminal court and there force a lawyer upon him, when he insists that he wants to conduct his own defense. In order to stress this statement, the court showed that Faretta was literate, competent, and intelligent, and he was voluntarily exercising his informed free will.

The right to waive defense counsel is guaranteed for the purpose of guaranteeing the right to effective counsel. As mentioned above, the right to waive the right to defense counsel is at all times thoroughly considered by US judges and only applied in a limited manner. This thoroughness derives from the rights and interests of the accused themselves. Going back to the case of the *Miranda Warning* (see supra), the United States Supreme Court declared in *Miranda v. Arizona* that the Fifth Amendment's privilege against self-incrimination includes an implied right to counsel once a suspect is subject to "custodial interrogation" - meaning that the suspect is questioned by police. Thus, once a suspect exercises the Miranda Right to Counsel, the State is required to "make counsel available" for the suspect, meaning that the suspect cannot be questioned again unless an attorney who represents the suspect is present. If the accused choose to waive his Miranda Right to Counsel, the police can question him without an attorney present to represent his interests. Although he may not feel like he need an attorney present, if he has waived his Miranda Right to Counsel, any incriminating statements that are made by he may be used as:

- Probable cause to support further investigation, including searches.

- Evidence at trial against him.

If the accused waived his Miranda Right to Counsel and the police or prosecution are trying to use his statements against him, he can challenge that use by claiming that the waiver was not knowing and voluntary because, for example, he didn't understand the consequences of waiving the right.

Based on this reasoning, the right to waive defense counsel is limited in cases where the courts have doubt of the mental capability of the accused. The Court in *Wade v. Mayo*, 334 U.S. 672, 684 (1948) pointed out that in some cases, the court should be wary regarding a decision to waive the right to counsel: “there are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature”. This may be obvious but the determination is not always easy. Judges have even opined that it is necessary to distinguish between the competency standard for standing trial and the standard for waiving the right to defense counsel as two different matters. This could give rise to difficulties for a court holding that a person is competent to stand trial but not to waive the right to defense counsel. And in this case, the acceptance of the waiver of the right to defense counsel of the accused in order for him/her to implement the right of self-defense would cause extreme difficulty since it may affect the key right to effective defense counsel.⁸⁴ See *Gordinez v. Moran*, 509 U.S. 389 (1993) and *Peter v. Gunn*, 33 F.3d 1190 (9th Cir.1994). And in its latest precedent, the Supreme Court stated that, in deciding whether an individual could represent himself, a trial judge may “take realistic account of the particular defendant’s mental capacities.” Accordingly, the standards for competency to stand trial and competency to present oneself are indeed not necessarily always the same. See *Indiana v. Edwards*, 554 U.S. 208 (2008).

In terms of the effectiveness of the implementation of rights, the courts have also accepted that the accused may waive the right to defense counsel where there is any inconsistency or difficulty in coordinating with the defense counsel; however, he/she may ask to have another defense counsel appointed. In this case, the court shall appoint a new defense counsel. This issue was initially raised in the case of *Brown v. Craven*, 424, F 2d 1166 (9th Cir. 1970). The court in this case believed that “[T]o compel one charged with a grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable

⁸⁴ Joseph G. Cook, Paul Marcus, Melanie D. Wilson, *supra* note 45, p. 412.

conflict is to deprive him of the effective assistance of any counsel whatsoever”. Afterwards, at the federal level, in *Wheat v. United States*, 486 U.S. 153 (1988), the Court decided that trial judges have considerable discretion in dealing with situations in which a criminal defendant seeks to waive the right to a conflict-free attorney.

The right of a juvenile to waive defense counsel has been also considered as a matter which may affect the effective defense and the right to waive defense counsel is thus very limited. The Sixth Amendment right to counsel also applies to juveniles accused of criminal offenses, and concurrently ensures the respect of the right of self-defense. However, as mentioned above, the age of the accused is one of the conditions indicating the capability for defending himself in person (see *Wade v. Mayo* supra). In fact, several states prevent or severely limit a juvenile's ability to waive their Sixth Amendment right to counsel. Illinois, Iowa, and Texas completely prevent juveniles from waiving their right to counsel. Arizona, Georgia, Indiana, Louisiana, Maryland, Minnesota, Montana, New Jersey, New Mexico, Virginia, and West Virginia have specific requirements for Sixth Amendment right to counsel waivers by juveniles. Several other states require that juveniles consult with an attorney before waiving their Sixth Amendment right to counsel.⁸⁵

In brief, in addition to guaranteeing the right of the accused to be represented by defense counsel, the right to waive defense counsel has been viewed as a legitimate right of the accused. However, this is a case of waiving a Constitutional right, a key aspect of guaranteeing citizens rights and the US Supreme Court held that the waiver of defense counsel should be properly considered in order not to violate the proceeding right, particularly the right of self-defense (see *Faretta* supra), and concurrently to ensure the principle of due process in the adversary system of justice. As a result, conditions for waiving the right to defense counsel are binding not only upon the accused but also on the court.

On the conditions applicable to this waiver, the Court in *Johnson v. Zerbst* 304 U.S. at 464-65 (1938) held that the defendant can waive his right to defense counsel only if his choice is “knowing and voluntary”. In 2004, the Supreme Court reaffirmed its position on waiver of counsel in the case of *Iowa v. Tovar* 541 U.S. 77 (2004). In this case, the defendant pleaded guilty to the misdemeanor charge of operating a

⁸⁵ Myron Moskovitz, *Case and Problems in Criminal Procedure: the Courtroom*, 5th Ed., LexisNexis, 2009, p. 521.

motor vehicle while under the influence of alcohol. Citing its 1938 decision in *Johnson v. Zerbst* the Court again emphasized that “any waiver of counsel [must] be knowing, voluntary, and intelligent.” The conditions are considered essential so the judges must consider accepting the waiver of defense counsel or not in terms of these criteria.

It is the responsibility of the court and the judge can fully allow the waiver in two cases: first, the trial court informs the defendant about the dangers of such a strategy; or second, it otherwise appears from the record that the defendant understood the dangers. See *Faretta* supra.

Furthermore, the standby counsel shall be available to attend in order to represent the accused where the accused is faced with any difficulty after he/she successfully waives the right to have defense counsel for self-defense.

Also in the case of *Faretta* (see supra), the Supreme Court acknowledged that “[o]f course, a State may – even over objection by the accused – appoint a ‘standby counsel’ to aid the accused if and when the accused request help, and to be available to represent the accused in the event that termination of the defendant’s self-represent is necessary.” Since the Court’s decision in *Faretta* was handed down, many trial court have adduced this option to provide standby counsel to assist the defendant who is defending him/herself. For example, in the case of *McKsagle v. Wiggin*, 465 U.S. 168 (1984) the Court based itself on the *Faretta* decision and held that appointment of standby counsel does not violate the self-representation right unless counsel interferes with substantial decisions of the defendant.

In terms of guaranteeing rights, I believe that the US Supreme Court has established a system that guarantees the rights of the accused when considering the right to waive defense counsel. US judges seem to have foreseen the risks arising when the accused waives his/her constitutional rights. Personally, this is a point that Vietnam should learn from.

4.2.2.3. *Effective defense counsel*

During our research, we have seen that a very important element in guaranteeing the right to defense counsel is the notion of “effective defense counsel” which is linked to the actual activities of defense counsel.⁸⁶ Many convicted defendants complain that they face difficulties and even that right of defense is affected by reasons due to

⁸⁶ Russel L. Weaver, Leslia W. Abramson, John M. Burkoff, Catherine Hancock, *supra* note 2, p. 39.

their defense counsels. This leads to the ineffective defense issue. Researchers have pointed out that this involves two causes: *first*, objective aspects relating to the capability of the defense counsel, for example age (too young or too old), lack of experience in defending in criminal cases or the defense counsel may suffer from mental illness or any other matters such as alcoholism; *second*, subjective effects such as the irresponsibility of the defense counsel in defense. Resulting from all this, the demand for “effective defense counsel” has been considered as an important criterion for the purpose of guaranteeing the right to defense counsel in US criminal procedure.

In terms of the historical development, the right to defense counsel was mentioned very early on in the case of *Powell v Alabama* in 1932 (see *supra*) where the court concluded that the Constitutional right under the Sixth Amendment regarding the right to defense counsel including the right to effective assistance of counsel. In case of *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970), the Supreme Court has reaffirmed that the “the right to counsel is the right to the effective assistance of counsel.” However, the court did not point out criteria or measures to assess how “effectiveness” is defined or measured. This causes difficulties for a judge determining the conditions allowing defense counsel to be entitled to participate in protecting his/her client. It is likely that an assessment based on the ineffectiveness of the defense counsel will be easier to work with. This is clearly shown by the two cases of *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984).

In *Strickland v. Washington*, 466 U.S. 668 (1984),⁸⁷ the Court held that to successfully claim ineffectiveness, a defendant must establish that the facts of the case satisfy a two-pronged test: *First*, the defendant must show that counsel’s performance was deficient.⁸⁸ This require showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. However, in evaluating a claim of ineffectiveness, a court

⁸⁷ Strickland had appealed his convictions for three capital murders and was claiming his counsel was incompetent. He listed specific ways his counsel has been inadequate. Strickland had pleaded guilty and waived the right to an advisory jury at his sentencing hearing. These decisions and others he made were against the advice of his counsel. He was sentenced to death on each of the three murder counts and prison for various other crimes. In state court, his counsel was found to be adequate, but an appellate court having just derived revised rules for judging the competence of counsel ordered that the lower court review his case using the new standard. That decision was appealed to the Supreme Court. The Supreme Court accepted this case so as to have the opportunity to provide guidance regarding when a criminal judgement should be overturned because of the actual ineffective assistance of counsel. Finally, the Court found that Strickland had adequate counsel and his conviction was sustained. See Ronald Banaszak, *supra* note 35, p. 199.

⁸⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

“must be highly deferential to defense counsel”⁸⁹ and “indulge a strong presumption that counsel’s performance was within the wide range of reasonable professional assistance.”⁹⁰ *Second*, the defendant must show that “any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”⁹¹ This requires showing that counsel’s errors was so serious as to deprive the defendant of a fair trial, because “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”⁹² Accordingly, the defendant must show both that his defense counsel performed deficiently and that the deficient performance actually prejudiced his defense. The *Strickland*’s decision has been enormously influential, with states overwhelmingly adopting its framework in state constitutions.⁹³

It is indicated here that the verification of whether the defense counsel is ineffective may affect the rights and interests of the defense counsel him or herself, especially in cases where the judge has a bias against the defense counsel, and at the same time burden counsel’s responsibility to the accused.⁹⁴ This causes difficulties for the courts. The interpretation of the right to an effective defense has again been based on the ground of adversarial process. In a companion case to *Strickland*, the Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984) rejected an exception to its *Strickland* standard based upon external factors related to the nature of the defense services provided, and stated that the right to effective assistance is the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversary testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. The test focuses on whether there has been an “actual breakdown of the adversary process.” This means that, in a case where the defense counsel is proved to be ineffective, the defense counsel may be denied. The court in the case of *Cronic* did have more considerations in verifying conditions given in the case of *Strickland*. The Court in *Cronic* recognized that there could be circumstances where “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small

⁸⁹ *Ibid.*, at 689.

⁹⁰ *Ibid.*,

⁹¹ *Ibid.*, at 692.

⁹² *Ibid.*,

⁹³ Marc L. Miller, Ronal F. Wright, *supra* note 26, p. 808.

⁹⁴ Myron Moskovitz, *supra* note 85, p. 866.

that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”⁹⁵

In fact, like the US Constitution, state constitutions typically contain provisions guaranteeing the assistance of counsel. State supreme courts, therefore, could avoid the *Strickland* test for ineffective assistance by invoking their own state’s constitutional provisions on counsel and devising tests for ineffectiveness less stringent than the test contained in *Strickland*.⁹⁶ The manner of demonstrating an ineffective defense has been considered and is still being reviewed within the US criminal procedure system.

The writer also finds that the guaranteeing of effective counsel means not only providing competent defense counsel but also providing in a timely manner defense experts having the capacity to give assistance to the accused at the proceedings, regardless of whether they are legal experts or not. Based on the Griffin’s decision,⁹⁷ the Court in 1985 in *Ake v. Oklahoma*, 470 U.S. 68 (1985) held that the state must provide access to a psychiatrist for an indigent defendant who makes a preliminary showing that his sanity will be an issue at trial. The *Ake* decision has been invoked by federal and state courts to require that other kinds of assistance, both expert and non-expert, are provided to indigent defendants, thereby helping to ensure that the accused receives meaningful legal representation. In line with the Griffin decision, state judges have gathered various experts in different fields in order to give assistance to the accused in defense activities. Such as: battered-spouse syndrome expert in *Dunn v. Roberts*, 963 F.2d 308, 313 (10th Cir. 1992); ballistics expert in *Scott v. Louisiana*, 934 F.2d 631, 633 (5th Cir. 1991); expert to assist with intoxication defense in *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987) etc.

Additionally, practice has pointed out situations that may affect an effective defense by virtue of the relationships of the defense counsel:

- In cases where a lawyer is transferred to a position in the prosecutor’s offices while defending a defendant in a matter, or where the defense counsel and the prosecutor have a close “relationship”. The American Bar Association has defined such a relationship as suggesting a conflict of interest between the counsel and his

⁹⁵ *States v. Cronin*, 466 U.S. 648 (1984) at 659-60.

⁹⁶ Report of 2009, *supra* note 8, p. 42.

⁹⁷ See *Griffin v. Illinois*, 351 U.S. 12 (1956). The Court in *Griffin* construed that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has...”.

client.⁹⁸ This is considered to establish adverse interests between the defense counsel and his/her client. In this case, the defense counsel must refuse to participate in any defense. Concurrently, the defense counsel is obliged to notify his/her client of adverse interests related to the case and to advise the client to select a new defense counsel. The accusation must also be assigned to another prosecutor for implementation. The American Bar Association assumes that it would be unprofessional of a lawyer if he formerly worked as a prosecutor and vice versa. In practice the court has not accepted defense counsel in such case and has also requested another prosecutor implement the prosecution of the case.⁹⁹

- The defense counsel has a relationship with the defendant's spouse. Most the courts believe that this case may lead to the possibility that the defense counsel will have prejudice against or betray his/her client. This may again be the cause of a conflict of interest, and concurrently it may make it difficult to ensure an effective defense.¹⁰⁰ However, the courts have not given rulings allowing one to conclude this matter and there are only arguments suggesting that it is difficult expressly to affirm that any relationship of defense counsel with his/her client's spouse may affect the defense counsel's performance. The result of any case reflects the actual situation of the accused and he is responsible for proving damage based on the criteria in *Strickland*.¹⁰¹

- Concerning the relationship between the defense counsel and his/her client, the law recognizes that a lawyer should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another.¹⁰²

The foregoing analysis presents basic legal issues which govern judges' performance in ensuring the right to an effective defense. Pending legislation or decisive precedents, however, it is necessary for judges to refer to other statutes and rules. The rules set up by the ABA are considered as professional standards which must be complied with by lawyers participating in defense activities. The study these rules is a critical element in this thesis.

⁹⁸ Standard 4-3.5 of the American Bar Association Standard for Criminal Justice (as amended in 1986).

⁹⁹ *Lux v. Commonwealth*, 24 Va. App. 516 (1997).

¹⁰⁰ *People v. Singer*, 226 Cal.App. 3d 23 (1990); *Hernandez v. Sate*, 750 So.2d 50 (Fla. Ct. App.1999).

¹⁰¹ *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

¹⁰² The American Bar Association in its Standards Relating to the Administration of Criminal Justice, Rule 3.5(b), 1974.

In order to ensure the quality of the defense, the ABA had enacted "Model Rules of Professional Conduct"¹⁰³ to determine the responsibilities of Criminal Defense Attorneys. Most states have adopted many of the provisions outlined in the Rules and Attorneys who fail to meet their professional responsibilities may be subject to disciplinary action. Accordingly, an attorney who is a criminal defense counsel must satisfy the following conditions:

Competent Representation: Criminal defense attorneys are responsible for competently representing their clients in court. Competent representation means that the attorney understands both the substantive and procedural laws involved in the practice of criminal law. Substantive laws define the actions that are punishable by the government, as well as the protections that the government must provide to defendants. Procedural laws define how the court system works. For example, procedural rules set forth the manner in which a trial is conducted.

Communication: Criminal defense attorneys are responsible for communicating with their clients on a regular and timely basis. This means if an attorney learns of information that could assist in the client's case or receives a plea bargain offer from the state, she should promptly notify the client. Criminal defense attorneys should also be available to answer any reasonable questions that the client has regarding a case, such as how the case will proceed or what to expect while in court.

Conflicts of Interest: criminal defense attorneys have a responsibility to check for and avoid potential conflicts of interest before taking on a new case. A conflict of interest can arise if the attorney is currently representing another interested party to the case, such as a co-defendant, or if the attorney has a personal bias against the defendant. In some cases, an attorney may be allowed to represent co-defendants if the attorney obtains written consent from both defendants before commencing the representation.

Duty of Confidentiality: Criminal defense attorneys have a responsibility to keep client matters confidential. If a defense attorney tells his spouse, friend or neighbor private facts about a case or the identity of a client, he will be in breach of the duty of confidentiality. Several exceptions to this rule exist. For instance, when the

¹⁰³ The American Bar Association has provided leadership in legal ethics through adoption of professional standards that serve as models of the law governing lawyers since the adoption of the Canons of Professional Ethics in 1908. The latest version of these standards is the Model Rules of Professional Conduct, first adopted in 1983 and amended a number of times since then. The Model Rules replaced the Model Code of Professional Responsibility, which was adopted in 1969. Valid as of 16 Sep, 2010.

attorney obtains knowledge that leads him to believe his client will cause physical harm to another person or if he knows the client intends to lie under oath, he may divulge privileged information to the authorities or to a judge.

Similarly, in February 2002, the American Bar Association adopted a set of 10 principles, which "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." The purpose of the Ten Principles of a Public Defense Delivery System¹⁰⁴ is to distill the existing, rather voluminous national standards for indigent defense systems down to their most basic elements and into a succinct form that busy officials and policymakers can readily review and apply.

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The private bar participation may include part time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.

¹⁰⁴ See available at <<http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf>>.

3. *Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.* Counsel should be furnished upon arrest, detention or request, and usually within 24 hours thereafter.

4. *Defense counsel is provided sufficient time and a confidential space with which to meet with the client.* Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses and other places where defendants must confer with counsel.

5. *Defense counsel's workload is controlled to permit the rendering of quality representation.* Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (*i.e.*, caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

6. *Defense counsel's ability, training, and experience match the complexity of the case.* Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

7. *The same attorney continuously represents the client until completion of the case.* Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8. *There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.* There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be set primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9. Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

4.2.2.4. Defense fee

It is clear that the fee for a defense counsel shall be borne by the accused if he employs such defense counsel himself. However, in cases where the defense counsel is appointed by the court, how will this fee be paid?

In terms of basic legal rights, the right to defense counsel appointed without charge has been affirmed in the landmark decision of *Gideon* “In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him.” This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present

their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal cases are necessities, not luxuries.”¹⁰⁵ Accordingly, the US Supreme Court has mandated that governments supply counsel to indigent defendants and spend a significant amount to provide appointed counsel. This is very important, because in case the state does not pay for counsel, the case cannot go forward, and the prosecution must be postponed.¹⁰⁶

As mentioned above, this is an issue in the US criminal procedure. The obligation to appoint free counsel will not apply to the court if the accused is not indigent. In US more than 90% of criminal defendants are indigent - they have no money to pay for a lawyer.¹⁰⁷ Therefore, determining the status of “indigent” or “non-indigent is a very important one for the courts in the United States of America.¹⁰⁸

Determination of indigence and Fees¹⁰⁹

How is a trial judge to determine which defendants are entitled to state-appointed counsel? This question has never been answered by the US Supreme Court.¹¹⁰ However, the facts show that most judge in state courts usually base themselves on the following common standard steps: First of all, the determining whether the accused is indigent or not must be done by the Court soon after charges are filed. Then the determination must be based on the relevant provisions of law and procedural rules. The judges must weigh and consider the elements of the accused’s identity, such as the seriousness of the crime, the amount of bail bond required, assets and debts of the accused, and the accused’s occupational status. Most jurisdictions required that the defendant must give a reason why he did not have a lawyer and set forth his assets.

Notably, even when the court has not fully gathered the foregoing information, the court may grant (appoint) the defense counsel for the accused and then collect the information needed to confirm whether the accused satisfies the conditions and is

¹⁰⁵ 372 U.S. 335, 344 (1963).

¹⁰⁶ Marc Miller, Ronald F. Wright, *supra* note 26, p. 875. For example, as a result, the failure to provide adequate funds has resulted in delays in capital trials in Louisiana too. In 2005, in the case of State v. Citizen, 898 So.2d 325 (La. 2005) the Louisiana Supreme Court ruled that, if the state’s government failed to pay for defense counsel, the prosecution would be stayed until funding was provided.

¹⁰⁷ Myron Moskovitz, 2009, *supra* note 85, p. 833.

¹⁰⁸ Marc L. Miller, Ronald F. Wright, *supra* note 26, p. 774.

¹⁰⁹ See general Marc L. Miller, Ronald F. Wright (*supra* note 26) and Joseph G. Cook, Paul Marcus, Melanie (*supra* note 45).

¹¹⁰ Joseph G. Cook, Paul Marcus, Melanie, *supra* note 45, p. 378.

entitled to have defense counsel appointed free of charge. Regarding this issue, most states stipulate that a person is required to repay the fees for a voluntary defense or free defense in case where the defendant pled guilty and the court finds that he/she can afford to pay the fees of the defense counsel.¹¹¹ The US Supreme Court upheld this and also affirmed that the judges should consider a statutory exemption for the defendant who could prove that repayment would impose “manifest hardship”.¹¹²

As to the fees, of course, defense costs will be paid to the counsel. Depending on the type of indigent defense system used by a state or county, payment may be in the form of set salaries linked to full or part-time employment, or fees based on a contract rate, or on an hourly basis. For court-appointed counsel, states or counties often set limits on the hourly rates and total compensation for the attorney.

Forms of assistance to the poor

In implementing the right to counsel, both state and local governments are free to decide the type of indigent defense systems to employ and how to fund them. However, in general, policies extending funds for defense activities for the indigent receive much attention from the government. The Federal government and the states have established various ways of providing counsel to the poor. At the federal level, the Court provides indigent defense to eligible defendants through the Federal Defender Services, community defender organizations, and private attorneys as established by the Criminal Justice Act of 1964, as amended.

State and local governments choose from three primary models to provide defense services for indigent defendants: public defender programs, contract counsel systems, or assigned counsel systems.

Public defender programs are public or private nonprofit organizations with full-or part-time salaried staff.¹¹³ In this model, attorneys are hired to handle the bulk of cases requiring counsel in that jurisdiction. It is used as the primary method to provide indigents with counsel in 30 States.

¹¹¹ See for instance, *Ohree v. State*, 494 S.E.2d 484 (Va. 1998).

¹¹² *Fuller v. Oregon*, 417 U.S. 40 (1974).

¹¹³ Public defender attorneys are full- or part-time salaried employees who frequently work together in an office with a director or administrator and support staff. Even when public defenders are the primary indigent defense providers in the jurisdiction, because some cases present a conflict of interest, public defenders cannot accept every case, and an alternative method for providing counsel must also exist. See Report of 2009, *supra* note 8.

The contract counsel system is a form of agreement between government with private attorneys, bar associations, or private law firms to provide indigent services for a specified dollar amount and/or a specified time period. Most contracts are annual and require counsel to handle a certain number of cases or a particular type of case (e.g., misdemeanors), although some require counsel to handle all cases except where conflicts exist.

Finally, in *the assigned counsel model*, private attorneys are appointed by the court from a formal or informal list of attorneys who accept cases for a fixed rate per hour or per case. This model is also typically used for cases when public defenders or contract counsel exist but cannot provide representation.

4.3. Status of the guarantee of the right to defense counsel in the US criminal procedure law

4.3.1. Strong points

From the above analyses it is clear that, by comparison with the criminal procedure of Vietnam and Germany, the US has set up a regime guaranteeing the rights of the accused in general and the right to defense counsel in particular in a flexible and favorable way. This can be considered as a strength that should be learnt. The advantages could be expressed as follows:

Even if it is a federal nation, the United States government has established a clear and consistent legal system.¹¹⁴ In the United States, the state courts operate under a system of dual federalism. On a case by case basis, defendants can appeal their convictions and have their convictions reversed if they have not been accorded the rights they are due. This sets up a sound legal system for the application and enforcement of the law's provisions. In terms of guaranteeing legitimate rights and interests of citizens, the right to defense counsel is a basic Constitutional right which must be guaranteed.¹¹⁵ This right is concurrently concretized in the Criminal Justice Act¹¹⁶ and other congressional mandates. In addition, the precedent system

¹¹⁴ As it is in a system of Common law, the United States has two forms of law namely the Constitution and Statutes and Rules of Congress and the judgments and precedents of the Supreme Court.

¹¹⁵ US Const. Amend. VI.

¹¹⁶ US Code (Title 18 on Crimes and Criminal Procedure, §3006A).

of the US Supreme Court and the concurrent validity of law enforcement guidelines further guarantee this key right.¹¹⁷

The US Supreme Court can play a very important role in promoting policies which guarantee citizens' rights. The supremacy clause of the federal constitution requires the states to follow the judgments of the federal Supreme Court where it has determined that the constitution has created rights enforceable against the state. The US Supreme Court has also established many programmes for the support of the demand that indigent and other parties be represented by defense counsel. One may also refer to the Defender Service Programme¹¹⁸ whose main duty is precisely to ensure the right to defense counsel guaranteed by the laws. The Programme has performed such helpful objectives as: providing services of defense counsel to all eligible persons in a timely manner; providing appointed counsel services that are consistent with the best practices of the legal profession; providing cost-effective services; protecting the independence of the defense function performance by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

Furthermore, the US has set up professional defense counsel organizations forming networks in state and federal government that can meet the demand for the provision of defense counsel in a timely way. For example, the National Legal Aid and Defender Association (hereinafter NLADA).¹¹⁹ The NLADA is the nation's leading advocate for legal professionals who work with and represent low-income clients, their families, and communities. Speaking on behalf of legal aid and defender programs, as well as individual advocates, it devotes its resources to serving the broad equal justice community. The NLADA provides a national voice in public policy and legislative debates on the many issues affecting the equal justice community. In early 2004, the NLADA and the Constitution Project¹²⁰

¹¹⁷ In terms of the historical development, the scope of guaranteeing the right to defense counsel in US criminal procedure has been gradually extended by judgments of the US Supreme Court.

¹¹⁸ Information on this is available at

<<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Mission.aspx>>.

¹¹⁹ The National Legal Aid & Defender Association (NLADA) founded in 1911, is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating for equal access to justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

See at <<http://www.nlada.org>>.

¹²⁰ The Constitution Project is a bipartisan, nonprofit organization that seeks to educate and promote reform in areas involving controversial legal and constitution issues. In addition to the Right to Counsel Initiative,

joined forces in a partnership to work on the right to counsel. Together, they established the National Committee on the Right to Counsel. At State level, several US states are obliged to incorporate the minimal due process rights into their codes of procedure, and must ensure that defendant is afforded counsel. The states have to decide how to provide counsel. They may use also a public defender service, contract with private counsel, pay private counsel on a fee-for-service model, or mandate pro bono provision of service as a condition of membership with the bar. The state can choose among or combine these options. The states have been generally compliant with the duty to provide some form of counsel.

Additionally, the ABA plays a positive role in the improvement of the quality of lawyers participating in defense in criminal cases. With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world.¹²¹ As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society. A regular activity of the ABA is to design and publicizes rules guiding legal professional activities of lawyers, their ethical conduct and practicing responsibilities. Besides, the ABA has also been organising surveys and research on the guarantee of the right to a defense and has made valuable recommendations for the purpose of enhancing the effectiveness of the guarantee. This may include reports on difficulties which lawyers are faced with in defense performance.

Giving information on the laws and practical information on their application to citizens also plays a considerable part in the enhancement of the effectiveness of the right to defense counsel. Ultimately, it is the citizens' opinions which are the basis for establishing proper and effective policies.

the Project has active initiatives on the constitutional amendment process and has sponsored successful initiatives dealing with constitutional amendment process.

See available at <<http://www.ConstitutionalProject.org>>.

¹²¹ Source: <http://www.americanbar.org/resources_for_lawyers.html>.

4.3.2. Actual status of the guarantee of the right to defense counsel in the US criminal procedure system ¹²²

In recent years, many comments and assessments have indicated that the guarantee of the right to defense counsel in the US still contains many limitations. A report of the US Department of Justice indicated that "indigent defense in the United States today is in a chronic state of crisis".¹²³ A few years ago, the ABA Report also commented on this situation: Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.¹²⁴

Assessing the true situation of the guarantee of the right to defense counsel in the US, the latest report of the National Right to Counsel Committee (Report of 2009) stated that:

*Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the Gideon decision and the Supreme Court's soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems. In the country's current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent.*¹²⁵

¹²² This content is based primarily on research results presented in the Report of 2009 (supra note 8). And see also the recent assessment studies of The Spangenberg Group, available at <http://www.spangenberggroup.com>. (The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. Created in July 1985 and located in West Newton, Massachusetts, the Spangenberg Group has conducted research and provided technical assistance to justice organizations in every state in the nation).

¹²³ Office of Justice Programs & Bureau Of justice Assistance, *Improving Criminal Justice Systems through Expanded Strategies and Innovative Collaborations IX* (1999). See general Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, William & Mary Law School Research Paper No. 09-92 57 HASTINGS L.J. 1031 (2005-2006), <<http://www.ssrn.com/abstract=1797783>>.

¹²⁴ American Bar Association Standing Committee on Legal Aid & Indigent Defendants, *Gideon's Broken Promise IV* (2004), <<http://www.abanet.org/legalservices/sclaid/defender/brokenpromise>>.

¹²⁵ Report of 2009, supra note 8.

The foregoing assessments show that the shortcomings in guaranteeing the right to defense counsel mainly lies in problems in the setting up and managing of the legal policies of the state. The US Supreme Court has done a good job in setting up a fairly complete system of rules regarding the guarantee of the accused's right to a defense. The State, however, has to bear the heavy responsibility of paying defense fees for the large number of accused that are indigent. It is easily understandable that there will be difficulties relating to State management of the system. According to the surveys, restrictions arise in the following areas:

First, lack of budget to cover the assigned defense counsel

By every measure and in every report analyzing the US criminal justice system, the defense function for poor people is drastically underfinanced.¹²⁶ With the current economic crisis, many indigent defense systems across the US were facing ever more serious budget shortfalls and cutbacks. For instance, in Kentucky, the legislature in 2008 cut the indigent defense budget by 6.4%, totaling \$2.3 million. As a result, the Department of Public Advocacy announced that it will begin to refuse several categories of cases, including conflict of interest cases, some misdemeanors, and probation and parole violation cases. Similarly, budget cuts in Florida are hitting hard in a number of counties. In Orange-Osceola County, where the criminal courts are among the busiest in the state, both prosecutor and public defender offices are facing combined budget reductions of \$3 million.¹²⁷

The funding shortage also has an effect on the salary of public defenders. The study of the US National Right to Counsel Committee has evidence that the appointed counsel's salary is one of the problems which affect an effective defense. The ABA has adopted a standard that public defenders and prosecutors be paid at "comparable" rates and in many states parity does exist. In others, however, defense lawyers receive lower salaries. The disparity in funding between defense and prosecution is estimated to be enormous. The US government currently spends about one hundred billion dollars each year on criminal justice, but only about 2-3% of that total goes to indigent defense.¹²⁸ Most commentators appeal to government to increase the indigent defense's costs, including the salary of public defenders. This reflects the view that equalizing compensation between defenders and

¹²⁶ See Paul Marcus, *supra* note 123.

¹²⁷ Report of 2009, *supra* note 8.

¹²⁸ *Ibid.*,

prosecutors acknowledges the equivalent roles the two play in the criminal justice system.

Secondly, the defense counsel has not been fully provided with the necessary conditions to perform his/her defense function

Inadequate Client Contact. Most surveys show that defense counsels usually meet difficulties when their matter leaves the court. Professional conduct rules require, and standards applicable to defense representation recommend, that attorneys keep clients informed of the status of their case and promptly respond to client requests for information.¹²⁹ The unfortunate reality is that indigent defense attorneys are often unable to comply with their professional duty respecting client contact due to several factors, such as excessive caseloads and the failure to be appointed in a timely manner. The situation is often worse for incarcerated defendants. Some defense counsel lack sufficient time to visit their clients in jail or are unable to accept collect calls from the jail.¹³⁰ Beside that, the late appointment of counsel not only affects the attorney-client relationship, but it also undermines a defendant's right to be heard on pretrial release and the ability to prepare a defense. Although the Court in *Gideon* held that counsel must be provided to the accused at all "critical stages" during proceeding, many indigent defendants obtain representation too late in the process or simply do not receive counsel at all.¹³¹

Lack of Technology and Data. The contents of the Report of 2009 show that technology and data management plays an important role in supporting the defense activities of counsel. But the facts show that some public defender offices do not have sufficient management information systems or technical support, leaving them unable to compile relevant statistical data regarding their caseloads. Some public defenders appearing in juvenile court did not have computers, and their secretary had no fax machine or copier, having to rely instead on the courthouse's equipment. Besides wasting attorney and staff time, sharing equipment raises concerns regarding confidentiality. In New York, for instance, some public defender offices have little or no access to online legal research. One large office did not even have updated copies of New York's penal law. As a consequence, without the appropriate technology, all information must either be handled manually or not at

¹²⁹ See ABA Model Rules, at Rule 1.4; ABA Standards for Criminal Justice: Defense Function (3d ed. 1993) at 4-3.8; Performance Guidelines for Criminal Defense Representation (4th Printing) (National Legal Aid and Defender Ass'n 2006), at 1.3(c), 2.2(b).

¹³⁰ Report of 2009, *supra* note 8.

¹³¹ *Ibid.*,

all. Of course any problems will be discovered too late, new counsel may have to be appointed, cases are delayed, efforts are often duplicated, and unnecessary additional costs are incurred.

Thirdly, lack of standard conditions in law enforcement

Many commentators indicated that the indigent defense provider's lack of independence is now a reality in many states. The assignment of cases to particular attorneys is the result of patronage and is not due to the overall obligation of government. This may be rooted in a desire to control costs but when the defense function so lacks independence, the integrity of the indigent defense system is compromised. And this situation runs contrary to both the duties of the defense provider and the interests of defendants.¹³²

- Lack of performance standards. The National Right to Counsel Committee, in its report, has stressed that although national performance standards exist, they are not binding in any state or local jurisdiction.¹³³ Even when such standards are adopted by a jurisdiction or defense program, due to lack of resources and high caseloads, compliance is not usually monitored or enforced. As a result, untrained and unskilled attorneys often fail to provide competent representation.

- The National Right to Counsel has indicated that one of the greatest difficulties of appointed counsel is the lack of experts, investigators, and interpreters. The facts show that while experts are often necessary to present an effective defense (e.g., insanity or battered woman's syndrome), test physical evidence, or provide an opinion independent of the prosecution's state-supplied expert, defense attorneys are denied the use of experts or investigators due to limited funds. On the other hand, the prosecution is often provided with such services which is seen as unfair.

Fourthly, an excessive caseload is a burden for the defense lawyer

There are many who complain that the excessive caseloads of counsel is one of the shortcomings of the American criminal justice. Therefore, the need for reducing caseloads is central to improving the defense of indigent clients.¹³⁴

¹³² *Ibid.*,

¹³³ National professional standards require that defense counsel's knowledge, skill, and training be sufficient to provide representation in each case. (NLADA Performance Guidelines, Principle 6 and 9 of ABA's Ten Principles and ABA Model Rules). ABA principles also require oversight of an attorney's performance measured against national and local performance standards (NLADA Performance Guidelines).

¹³⁴ *Ibid.*,

The fact shows that, in states across the country, public defense attorneys are carrying heavy caseloads, forcing them to jump from client to client. Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system.¹³⁵ The US Supreme Court has evidence that overworked and incompetent lawyers contribute to wrongful convictions and that truly well-prepared defense lawyers, with adequate support services, can attack the other causes of wrongful convictions, such as mistakes in eyewitness identifications and insufficient investigations.¹³⁶ According to the Report of 2009, the excessive caseloads of appointed defense counsel was due to the following reasons:

- Policies expanding the right to counsel: as mentioned above, since 2002, for a person to be incarcerated for violating the terms of a suspended or probated sentence, counsel must have been provided for the underlying offense even if the defendant was not facing incarceration at the time of conviction. See *Alabama v. Shelton*, 535 U.S. 654 (2002). Furthermore, states now provide counsel to indigent persons in certain non-criminal cases. The number and cost of these cases can be quite significant and are usually considered part of the state's total indigent defense caseload and expenditures. For example in Virginia, court-appointed counsel are provided in dependency and termination of parental rights cases and in cases requiring the appointment of a guardian (e.g., for a minor). In Massachusetts, defense lawyers are provided in numerous non-criminal cases, including dependency, guardian, and mental health (e.g., civil commitment) cases.¹³⁷
- Beside that, in recent years, the criminalization of minor offenses have increased the number of indigent defendants who are suffering from mental illness. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor,

¹³⁵ *Ibid.*,

¹³⁶ See Paul Marcus, *supra* note 123.

¹³⁷ Report of 2009, *supra* note 8.

adequately prepare for hearings or perform countless other tasks that would normally be undertaken by a lawyer with sufficient time and resources.¹³⁸

In order to overcome this situation, both the NLADA and the ABA have proposed resolutions to reduce excessive caseloads. For example the NLADA guidelines require that, prior to accepting an appointment, defense attorneys ensure they have adequate time available to provide quality representation; further, should this change during the course of a case, they should seek to withdraw as counsel.¹³⁹ Similarly, the ABA's standards and its ethics opinions require defense attorneys not to accept too many cases and to seek court approval to withdraw from cases when the workload is such that they cannot provide adequate representation. However, if defenders ask to withdraw or request that they not be appointed to additional cases, judges are not bound to heed their request and, if relief is not granted, the rules of professional conduct require that attorneys continue to provide representation.¹⁴⁰

The above remarks constitute my summary of the practical guarantee of the right to defense counsel in US criminal procedure. As mentioned above, the US government has created sound legal mechanisms which should ensure the accused's right to counsel. However, in order to uphold the effectiveness of those legal mechanisms, they should improve the way they are managed in various ways. The National Right to Counsel Committee has suggested twenty recommendations for the reform of the judiciary. The most important recommendation is that indigent defense should be independent, non-partisan, organized at the state level and adequately funded by the state.¹⁴¹

CONCLUSION

As previously mentioned, one of the purposes of this thesis is to study US criminal procedure on the guarantee of the right to defense counsel. In this Chapter, the writer has pointed out the ground for the establishment of a legal regimes guaranteeing the right to defense counsel which, in the US criminal procedure system, evolved from the principle of Due Process which itself originates from the history of English procedural justice. This is a factor governing and shaping the

¹³⁸ *Ibid.*,

¹³⁹ The Spangenberg Group, Resources of the Prosecution and Indigent Defense Functions in Tennessee (2007),

<http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/downloads/TN_Comp_StudyFINAL_7_30_07.authcheckdam.pdf>.

¹⁴⁰ Report of 2009, *supra* note 8.

¹⁴¹ *Ibid.*,

adversary system of justice, one of the key characteristics of the US criminal procedure. With this mode of procedure, defense counsel in US criminal procedure have the power to perform their defense function in a fair way.

In addition, the writer has also indicated the basic contents of the right of the accused to defense counsel and has found regimes guaranteeing this right in accordance US legislation. Remarkable features have been acknowledged as the following indicates:

- Indigent accuseds in federal and state cases have a right under the Sixth Amendment to have defense counsel appointed at critical stages of the prosecution. They must receive at government expense the basic tools necessary to assure that they have meaningful access to justice at trial and on appeal.
- Waiver of the right to defense counsel must be “knowing and intelligent”.
- Competent accuseds may waive their right to defense counsel and self- defense.
- The Accused have the right to the effective assistance of counsel.

Finally, for the purpose of commenting on the actual status of the guarantee of the right to defense counsel, we have found that the United States government has given firm assistance in various ways. This assistance has resulted in a sound legal system which not only ensures the rights of the accused but also orientates the activities of the courts, procuracy bodies and even defense counsel thus guaranteeing the constitutional rights of all citizens. The US believes that, with such a legal system, all defendants will have competent counsel representing them before the criminal procedure system. Furthermore, the fairness of legislation does not depend on the financial capacity of the accused. From which, we understand that all regimes of government must be involved in ensuring the fairness of the justice system. One of the condition precedents to ensuring such fairness is granting defense counsel the right to perform independently before the court and procuracy bodies. In this respect, we can see that both the ABA and the NLADA have long recognized that, when the defense function lacks such independence, the integrity of the indigent defense system is compromised. And I totally agree with the view of the reporters of the US National Right to Counsel Committee (Report of 2009) that “*the lack of independence of the defense function threatens the right to counsel*”.¹⁴²

¹⁴² Report of 2009, *supra* note 8.

CHAPTER 5: EVALUATION, COMPARISON AND RECOMMENDATIONS ON THE PERFECTION OF THE VIETNAMESE CRIMINAL PROCEDURE LAWS IN TERMS OF THE GUARANTEEING OF THE RIGHT TO DEFENSE COUNSEL

The results of the research presented in Chapters 1, 2, 3 and 4 have shown that the right to defense counsel is a basic procedural right of the accused which is assured in most jurisdictions. In typical legal regimes, ignoring fundamental differences in legal tradition (such as inquisitorial versus adversarial proceedings), the guaranteeing of the right to defense counsel is one of the key issues safeguarding human rights in criminal procedure. In Chapters 2, 3, and 4, the legal issues and the practical application of the laws guaranteeing the right to defense counsel in Vietnamese, German and United States systems were reviewed. It was demonstrated that the views of lawmakers in each of these systems contained many basic similarities. The setting forth of legal mechanisms to guarantee the right to defense counsel in the three systems also demonstrated adherence to the general spirit of the United Nations International Covenant on Civil and Political Rights. However, due to differences in legal tradition, the guarantee of the right to defense counsel also contained key differences. Based on the information presented in the previous Chapters, the author will, in Chapter 5, give an overview of the findings regarding the juridical systems in Vietnam, Germany and the United States concerning the right to defense counsel, and then evaluate the similarities and differences between them. The results of the evaluation and comparison will be the basis allowing the author to make recommendations for improving the Criminal Procedure Code of Vietnam regarding the accused's right to defense counsel.

Chapter 5 consists of two main parts. The first presents an evaluation and comparison of the guarantee of the right to defense counsel in Vietnam, Germany and the United States. In this section, the author focuses on two aspects, which are the overall evaluation and a more specific evaluation. In the context of the overall evaluation, the author summarizes and analyzes the factors that provide for the similarities and the differences in the mechanisms guaranteeing the right to defense counsel, for example, elements of the traditional procedure model, procedural rules and the rules for gathering evidence. In contrast, the specific valuation will synthesize and analyze the similarities and differences in specific legal mechanisms

in relation to the right to defense counsel in each jurisdiction system. In the first part of Chapter 5, conclusions and comparisons will be analyzed in each specific criterion. The second part will include recommendations for measures which could improve the Vietnamese criminal procedure code regarding the right to defense counsel. Based on the evaluation contained in the first section, and taking into account the conditions and circumstances of Vietnamese law, the author develops and proposes insights at two levels which relate to more general solutions and specific solutions. This is the most comprehensive basis allowing the author to propose suitable recommendations for the further improvement of the criminal procedure law of Vietnam.

5.1. Assessment and comparison of the laws of Vietnam, Germany and the United States regarding the guaranteeing of the accused's right to defense counsel

5.1.1. General review

Level of implementation of general standards covered by international conventions on human rights

Chapter 1 (section 1.2) shows that the accused's right to defense counsel is considered a basic procedural right guaranteed in most international and regional legal instruments on human rights.¹ In most of these instruments, the right to defense counsel is considered as an aspect of the right to a fair trial. In other words, guaranteeing the right to defense counsel means respecting and guaranteeing the right to a fair trial. It is seen as a principle governing the procedural aspects of criminal cases.

As members of the UN International Covenant on Civil and Political Rights (ICCPR), all three countries (Germany, the US and Vietnam) have institutionalized the general spirit of the Covenant in guaranteeing the right to defense counsel in their national laws. All three countries have recognized the right to defense counsel as a constitutional right² and further provided for this right in their laws. In the United States, the right to defense counsel is considered a key procedural right of the accused. A person who is supported by an effective defense lawyer will be

¹ Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human Rights and Citizen Rights.

² Sixth Amendment of the Constitution of the United States; Art. 103 of the Constitution of the United States; Art. 103 of the Constitution of Germany and Art. 132 of the Constitution of Vietnam.

avored in the exercise of his other rights of such person, partly because he will be thoroughly informed of his rights while, on the other hand, the defense counsel can advise him how his rights can be secured.³ In Germany and Vietnam, the right to defense counsel is a fundamental procedural right of the accused which is provided for in the Criminal Procedure Code.⁴ More specifically, under the Criminal Procedure Code of Vietnam, the guaranteeing of the right to a defense is treated as a fundamental principle controlling all procedural aspects of criminal cases.⁵ Germany, as a member of the European Convention on Human Rights, generally complies quite strictly with the general standards provided in Article 6.3(c) of the Convention. However, there are many who recognize that Germany is rather conservative in its institutionalization of the standards established by the Convention.⁶ Now, after the Lisbon Treaty and the accession to the European Convention on Human Rights,⁷ and given the EU's commitment to expanding mechanisms to guarantee basic procedural rights in the future, Germany must also standardize the legal mechanisms which will guarantee the procedural rights of the accused, including general commitments to guaranteeing the right to effective defense counsel.⁸

Although the level of institutionalization of the legal mechanisms guaranteeing the right to defense counsel is not absolutely the same in each country (the US, Germany and Vietnam), in line with the general spirit of the International Covenant on Civil and Political Rights, the right to defense counsel in each is guaranteed in all three of its aspects: (1) the right to defense counsel is a fundamental one and should be guaranteed by the Constitution and laws; (2) defense counsel will be favorable to efficient defense, (3) it is the responsibility of the competent authorities to ensure that the right to defense counsel is effectively implemented.

³ *Faretta v. California*, 422 U.S. 806 (1975) at 807.

⁴ Art. 136 StPO; Art. 11 Vietnamese CCP.

⁵ Art. 11 named as "Guarantee of the right to defense of the detainees, accused and defendants" is one of fundamental principle provided in Chapter 2 on "Fundamental Principles" of the CCP of Vietnam 2003.

⁶ See general Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *Effective Criminal Defence in Europe*, Intersentia: Antwerp – Oxford – Portland, ISBN 978-94-000-0093-3, 5/2010.

⁷ Art. 1(8) Lisbon Treaty states that: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

⁸ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 6.

Common difficulties in the application of the laws

The practical application of the laws in the three countries also reflects the common difficulties that all governments are struggling to overcome. Difficulties are generally concentrated in two aspects: first, imperfections in legislation, second, shortcomings in the practical application of laws. In the first aspect, the results of research on US laws in Chapter 4 indicate that US Criminal Procedure has established a fairly complete legal mechanism guaranteeing the right to defense counsel.⁹ Due to the flexible manner of law-making in common-law-based countries, judges in the US have more opportunities to help guarantee the fundamental rights of citizens, including the right to defense counsel. Germany and Vietnam have gaps in statutory provisions that should soon be filled, for example, Germany still lacks a strict rule guaranteeing the right of the accused to defense counsel in the process of police interrogation;¹⁰ while Vietnam still allows judges to conduct hearings without the presence of defense counsel,¹¹ and does not acknowledge the right to keep silence, etc.. In so far as concerns the practical application of the laws, all three countries are experiencing common difficulties, such as limitations on the professional capacity and responsibility of defense counsel, the approach of competent prosecution agencies, etc.. Especially, both Germany and Vietnam share the need to change the views of the prosecution authorities on the role of the defense counsel.

The trend towards convergence in legislation

The United States, Germany and Vietnam have developed, and operate, their institutions, organizations, and laws against a backdrop of extremely different historical, social, political, and economic forces. Accordingly, there is no reason to expect the three countries to view their citizens in the same manner or accord them similar rights. Despite major differences, many underlying similarities can be found in the three countries, and the three systems of criminal justice appear to be converging toward a single model that incorporates both adversarial and inquisitorial elements.

⁹ This judgment is evaluated by the author on the basis of comparison with fundamental standards in International Conventions on Human Rights and of the contrast with other systems.

¹⁰ Craig M. Bradley, *Criminal Procedure – A worldwide Study*, Carolina Academic Press, 2nd Ed., 2007, p. 258.

¹¹ Art. 190 CCP

It is obvious that the role of the defense counsel has an influence on the fate of the accused. Most legal systems have provisions on the rights of defense counsel. These rights are aimed at enabling defense counsel to perform his/her responsibilities in the fullest manner. Differing viewpoints still agree that the nature of the legal system has an influence on the defense's role.¹² In adversarial legal systems, the responsibility for the representation of the fact rests primarily with the parties, the jury and not the judge decides on the facts. On the contrary, in the inquisitorial system, the judge has the primary responsibility (or the privilege) to find out the truth, independently of the parties. In this system, the judges decide what has to be investigated. The verdicts of judges will be unavoidably affected by the results of their investigation. Furthermore, over and above their role in judging the truth, judges in the inquisitorial procedure can reject the presentation of certain facts by the parties.¹³ These differences make more for corresponding distinctions in the role of defense counsel. Most experts assert that the role of defense counsel in the inquisitorial system is not as esteemed as it is in the adversarial procedure.¹⁴ This affects law-makers setting forth mechanisms guaranteeing the right to defense counsel.

Results of the study presented in previous Chapters of this thesis have indicated that the United States is a typical adversarial system. Fair procedure is a principle controlling the judgment of judges. In the case of *Herring v. New York*, 422 U.S. 853, 862 (1975), the judge stressed that: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will promote the ultimate objective that the guilty be convicted and the innocent go free." As a result, the success of the trial system is dependent upon both sides being represented by contentious opposing advocates (the defendant as well as the state).¹⁵ Most lawyers in the US believe that when the defense does not measure up to the prosecution, there is a heightened risk of the adversary system of justice making egregious mistakes.¹⁶

¹² Michail Wladimiroff, *Representation and Legal Aid*, 17th International Conference on the Coverage of Criminal Justice Systems, the Hague 24-28 August 2003, <<http://www.isrcl.org/Papers/Wladimiroff.pdf>>.

¹³ *Ibid.*,

¹⁴ See general Hodgson Jacqueline, *The role of the Criminal Defense Lawyer in an Inquisitorial Procedure: Legal and Ethic Contranst*, Hart Publishing, Vol. 9, 2006; Linarelli and Herzog, *Model Practice in Judicial Reform; A Report on Experiences Outside the Region, Justice Beyond our Border*, John Hopsins Press, 2000.

¹⁵ Jerold H. Israel, Yale Kamisar, Wayne R. LaFave, *Criminal Procedure and the Constitution*, Thomson West, 2004, p. 25.

¹⁶ Report of the National Right to Counsel Committee on April 2009. See available at <<http://www.constitutionproject.org>> and <<http://www.nlada.org>>.

Different in this from the United States, Germany and Vietnam have a similar inquisitorial procedure model, which fosters the initiative of judges in providing evidencing of guilt. Hence, we have found several similarities between Germany and Vietnam in matters handled very differently in the United States. The first phase of a criminal prosecution is the pre-trial investigation to determine if there are grounds for a formal indictment. If a prosecutor determines that there is, the case is transferred to the appropriate court, where the presiding judge decides if the evidence warrants a trial. This contrasts markedly with the US, where a judge will have little or no knowledge of the facts of a case until evidence has been introduced in the courtroom.¹⁷

Besides, the most critical point in the US adversary system of justice is determining the truth during adjudication where the prosecution and defense counsel compete against each other while the judge ensures fairness and adherence to the rules.¹⁸ In contrast, in Vietnam and Germany the seizure of evidence and cross-examinations in the pre-trial stage are considered as a burden for the investigating bodies. Further, professional judges are usually familiar with the file on an investigation before a trial begins. This practice indicates that the judgment in such cases may not be fair and objective in comparison with US approach.

There is no such thing as a jury trial in Germany and Vietnam, and instead lay judges sit alongside professional judges.¹⁹ The law in both Germany and Vietnam calls for a majority of two-thirds of the judges in any decision adverse to the defendant, and lay judges also participate in the determination of the sentence since there is no procedural separation between verdict and sentence.²⁰ This is sometimes the cause of unfair judgments because of the result of the verdict was a majority opinion of the trial who are unprofessional and lack legal knowledge. However, lay judges in Vietnam frequently accept the professional judge's conclusion because of the latter's superior experience and knowledge of the law. It is the same thing in Germany.²¹ But the US common law jury determines only guilt, not sentence. Most states in the United States still require unanimous jury verdicts for both convictions

¹⁷ William T Pizzi, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body*, Hart Publishing, 2008, p. 79, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331636>.

¹⁸ *Ibid.*,

¹⁹ German Court Organization Act (Gerichtsverfassungsgesetz) (1975); Arts. 25, 33 Vietnamese CCP.

²⁰ Art. 263 StPO; Art. 6 Vietnamese Court Organization Act (2002) and Art. 185 of the Vietnamese CCP.

²¹ Richard S. Frase and Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. Int'l & Comp. L. Rev. 317 (1995), <<http://lawdigitalcommons.bc.edu/iclr/vol18/iss2/2>>.

and acquittals.²² With this approach, the judge's verdict will be more objective and accurate.

One more criticism is that the defense lawyers in Germany and Vietnam are not as active in court as is an American lawyer. In a German or Vietnamese trial, the judge, not the defense counsel or the prosecutor, obtains the testimony of the witnesses. After the judge is finished, the prosecutor and the defense counsel will be permitted to question witnesses. The aim is to obtain the truth from witnesses by direct questioning rather than through the examination and cross-examination procedure generally used in a US trial. Further, in the United States, an accused party can plead guilty in order to receive a lesser punishment. On the contrary, the formal pleas of "guilty" or "not guilty" do not exist in German or Vietnamese trials.

The foregoing analyses have demonstrated the differences between the US laws and the laws of Germany and Vietnam in the presentation of evidence and in the role of the concerned parties. We may thereby find that the United States Criminal Procedure, with the specific characteristics of the adversarial system, has manifested its good points compared to that of German and Vietnam. The defense counsel in the US is vested with an equal opportunity of presenting evidence to the judge. This means that the accused in the United States also has more opportunities to be protected by defense counsel. Accordingly, one of the conditions precedents to improving the effectiveness of the guarantee of the right to defense counsel is to establish a proper procedure which ensures the parties in a case are treated equally. Current trends have shown that the modern development of criminal procedure law does indeed go rather in the direction of a certain convergence, in which the principle of adversariality has the dominant role to play.²³ Several experts have noted that one of the factors that need to be changed by countries applying the model of inquisitorial procedure is the over-prominent role of judges at trial.²⁴ Additionally, many opinions have claimed that, inquisitorial features can be found in Anglo-American countries, sometimes quite conspicuous.²⁵ Most of studies show that, the modern Continental procedure retains certain inquisitorial features, such as the active role of the presiding judge, is not necessarily an obstacle. As a result, the inquisitorial procedure may be best suited to getting at the truth; the adversarial may

²² *Ibid.*,

²³ Stefan Trechsel, *Human Rights in Criminal Proceeding*, Oxford, 2006, p. 5.

²⁴ Linarelli and Herzog, *supra* note 14.

²⁵ Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* New Haven, Yale University Press, (1986).

afford better protection for the individual. Since both objectives have to be attained, a combination of elements of both types of procedure may be best. The problem is of course how and which elements of both types of procedure should be combine together. This shows that moving towards an effective procedural model, combining the advantages of both the adversarial and the inquisitorial procedure is an objective matter. The ultimate objective of such a trend is to improve the effectiveness of criminal procedure and to further guarantee human rights in it, among which is the right to defense counsel.

Vietnam has expressly shown its intention to change the way of establishing a fairer adversarial hearing system. Resolution No. 08-NQ/TW dated 2 January 2002 of the Politburo on a Number of Key Duties in Judicial Mission for the coming time paid special attention to the role of lawyers and obliged the judicial authorities to guarantee the activities of lawyers in criminal procedure. The Resolution specified: "Improving the quality of prosecution of prosecutors at court trials, ensuring the adversarial procedure in a democratic way with lawyers, defense counsel and other participants..."; "the judgment of a court must be based mainly on the result of the adversarial procedure at trial, including a full and comprehensive review of the evidence and the opinions of prosecutors, defense counsels, the accused, witnesses, plaintiffs, defendants and other persons with interests and obligations related to the case for the purpose of giving verdicts and decisions in strict accordance with the laws that are convincing and must be given within the time-limit provided by the laws"; "judicial authorities are responsible for making it easy for lawyers to discuss matters in a democratic way at trial". It is likely that this is a correct orientation for Vietnamese law-makers, especially ibearing the above-mentioned convergence in mind. I myself back the view that a defense counsel can only uphold his/her procedural functions if he/she is recognized as a supporter in the investigation to find the truth ultimately controlled by the judge.²⁶

5.1.2. Particular assessments

The above assessment has indicated that expanding the guarantee of the right to defense counsel is still a concern in many countries. In this section, the author focuses on analyzing, comparing and assessing the similarities and differences and the strong points and shortcomings of Vietnamese laws in comparison with the laws of German and the United States regarding the right to counsel. In addition to the

²⁶ Hodgson Jaccqueline, *supra* note 14.

general assessment (see *supra*), the assessments presented in this part will serve as a basis on which the author can base her recommendations for improving the laws of Vietnamese regarding the guarantee of the right to defense counsel.

5.1.2.1. The time for guaranteeing the right to defense counsel

Even though they are not totally the same, the laws of the three countries (Vietnam, Germany and the United States) promulgate provisions which are quite similar where the issue of the time when the right to defense counsel is guaranteed are concerned.

Under United States law, a person is entitled to the assistance of counsel at a “critical stage” of the prosecution, after the initiation of an ‘adversarial proceeding’;²⁷ it is where and when he learns the charges against him and his liberty is subject to restriction which marks the start of adversary judicial proceedings that trigger the Sixth Amendment right to counsel.²⁸ Judgments of the US Supreme Court have also recognized that the “critical stages” include: the pre-trial stage (pre-indictment preliminary hearing,²⁹ post-indictment retrial lineup,³⁰ post-indictment interrogation,³¹ arraignment);³² the trial stage (the sentencing hearing)³³ and the first appeal stage.³⁴ Further, according to the Federal Rules of Criminal Procedure, an accused who is unable to obtain counsel is entitled to have counsel appointed to represent him or her at every stage of the proceedings from the initial appearance through appeal, unless the defendant waives this right. Besides that, an accused shall have access to counsel at every stage of the proceedings, beginning with the defendant's initial appearance. If a defendant demands the presence of counsel during police interrogation, police must stop the interrogation until the defendant's counsel is present.³⁵

Meanwhile, the Criminal Procedure Code of Germany only provides in a general way when the right to defense counsel applies. Article 137 of the Criminal Procedure Code of Germany (StPO) states that the accused may have the assistance of defense counsel at any stage of the proceedings, but does not further specify the

²⁷ *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

²⁸ *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

²⁹ *Coleman v. Alabama*, 399 U.S. 1 (1970).

³⁰ *United States v. Wade*, 388 U.S. 218 (1967).

³¹ *Massiah v. United States*, 377 U.S. 201 (1964).

³² *Halminton v. Alabama*, 368 U.S. 52 (1961).

³³ *Mempa v. Rhay*, *supra* note 27.

³⁴ *Douglas v. California*, 372 U.S. 353 (1963).

³⁵ Rule 44 (a) of the Federal Rules of Criminal Procedure.

time on which the right to defense counsel appears. The Criminal Procedure Code of Germany, however, emphasizes that the appointment of defense counsel must be guaranteed in the investigation and first instance phases with respect to accused persons charged with felony crimes or to accuseds in provisional detention.³⁶ In addition, the right to appoint a defense counsel is also guaranteed at appeal.³⁷ These phases could be understood as “critical stages” in the US sense when the presence of defense counsel is required.

On the other hand, the laws of Vietnam provide that the right to defense counsel applies once a person is held in custody (detainee).³⁸ This right remains guaranteed throughout the investigation stage and the trial stages (including the first instance trial and appeal).

In terms of content, although the provisions are not completely identical, all three jurisdiction systems contain similarities regarding the time when the right to defense counsel is guaranteed. Indeed, the right to defense counsel must be guaranteed during many stages, namely the pre-trial stage, first instance trial and first appeal stage. However, there is a notable difference in that both Germany and the US have recognized that the suspect has the right to silence and to be informed of his/her right to defense counsel during interrogation by the police.³⁹ Immediately after an arrest, the police are obliged to inform and explain to the suspect that he/she has the right to silence and the right to have the assistance of the defense counsel. In contrast, the laws of Vietnam have no provision on the right to silence. Thus, in terms of time, even when a person is arrested, the police are not obliged to say anything about the right to silence or the right to defense counsel. We believe that the right to silence is necessary for the accused. In both theory and practice, the testimony of the accused may be evidence against him. To avoid a one-sided view in assessing the evidence, the accused should be assisted by defense counsel as soon as possible. Therefore, according to the law of most countries, investigators may not question the accused on matters relevant to the case if there is no defense counsel involved unless the accused rejects the right to defense counsel. We believe that this should soon be added to the laws of Vietnam.⁴⁰

³⁶ Art. 140 (1) (2), Art. 141(3) StPO

³⁷ Art. 364(a) StPO

³⁸ Arts. 11 and 48 CCP

³⁹ See *infra* section 5.1.2.5.

⁴⁰ *Ibid.*,

5.1.2.2. Counsel's fees and the guarantee of the right to free defense counsel for the indigent

The issue of defense counsels' fee rate is regulated very differently in the three legal systems. In the United States, if the accused is non-indigent, the state's responsibility to appoint a defense counsel for him/her does not mean that the defense's cost will also be covered. In Germany and Vietnam, once a defense counsel is appointed for a criminal case the cost of counsel is potentially covered by the State. However, in Germany, the nature of the verdict is in fact decisive when it comes to the question of free defense counsel. If the accused is acquitted, the court generally pays the counsel's fee.⁴¹

A closer investigation shows that there are indeed profound differences between the three legal systems concerning the policy regarding the right to have free defense counsel for indigents. Under American law, it is the State's responsibility to provide free defense counsel for an accused who is indigent.⁴² In other words, the accused will have defense counsel appointed for free if he/she is an indigent. However, there is a significant gap between policy and practice. There are considerable difficulties in implementing this generous policy in practice. Surveys shows that finding the financial resources to pay for free defense counsel is quite a challenge given other social needs.⁴³ Moreover, judges often find it difficult to trace the fine line between indigent and non-indigent. The lack of resources has rendered the policy, generous and humanitarian as it may be, inapplicable and the right to free defense counsel becomes in practice unenforceable.⁴⁴ Also, in practice, the Federal Supreme Court has expressed its support for states who rule that defense counsel's cost will not be

⁴¹See *supra* Chapter 3 (section 3.2.3).

⁴² See general Gideon v. Wainwright, 372 U.S. 335 (1963), Fuller v. Oregon, 417 U.S. 40 (1974).

⁴³ See general Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, William & Mary Law School Research Paper No. 09-92 57 HASTINGS L.J. 1031 (2005-2006).

⁴⁴ See for instance:

- Louisiana: "[T]he indigent defense system devised by the legislature in Louisiana delivers ineffective, inefficient, poor quality, unethical, conflict-ridden representation to the poor." *Source*: NAT'L LEGAL AID & DEFENDER ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON* (2004). Available at: <http://www.nlada.org/DMS/ID78863541.49/A_voyelles%20Parsh%20Body%20Text.pdf>.
- "Pennsylvania does not guarantee indigent criminal defendants adequate, effective representation." *Source*: Nat'l Legal Aid & Defender Ass'n, Gideon Reviewed: The State of the Nation 40 Years Later, <<http://www.nlada.org/DMS/Documents/1047416381.38/Gideon%20Reviewed%20-%20The%20State%20of%20the%20Nation%2040%20Years%20Later.pdf>>.
- North Dakota: "The current system is in danger of failing to fulfill its constitutional mandate of providing indigent defendants with effective assistance of counsel." *Source*: ABA, REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA 1 (2004).

paid if the accused indigent is found guilty and it is found later on that he/she can afford the cost.⁴⁵ Nevertheless, from a political perspective, the United States has provided a most generous policy on free defense counsel for the indigent, which shows that law-makers in the country adopted a very humanitarian approach regarding the right to defense counsel.

In contrast, there is no public defender system for indigents in Germany; instead a criminal legal aid approach is applied in cases where mandatory defense counsel is called for. Unlike American law, German law aims at providing defense counsel to the accused rather than dealing with the question of who will cover the cost.⁴⁶ Whether or not the accused is an indigent does not affect their right to appointed defense counsel. In cases where it is mandatory for the State to appoint a defense counsel, the State will pay the remuneration of counsel in accordance with the law.⁴⁷ However, such a payment will be refunded to the State by the accused if he/she is eventually found guilty. To some extent, this policy is similar to that in the United States. However, in Germany the law does not mention any right of the poor to have free defense counsel. A study shows that, a comparison of the total expenditure on indigent defense in the two countries (adjusted for differences in population and crime rates) indicates that the American budget is significantly higher than that of the German.⁴⁸ As a consequence, it seems that indigents in the United States have more chance of being represented by defense counsel than do those in Germany.⁴⁹

Unlike the American position and similar to German law, Vietnamese law does not state that an indigent accused is entitled to free appointed defense counsel. As mentioned above, according to the Criminal Code of Vietnam, the responsibility for appointing a defense counsel includes the responsibility for covering the cost for the defense service. Accordingly, in case of mandatory defense counsel, the accused will have the counsel for free.⁵⁰ The steps in the appointment of a defense counsel are conducted in order. First, the competent authority sends a letter of request to the

⁴⁵ Fuller v. Oregon, see *supra* note 42.

⁴⁶ Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 6, p. 261.

⁴⁷ *Ibid.*,

⁴⁸ COMMISSION JUSTICE PENALE ET DROITS DE L'HOMME, LA MISE EN ETAT DES AFFAIRES PENALES Rapports 142 (1991) which reports that estimated expenses per inhabitant for indigent defense in the United States are 20 times higher than in France, and that German expenses are five times higher than in France. This would make U.S. expenses per inhabitant four times the German figure; after allowing for the higher US criminal caseload per inhabitant, indigent defense expenditures per case would still be about 2.5 times higher in the United States. As quoted by Richard S. Frase and Thomas Weigend, *supra* note 21.

⁴⁹ Richard S. Frase and Thomas Weigend, *Ibid.*,

⁵⁰ Clause 2, Art. 57 CCP.

relevant local bar association. The bar association will then appoint a defense counsel as per the request of the litigating authority. Finally, the cost for that defense counsel is covered by the annual budget of the litigating authority that made the request.⁵¹ Like Germany, Vietnam does not have a general public defender service serving the indigent in particular. However, the poor can still enjoy free defense counsel provided by the legal aid centers in accordance with the Law on legal aid (2006).⁵² In my opinion, this is a suitable approach, which helps ease the burden of expenditure on the State while the accused's constitutional right to defense counsel is still guaranteed. This shows that Vietnam has made a good effort to satisfying the right of the poor to have free defense counsel.⁵³ It remains the case, however, that Vietnam needs to state in the law that the right to free defense counsel is a fundamental procedural right of the indigent. Such a statement would be very significant. At the same time, legal aid should still be provided to all those who need it.

5.1.2. 3. Appointed Defense Counsel

The obligation to appoint the defense counsel: all three jurisdiction systems have recognized that guaranteeing the accused's right to defense counsel involves an obligation by the government to appoint the defense counsel. However, there is a clear difference in the legislation of these three nations on the issue. Under US law, the appointment of the defense counsel is based on the status of the accused. Accordingly, the government has the obligation to appoint defense counsel if the accused is indigent; charged with offenses punishable by a custody sentence; charged with juvenile delinquency or subject to mental illness or other disability.⁵⁴ However, the obligation to appoint defense counsel is not synonymous with the responsibility to pay defense counsel's fees unless the accused is indigent.⁵⁵

⁵¹ Article 11, Decree 28/2007/NĐ-CP dated 26 February 2007 of the Government providing detailed provisions and guidance for the implementation of the Law on Lawyers.

⁵² Legal aid centers are under the general authority of the Government and the Ministry of Justice (Art. 47). Their working principles are: free service to the legal aid beneficiaries, honesty and respect of objective truth, responsibility before the law" (Art. 4). Legal aid providers and lawyers from lawyer offices form the main work-force (Arts. 21, 23).

⁵³ The right to free legal assistance is provided for in Art. 14(3)(d) of the International Covenant on Civil and Political Rights, Art. 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Art. 8(2)(e) of the American Convention on Human Rights.

⁵⁴ See generally *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). See *supra* Chapter 4 (section 4.2.2).

⁵⁵ See *supra* Chapter 4, (section 4.2.2 and section 4.2.2.4).

Quite different in this from the United States, the rationale of the "right" to appointed counsel in Germany is the public interest in conducting the criminal process in a rational and fair manner.⁵⁶ The German Code of Criminal Procedure stipulates the cases involving the mandatory appointment of defense counsel.⁵⁷ In these cases, the state fixes the obligation of the court to appoint defense counsel. As such, many commentators have concluded that, under the German Code of Criminal Procedure, the right to defend one's self as well as the right to refuse defense counsel are limited.⁵⁸ Accordingly, the obligation to appoint defense counsel in German Criminal Procedure has a larger scope in comparison than the corresponding obligation in US legislation. However, it would be difficult to decide whether this is an advantage or a limitation of the German Criminal Procedure Code. The right to the defense counsel appointed is thus guaranteed absolutely and positively in Germany. It can be guessed that this kind of provision results from the view that in any case involving seriousness or complexity, or in cases where the accused is limited in physical or mental capacity, the involvement of the defense counsel is necessary to guarantee the fairness of the proceedings. However, in general, a person has the right to refuse any rights vested in him/her by the laws. Hence, the provisions of Article 140 of the Code of Criminal of Germany have, to some extent, limited the right to defend one's self and the right to refuse defense counsel. In contrast, the judges in US are required to respect the right of the accused to refuse defense counsel and to defend him/herself.⁵⁹

As is the case in Germany, the Code of Criminal Procedure of Vietnam also regulates the cases where defense counsel is mandatory, but in a narrower way.⁶⁰ The competent authorities only have the obligation to assign defense counsel in two situations: the accused or the defendant is charged with offenses punishable by death penalty; or they are the minors or people suffering from mental or physical diseases. If the competent authorities do not carry out their obligation in such cases,

⁵⁶ Richard S. Frase, Thomas Weigend, *supra* note 21.

⁵⁷ Article 140 of the CCP reads: (1) In case where the defendant is judged under the first instance at a regional court or superior court; (2) The accused or the defendant is charged with a serious crime, the judgment may lead to an order prohibiting such accused or defendant to conduct a certain act; (3) The accused or the defendant is detained for at least 3 months according to the decision of the Court and shall not be released for at least 2 weeks prior to the opening of the court hearing; (4) The accused or the defendant is in the process of being considered by the Court with respect to his/her mental illness; (5) The accused or the defendant is applying for a detention preventing measure or there is a decision to change lawyers participating in the proceedings.

⁵⁸ Richard S. Frase, Thomas Weigend, *supra* note 21.

⁵⁹ Myron Moskovitz, *Case and Problems in Criminal Procedure: the Courtroom*, 5th Ed., LexisNexis, 2009, p. 521.

⁶⁰ Art. 57(2) CCP.

this will be considered as an extreme violation of procedure. However, differing from those of Germany, Vietnamese laws acknowledges that even in these two cases the accused still has the right to request a change of, or refuse to have defense counsel.⁶¹

Compared to Germany and the US, we see that the scope of the guarantee of the right to defense counsel appointed in Vietnamese laws is relatively narrow. This affects the effectiveness of the right to defend. Regulations expanding the number of cases where defense counsel have to be appointed will significantly enhance efficiency and serve to guarantee the principle of the right to a fair trial.

Selecting and waiving the right to defense counsel: There are significant differences in the way the right to use and waive the use of appointed defense counsel is provided for in the three legal systems. According to US law, the right to appointed defense counsel is still enforceable even after a defense counsel has been hired by the accused.⁶² In other words, even with appointed defense counsel, the accused is still entitled to hire a defense counsel of his/her own. He can then select either of the two defense counsels or even both of them. The court will acknowledge the defense counsel per the accused's request.⁶³ However, a defendant who is an indigent does not have the right to select an appointed defense counsel.⁶⁴ With respect to the right to waive defense counsel, the Federal Supreme Court of the United States provides two conditions for such right to be enforced, namely consciousness and voluntary.⁶⁵ The right to waive defense counsel is limited in case the court has doubt about the mental capability of the accused or the accused is a juvenile.⁶⁶

Unlike the United States, Germany puts significant limits on the right to waive appointed defense counsel. Defense counsel is appointed by the presiding judge of the case from lawyers registered at the respective court. Within a stated period of time, the accused is allowed to select one defense counsel from the lawyers proposed by the judge.⁶⁷ There are no regulations on the right to waive defense counsel in the German laws. And in cases where defense counsel is mandatory,⁶⁸ the accused does not have the right to reject the defense counsel appointed for

⁶¹ *Ibid.*,

⁶² Chandler v. Fretag, 348 U.S. 3, 9 (1954).

⁶³ *Ibid.*,

⁶⁴ See *supra* Chapter 4 (section 4.2.2.2).

⁶⁵ Johnson v. Zerbst 304 U.S. (1938).

⁶⁶ Wade v. Mayo, 334 U.S. (1948).

⁶⁷ Art. 142(1) StPO

⁶⁸ Art. 140 StPO

him/her. That is why the view is taken that German law mandates the provision of counsel even if the accused does not wish it.⁶⁹

Like German law, Vietnamese law also states that the competent authorities are obliged to appoint defense counsel in certain cases.⁷⁰ And the appointed defense counsel is obliged to participate in the criminal case in question. This means that the competent authorities can only proceed if the defense counsel is present. However, unlike German law and like American law, Vietnamese law recognizes that the accused is entitled to reject an appointed defense counsel. What is different from the American law in this regard is that the current regulations on this is to be done have not been clearly stipulated and there is no statement on the conditions allowing for a waiver of defense counsel, nor is there is a clear differentiation between the right to waive defense counsel of juveniles, adults and persons with physical or mental defects.

It is our opinion that the right to defense counsel means not only the right to have appointed defense counsel but also the right to waive appointed defense counsel. Theoretically, one cannot be forced to accept his/her legal right. The right to waive appointed defense counsel must be recognized, except when such waiver would do harm to the accused or ruin the fairness of the law. The State needs to provide for such exceptional cases in order to guarantee fairness. The right to select or waive appointed defense counsel is regulated differently in the three legal systems because of differences in their respective theoretical premises. The fact that German and Vietnamese law has stipulated specific cases where appointed defense counsel is mandatory shows a positive attitude to protecting the best interests of the accused. However, while specific cases of appointed defense counsel (German law) are emphasized other fundamental rights of the accused are affected, namely the right to defend him/herself. In our opinion, the American regulations on this matter are very relevant because recognition of the right to waive defense counsel also means that the accused's right to defend him/herself is respected. On the other hand the law can still guarantee effective defense by a rule defining cases where waiver is not allowed. From a human rights protection perspective, such stipulation is an

⁶⁹ Richard S. Frase and Thomas Weigend, *supra* note 21.

⁷⁰ Art. 57(2) CCP

advantage and needs to be studied.⁷¹ It is a suitable direction to follow when the author will suggest improvements to Vietnamese law.⁷²

5.1.2.4. *Right to effective defense counsel*

As described in Chapter 4 (Section 4.2.2.3.), in the United States, the accused has the right to the effective assistance of counsel. The significance of this right is expressed in two standards: *first*, the defense counsel must be competent in the performance of defense activities; *second*, the government must provide conditions which guarantee the accused's right to effective defense counsel. On the first standard, the competence of the defense counsel requires him or her to have sufficient legal knowledge, and be proficient in professional skills and ethical matters as well. As to the second standard, the effectiveness of defense entails that the government is responsible for timely provision of other non-legal experts, such as doctors, psychologists, etc., to support the accused and his or her defense counsel in the provision and presentation of evidence. In addition, the American Bar Association is responsible for setting out rules on the standards of professional ethics for lawyers as well as those concerning exclusion situations (cases where lawyers are not allowed to participate in the defense)⁷³ all to guarantee the effectiveness of a lawyer participating in the defense of criminal cases. I think this mechanism is an outstanding feature of the US Criminal Procedure and it is worth learning from.

Meanwhile, German and Vietnamese laws have not clearly recognized that the accused has the right to an effective defense counsel as provided for in the US. However, the Criminal Procedure Codes of Germany and Vietnam both contain several separate provisions that guarantee at least the participation of defense counsel. These include provisions on the obligations and responsibilities of defense counsel and on cases where defense counsel is not allowed to defend at the hearing. Under German law, the issue of the presence of the defense counsel at a hearing is provided for in some detail. According to the Criminal Procedure Code,⁷⁴ in case of absence of the defense counsel, the presiding judge shall immediately appoint a new defense counsel, or may postpone the hearing. In case where the newly appointed defense counsel announces that he does not have enough time to prepare for the

⁷¹ See *supra* Chapter 4 (section 4.2.2.2).

⁷² See *infra* section 5.2.2. (recommendation 2).

⁷³ See *supra* Chapter 4 (section 4.2.2.3).

⁷⁴ Art. 145 StPO

defense, the court must postpone the hearing. The original defense counsel must even pay compensation if the absence is due to his fault. Similarly, the Vietnamese Code of Criminal Procedure provides that defense counsel is obliged to participate in court sessions though they may send their written defense to the courts in advance. But unlike the position in German laws, the judges under Vietnamese laws can still continue with court sessions even if defense counsel is absent. The trial panels must postpone sessions only in cases of mandatory defense counsel being absent.⁷⁵

I think the above reflects the fact that the law makers recognize the importance of the right to defense counsel. However, to track general trends in international law, these countries need to further improve their existing provisions. As discussed in previous Chapters, the concept of the right to effective defense counsel was stressed by the European Court of human rights and their judgments continue to affirm its importance.⁷⁶ In addition, enhancing the quality of the right to an effective defense counsel is a major concern of reformers and law enforcement bodies in many European countries.⁷⁷ Therefore, the internalization of the standards of the European Convention on Human Rights and the content of the judgments of the European Court of Human Rights is a requirement inevitably imposed on the member countries, including Germany. Similarly, for Vietnam, acquiring and learning from modern regulation systems is essential and should be done promptly. Compared to the US and Germany, Vietnam needs to strengthen its regulations and provide new legal mechanisms to guarantee the involvement of the defense counsel in all cases. In addition, there is a need to conduct research and then establish rules of professional ethics for all who act for the defense in criminal cases.

5.1.2.5. The accused's right to remain silent

The right to remain silent is a fundamental procedural right of the accused. It was recognized in the 16th century in England.⁷⁸ The theory behind this right derives, from the historical point of view, from the balance between the authority of the

⁷⁵ Art. 190 CCP

⁷⁶ In case of *Salduz v. Turkey* (Application no. 36391/02), 27 November 2008, para. 51, the Court further reiterates that, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. This is also mentioned in the case of *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008.

⁷⁷ See general Ed Cape, Zaza Namoradze, Roger Smith, Taru Sponken, *supra* note 6.

⁷⁸ Ronald Banaszak, *Fair Trial Rights of the Accused*, Greenwood Press, 2002, Introduction section.

government and the rights of the people.⁷⁹ Accordingly, anyone charged with a criminal offence has the right not to be compelled to testify against himself or to confess guilt. It is rather the obligation of the authority to provide evidence to prove the accusation. This is also the essence of Article 14.3(g) of the 1966 International Covenant on Civil and Political Rights of the United Nations

Almost all members of the 1966 Covenant have recognized the right to remain silent as a fundamental procedural right of the accused.⁸⁰ In the United States and Germany, the right to remain silent is based on the premise that the accused is not obliged to disclose evidence which could then be used against him/her though this, however, does not mean that the obligation to testify is ruled out. Under US law, the Federal Rules of Criminal Procedure provide that an accused shall have access to counsel at every stage of the proceedings, beginning with the defendant's initial appearance. If a defendant demands the presence of counsel during police interrogation, police must stop the interrogation until the defendant's counsel is present. Besides that, the police are obliged to give a Miranda Warning, which means that the police must inform and explain to the suspect that he/she has the right to remain silent and that everything he/she says may be used against him/her. There is a similar provision in German law; accordingly the right to remain silent must be respected not only during the investigation phase but also at other phases of the criminal proceeding.⁸¹ Suspects have an unqualified right to remain silent, and must be informed of this right, as well as of the charges against them at the very beginning of each interrogation.⁸² That is why in any interrogation or testimony session and whether before a judge, the prosecutor or the police, the accused must be informed of the right to remain silent. Failing to do so would cause all evidence collected to be invalid, unless the accused fails to oppose its introduction in court.

⁷⁹ *Ibid.*,

⁸⁰ For example: in Australia, the State and Federal Crimes Acts and Codes states that criminal suspects have the right to refuse to answer questions posed to them by police before trial and to refuse to give evidence at trial; In Canada, the right to silence is protected under section 7 and section 11(c) of the Charter of Rights and Freedoms which state that the accused may not be compelled as a witness against himself in criminal proceedings, and therefore only voluntary statements made to police are admissible as evidence; the Constitution of India guarantees every person right against self-incrimination under Art. 20 (3) "No person accused of any offense shall be compelled to be a witness against himself" etc.

⁸¹ Art. 136 StPO

⁸² Art. 136(1) and Art. 163a(3) StPO. The principle was also confirmed by a number of decisions by the Federal Appellate Court (BGHSt - Entscheidungen des Bundesgerichtshofes in Strafsachen), for examples Decision No. 38, 327 (1992) [BGHSt. 38, 327 (1992)]; Decision No. 42, 15 (1996)[BGHSt. 42, 15 (1996)], Decision No. 42, 170 (1996), [BGHSt. 42, 170 (1996)].

Unlike the United States and Germany, under Vietnamese law, the accused has no right to remain silent. As a consequence there is no obligation to inform the accused of such right. In contrast, the accused has the duty to answer questions truthfully when questioned by the investigator. It is considered an offense if a person knowingly gives false testimony in criminal proceedings.⁸³ The Criminal Procedure Code does not mention anything about a right to refuse to answer questions that are relevant to the case. The law, however, does provide that confessions of the accused or defendants shall only be regarded as evidence if they are consistent with other evidence of the case, and they must not be used as the sole evidence justifying a conviction.⁸⁴

In my opinion, the right to remain silent has a close relation to and is a meaningful component of the right to a defense counsel. It has been shown that, in the criminal procedure systems of Germany and the United States, it is crucial to inform the accused of the right to remain silent. Interrogation without the presence of defense counsel is considered to create an imbalance between the authorities and the accused. When the participation of the defense counsel is delayed, the defense will have to cope with challenging incriminating evidence which might not have been collected if defense counsel had been present earlier. This is exactly the shortcoming of the Criminal Procedure Code of Vietnam, which needs to be rectified immediately.

The comparison of the right to defense counsel in the American, German and Vietnamese criminal procedure systems presented at length above shows that, when compared to the other two systems, the Vietnamese system does contain some modern and advanced provisions. In general, the legal mechanism guaranteeing the right to defense counsel is up to the international standards. However, some specific provisions or aspects of criminal procedure need to be improved in order for human rights in general and the right to defense counsel in particular to be guaranteed more effectively. The above comparisons will allow the author to make recommendations for improving regulation of the right to defense counsel in the Vietnamese law on criminal procedure.

⁸³ Art. 308 of the 2000 Criminal Code of Vietnam.

⁸⁴ Art. 72 CCP

5.2. Recommendations for reforming the Vietnamese Criminal Procedure Laws regarding the guarantee of the right to defense counsel

Learning from the experience of Germany and the United States, and basing himself on the conditions of and circumstances surrounding the laws of Vietnam, the author's suggestions in this section operate on two levels. *First*, they are oriented recommendations and *second*, specific recommendations. Oriented recommendations are those having a broad and general sense, directly affecting the legislative perspective of lawmakers, and concurrently making supplements to and comments on the general principles of reasoning used in the science of law. Specific recommendations are those directly tied to specific provisions in statutes and legal documents. The specific recommendations are however complemented by the oriented recommendations.

5.2.1. Some guiding recommendations

5.2.1.1. Encouraging adversarial activities and recognizing adversariality as a fundamental, important principle of criminal procedure

The analyses presented above have shown that the ultimate goal of criminal proceeding is to guarantee the fairness of the law even while the protection of human rights in criminal cases is being handled. Thus, fair adversarial litigation must be treated as an element that ensures the realization of the principle of a fair trial. This, in its turn, require an appropriate consideration of the role of defense counsel as well as a better assurance of the right to defense counsel. In order for the ultimate goal of criminal proceedings to be achieved, it is imperative that there be a balance between the objective of suppressing crime and the guarantee of human rights within the criminal proceedings. It is an ongoing factor in Vietnam that priority is still given to crime control. The State focusses on how to bring criminals to justice. Crime preventive measures feature retaliation rather than education and rehabilitation. This practice sometimes even leads to corruption in the crime fighting authorities and causes infringements of the State's and citizens' legitimate rights and interests even as the crime rate continues to rise. It is essential therefore that the "guarantee of human rights" in criminal proceeding is seen as the

foundation of an advanced justice system, without which all criminal procedures would only work in a formal and unjust manner.⁸⁵

One of the most important tasks for the foreseeable future is to establish an effective criminal proceeding model, which meets the objectives of judicial reform.⁸⁶ We are of the opinion that a semi-adversarial model is most suitable for Vietnam at the moment, because it will not only promote a synthesis of the positive, relevant elements of both the adversarial and the inquisitorial systems but will also meet the needs of international integration and judicial reform within the country. For such a model to be established, it is imperative that the relevant legal framework be adopted to allow and encourage adversarial activities during criminal proceedings. Accordingly, the role of the defense counsel must be strengthened, particularly during trial, even if traditional inquisitorial methods are still being used in the pre-trial investigation phase. This would then be based on the principle that the parties have equal opportunities and a fair chance to collect and present evidence. It is important in this regard to change the perception of adversariality in general as well as the role of defense counsel in particular.

By nature, adversariality will appear in adjudicative activity. Only at the trial does it present itself fully with the presence of all parties who have a stake in the criminal case in question. However, it would be superficial to confine the adversariality principle to the four walls of the trial room or to equate adversariality with an argument session at the trial or even worse to conclude that only procedures during the trial at court need to feature adversariality.⁸⁷ Fair judgement in a criminal case must be the result of a thorough consideration of the evidence provided by all parties in all phases of the related criminal proceeding rather than at the trial only. Thus, opinions such as “only at the trial find adversarial activities” are wrong and must be rectified. Of course it is undeniable that an adversarial trial is where the judge renders final judgement in a criminal matter. Nevertheless, without fair adversarial litigation during the pre-trial phases (such as investigation) it is very difficult to later produce a fair and unbiased judgement. The promotion of adversariality in the investigation phase means the accused’s right to defense counsel would be further entrenched. The participation of defense counsel in the

⁸⁵ Nguyễn Thái, Phúc, *Vietnam criminal proceeding model - theoretical and practical issues (Mô hình Tố tụng hình sự Việt Nam - Những vấn đề lý luận và thực tiễn)*, Legal Science Journal, Issue 5(42), 2007.

⁸⁶ Resolution 08/NQ/TW dated 2 January 2002 of the Politburo.

⁸⁷ Trần Văn Độ, *The nature of adversariality at the trial (Bản chất tranh tụng tại phiên tòa)*, Vietnamese Legal Science Journal, Issue 4, 2004.

investigation phase is a guarantee of the objectivity and fairness of the final judgement.

In addition, for adversarial litigation to be fully effective, adversariality must be recognized and introduced as a main cross-cutting element during the whole criminal proceeding rather than being confined to first-instance trial. It must be understood that adversariality means fair litigation between parties with antithetical interests. To participate in adversarial procedures, the parties must have equal rights to collect and present evidence, rather than just using the testimony of the police investigations.

Echoing Professor Nguyễn Thái Phúc's standpoint,⁸⁸ we are of the opinion that it is absolutely necessary to establish adversariality as a fundamental principle of the Criminal Procedure Code of Vietnam.⁸⁹ Recognition of the adversarial principle is linked to and enjoys all the virtues of fair criminal proceedings. It is the natural law of criminal proceedings. The adversarial model is the realization of that natural law in criminal proceedings in numerous countries, those under the influence of both certain objective (history, culture, economy) and subjective elements (consciousness of legislators).⁹⁰ Such a statement of the adversarial principle in the law will provide a legal basis allowing the parties to criminal proceedings to function equally in accordance with the law. The principle of adversariality, as it would be stated in Vietnamese law, should be based on the following criteria:

1. The principle should be stated in its full sense in order to differentiate between the basic litigating functions (the procuracy, the defense and the court);
2. The rights and tasks of these litigating authorities should be prescribed in a way relevant to their functions and in accordance with the law;
3. Guaranteeing conditions and elements must be prescribed to ensure that the defense and procuracy sides are equal in adversarial proceedings.

⁸⁸ Nguyễn Thái Phúc, *supra* note 85.

⁸⁹ At the moment, a whole chapter in the 2003 Criminal Procedure Code (Chapter 2) is devoted to providing for the fundamental principle of criminal procedure (unfortunately the principle of adversariality is not there). These principles, which are binding on all litigating authorities, provide guidance for all litigating activities in criminal proceedings, for example the presumption of innocence (Art. 9), the determination of facts of a criminal case (Art. 10), the guarantee of the right to defense of the detainee, accused and defendant (Art. 11), the participation of people's assessors in the trial (Art. 15) and equal rights before the court (Art. 19) etc.

⁹⁰ Nguyễn Thái Phúc, *supra* note 85.

An unequivocal statement of the principle of adversariality in the law will also facilitate the establishment of legal mechanisms to guarantee the legitimate rights of the accused during criminal proceeding. The current criminal procedure law in Vietnam put the whole burden of proof on the collegial bench, which requires the judges to play too proactive a role in the court-room. This in turn often causes the court to “encroach upon the realms” of other actors who carry out the accusing and defending functions in criminal proceeding. Yet the adjudicating function of the court itself is also affected by such a proactive role. An unequivocal statement that adversarial proceedings are a fundamental principal of criminal procedure law will help balance the roles of the litigating parties before the court, strengthen the role of defense counsel and also help guarantee the accused’s right to have a defense counsel as such.

5.2.1.2. Raising the capacity and consciousness of competent authorities and litigating officials⁹¹

The accused’s right to defense counsel will not be respected and enforced unless competent authorities and officials are fully aware of the contents, meaning and important nature of such a right. According to current law, competent authorities and officials conduct the activities which allow them to collect, examine and evaluate the evidence which helps them to unravel the truth of a criminal case within their mandates. First of all, they must be aware that to guarantee the enforcement of the accused’s right to a defense will help them to handle the case in an objective and comprehensive manner. This is indeed their task, which is assigned by the State. Yet not all litigating officials are fully aware of this issue. As they deal with the case directly, litigating officials must know and follow provisions of the law on the right to defense counsel allowed to defendants and detainees. They are also obliged to explain the right to a defense and to create favorable conditions allowing defendants and detainees to enforce the right effectively. Once the relevant provisions are fully in place, the litigating officials must abide by and be aware fully of them.

The Resolution No. 03/NQ-TW (1997) of the Third Conference of the Central Executive Committee Session VIII of the Vietnamese Communist Party states: “*To build up a set of judicial officials who are clean, able, politically and ethically*

⁹¹ Under Article 33 of the Vietnamese Code of Criminal Procedure, the *competent authorities* include Investigating bodies, Procuracies and Courts; *litigating officials* includes investigators, prosecutors, judges, lay-judges and court clerks.

virtuous and professionally qualified. To devise plans to select, train and use judicial officials based on specific criteria for specific titles.” Judicial institutions have taken a number of measures to carry out this resolution of the Party and to ensure the number of litigating officials is sufficient in terms of both quality and quantity. In our opinion, in order to raise the professional knowledge and consciousness of the litigating officials, the following points should be stressed:

Firstly, frequent training should be provided to officials engaged in prosecution work. Training curricula should cover new legal knowledge, professional skills and exchange of practical experiences. Regular exams shall also be held to test and rank them on their professional knowledge, based on which awards and commendations can be awarded. A movement should be launched to call upon officials to promote ethics and good and healthy work and life style. This could be considered as one of the bases for promotion.

Secondly, the incorrect stance of such officials regarding the role and position of defense counsel in criminal procedure must be rectified. It should be stressed that the participation of defense counsel is an objective element helping to ensure the correct settlement of a criminal case. The presence of defense counsel does not create obstacles for the authorities. They are there to confront unfounded accusations rather than to be “*competitors*” of the authorities. Officials should create favorable conditions allowing defense counsel to carry out their function.

Thirdly, adequate facilities and budget must be provided to the officials. As science and technology evolve, crimes are becoming more complicated and tricky, which causes difficulties for criminal investigation and prevention operations. Officials need to be equipped with the knowledge and ability to use hi-tech equipment to support their work. One of the shortcomings that currently affects investigation, accusation and adjudication is the lack of the necessary hi-tech equipment; the budget for investigative activities is also very modest, which hinders the finding out of the truth as well as the guarantee of the right to defense counsel in criminal proceedings.

5.2.1.3. Dissemination and raising public legal awareness

Dissemination of information is an effective way to raise the legal awareness and knowledge of the public. It helps the public be aware of and follow the law and

protect their own legitimate interests, while on the other hand it would also help the authorities discover and handle criminal acts in a timely way.

We also need to change the prejudiced view of accuseds and their legal representatives that defense counsel is costly and unhelpful. This mind-set is a major obstacle to the participation of defense counsel in criminal proceedings, where the accused and their legal representatives do not have effective defense skills. Defense counsel's participation depends very much on the attitude of the accused, their legal representatives and families. Creating a pro-defense counsel attitude is the best way to equip accused persons, defendants and detainees to protect themselves against the risks of their procedural rights being violated by authorities and officials.

With respect to the defense counsel, training to raise their legal knowledge and skills is also necessary. Defense counsel must be aware of their responsibility to protect the rights and interests of the accused, defendants and detainees when participating in criminal proceedings. Defense counsel must update their legal knowledge regularly and be trained in their skills in order to meet the demands on their service effectively.

5.2.2. Specific recommendations

Recommendation 1: to promote adversarial activities in criminal proceeding we suggest amending Article 10 of the Code of Criminal Procedure (CCP) as follows: *“the burden of proof must be imposed on investigating agencies and the procuracy; the court is only in charge of the adjudicating function; the accused and defendant shall have the right but not the obligation to prove their innocence”*. The current law imposes the burden of proof on litigating authorities, including the court.⁹² This makes the court carry out both the adjudicating and the prosecuting function, while the latter together with the burden of proof should be the responsibility of the procuracy. Indeed the court plays an important role in criminal proceeding by discharging the adjudicating function; however the current provision of the law has put the court in a position where it is virtually compelled to take over the

⁹² Art. 10 of the CCP states: “Investigating bodies, procuracies and courts must apply every lawful measure to determine the facts of criminal cases in an objective, versatile and full manner, to make clear evidence of crime and evidence of innocence, circumstances aggravating and extenuating the criminal liabilities of the accused or defendants. The responsibility to prove offenses shall rest with the procedure-conducting bodies. The accused or defendants shall have the right but shall not be bound to prove their innocence.”

prosecuting function of the procuracy as well. The principle of adversariality will not work in practice if these two functions are not clearly separated.

Recommendation 2: Article 57 of the CCP provides three procedural rights for the accused, namely the right to select counsel, to ask for their replacement or to refuse an appointed defense counsel. However, those rights are not clearly stipulated. We propose that this should be amended as follows:

Firstly, regarding the right to select a defense counsel,⁹³ it is necessary to differentiate between cases where the accused hires a defense counsel and those where defense counsel is assigned by a litigating authority.

In the case of hired defense counsel: there should be a differentiation between the right to select a defense counsel by accused persons who are adult and those who are juvenile or have physical or mental disabilities.

- Where the accused is adult, he or she can decide to select a defense counsel on his or her own initiative. If he or she cannot hire a defense counsel directly then their legal representatives can hire one on their behalf.
- If the accused is a juvenile or physically or mentally disabled, they have the right to select or change their defense counsel and their legal representative (e.g. parent or the guardian of the juvenile) is entitled to select a defense counsel for them. In case of disagreement on the selection of defense counsel, the final decision rests with the accused.

In cases where defense counsel is assigned by the authorities: As mentioned in previous chapters, in the German and American systems, the accused has the right to select the defense counsel he/she wants to hire. Such right is, however, limited in Germany when the accused receives an appointed defense counsel.⁹⁴ In the United States the accused is entitled to select from a list of appointed defense counsel even if he/she is an indigent.⁹⁵ In my opinion, there is a legitimate reason to limit the right to select defense counsel in cases of appointed defense counsel. The purpose of assigning a defense counsel to an accused is to furnish the latter with counsel who is capable of representing him/her before the authorities. Once defense counsel

⁹³ At the moment, according to Resolution 03/2004/NQ-HĐTP dated 2 October 2004 of the Grand Panel of the Supreme People's Court, the accused or his/her legal representative is entitled to select a defense counsel. However it is not clear whether the right to select is applicable to appointed or hired defense counsel.

⁹⁴ In case of appointed defense counsel, the accused can select a defense counsel from a list of lawyers provided by the court (Art. 142 StPO).

⁹⁵ See *supra* Chapter 4 (section 4.2.2.2).

is assigned, the litigating authority has fulfilled its duty vis-à-vis the accused. Article 57 of the Criminal Procedure Code of Vietnam does not provide for the right to select among assigned legal counsel. Learning from the German and American experience, we suggest that a new clause be added to Article 57, which states that: *in case of assignment of a defense counsel, the accused has the right to select defense counsel based on a list of capable lawyers to be presented by the authorities. The authorities are obliged to promptly provide such a list, which should be composed of capable lawyers from bar associations, to the accused.*

Secondly, the provision on the right to waive the defense must be amended. In cases where the law provides for appointed defense counsel, the participation of a defense counsel is critically important not only for the accused but also for the promotion of the adversariality of the criminal proceedings. Normally, minors and people with mental or physical disabilities are not able to represent themselves fully in legal proceedings and must be represented by a defense counsel. In the American system, it is recommended that the right to waive defense counsel should be restricted if the accused's capability to defend him or herself is in doubt, for example when the accused is a minor or has a mental disability.⁹⁶ In Germany, the right to waive appointed defense counsel does not exist. Our opinion is that in this regard, the guarantee of an individual's rights might not be realized if the person does not desire such defense counsel. That is why it is necessary to provide for the right to waive defense counsel in the law. However, in this matter the public interest and the claims of justice are also involved and must be respected. Therefore, the authority must be entitled to suppress the right to waive defense counsel should they deem that without the participation of defense counsel, the criminal proceedings would result in a violation of the accused's legitimate rights. Based on the preceding analysis, we are of the opinion that Article 57 of the current Criminal Procedure Code of Vietnam is not optimal and can be improved.⁹⁷ Learning from the American and German experience, we propose to add to the current Article 57 provisions on the right to waive defense counsel as follows:

1. The right to counsel may be waived by an an accused, except where he or she:
 - a) is a juvenile; or
 - b) Displays signs of mental illness or other mental disabilities;

⁹⁶ *Ibid.*,

⁹⁷ According to the current law, the accused or defendant is allowed to waive appointed or hired defense counsel.

c) Before an accused waives his or her right to counsel, the implications of waiving the right to counsel must be explained to him. This should include a declaration that the implications of waiving the right to free appointed counsel have been explained to the accused and that he understands the consequences of waiving his right;

2. A waiver of the right to counsel by an accused must be:

a) Voluntarily made;

b) In writing;

c) Signed by the accused; and

d) Signed by the investigator, prosecutor, or judge to whom the waiver is presented.

We also propose introducing and applying the American model of standby counsel⁹⁸ in case the accused waives the right to have a defense counsel and then has difficulty defending himself. Such a model of standby counsel would also be very useful where the accused waived the right to have a defense counsel during the investigation phase but demanded the right be enforced during trial.⁹⁹ The reason why the laws confer the right to a defense counsel on the accused is to help the latter protect his/her legitimate rights. It is an obligation of the State to guarantee such a right to the accused. Needless to repeat that the participation of the defense counsel would also help guarantee the cause of justice itself in criminal proceeding. What the litigating authorities need to do is to make up a list of lawyers from Bar Associations and Legal Aid Centers so that they can provide any accused with defense counsel should it be so required at any stage of the proceedings.

Thirdly, the Vietnamese Criminal Procedure Code should provide for more circumstances where appointed defense counsel is required. According to clause 2, Article 57 of the CCP, the accused is entitled to appointed defense counsel in two circumstances:

a) The accused or defendants are charged with offenses punishable by death as the highest penalty as prescribed by the Penal Code, and

b) The accused or defendants are juvenile or persons with physical or mental disabilities.

These two circumstances are too few and more need to be added.¹⁰⁰ Best practice shows that people who are charged with serious crimes should also be given the

⁹⁸ See *supra* Chapter 4 (section 4.2.2.2).

⁹⁹ See *supra* Chapter 2 (Section 2.3.2.1).

¹⁰⁰ In comparison with German and American laws. See *supra* section 5.1.2.3.

right to have appointed defense counsel. On that basis we propose to add to the list the circumstance that the accused is charged with offenses that could result in twenty years life imprisonment.

Recommendation 3: Article 58 of the CCP should be amended by way of allowing defense counsel to participate from the time of the decision to initiate a criminal case against an accused in cases involving crimes against national security.

The current Criminal Procedure Code¹⁰¹ eliminate the defense counsel's participation in cases where the investigation needs to be secret because crimes against national security are involved (except from the completion of the investigation onwards). This article also rejects access to materials which are considered state secrets. In our opinion, keeping the confidentiality of state secrets is an extremely important task and totally legitimate. But the argument that the participation of the defense counsel at the beginning of the procedure would obstruct the authorities in investigating the case and risk the exposure of the secrets concerned is unjustified and unconvincing. Moreover, such a limitation is not consistent with the principle "guaranteeing the equality of all before law",¹⁰² as the accused in such cases do not enjoy the same rights as those in other types of cases would do. It should be stressed that the accused and defendants in such serious cases are in extreme need of help from defense counsel. In my opinion, the participation of defense counsel right from the start of the proceedings will not only help to guarantee a full and comprehensive investigation but will also effectively protect any defendants. More than anyone else, defense counsel will bear in mind the gravity of the case and be always aware of the responsibility to protect state secrets. There are enough legal regulation allowing the punishment of defense counsel if they disclose state secrets. Therefore, Article 58 can and should allow defense counsel to participate in the investigation of crimes against national security from the initiation of the case against the accused onwards.

Recommendation 4: Article 190 of the CCP on the presence and participation of the defense counsel at the trial should be amended. The current provisions, which allow the court to conduct a trial while defense counsel is absent, simply give

¹⁰¹ Art. 58 CCP reads: "In case of necessity to keepsecret the investigation of the crimes of infringing upon national security, thechairmen of procuracies shall decide to allow defense counsel to participate in theprocedure from the time of termination of the investigation."

¹⁰² Art. 5 CCP

defense counsel a good excuse for acting irresponsibly.¹⁰³ In addition, the absence of defense counsel will affect the objectivity of the examination of the evidence at trial, so the quality of the judgment, which is supposed to be based on an objective and comprehensive examination of evidence at the trial, will likely be lower than one would expect. Following the United States and Germany we should stipulate that the presence of defense counsel at trial should be made mandatory for the sake of a fair adversarial trial. Whenever defense counsel is absent, the trial panel must postpone the court session.

Recommendation 5: proceedings conducted at first-instance and appellate trials should be based on the principle of adversariality - a fundamental element of any adversary system. Accordingly, the trial must be adversarial as a whole. Examination procedures at the trial, which are currently regulated by Articles 206 to 216 of the Code of Criminal Procedure, should be adjusted to promote an adversarial relationship between the litigating parties, namely the defense and the prosecution, and to avoid purely inquisitorial examinations.¹⁰⁴ Parties to a trial have equal right to present evidence and conduct cross-examinations. The judge listens to the evidence presented by the two litigating parties and plays the role of a referee, who maintains a fair environment for the parties, rather than that of a direct examiner. The judge's main task is to consider evidence and arguments presented by the parties and pronounce the judgment. The judgment delivered must be based on the result of the adversarial activities at the trial. It must also be in accordance with the criminal and criminal procedure laws. Investigatory conclusions made by the investigation agency and the procuracy are only the preliminary legal ground when the court considers its judgment. Following this approach will ease the court's burden when studying the case file; on the other hand, it will also help promote the adversarial roles of the parties, thereby ensuring the objectivity of the judgment.

Relating to the argument at court sessions, Articles 217 and 218 are more democratic and objective as compared to the provisions in the 1988 Code of Criminal Procedure. Improvements, however, are still needed in order to prescribe in a clearer manner the rights and obligations of parties in an argument and the

¹⁰³ Art. 190 CCP states: "Defense counsel shall be obliged to participate in court sessions. They may send in advance their written defense to the courts. If the defense counsel is absent, the court shall still open the court sessions."

¹⁰⁴ According to the Code of Criminal Procedure of Vietnam, the order of procedures at the trial starts with the opening of the trial, examination, argumentation, judgment deliberation and announcement. In practice, examination accounts for the major part of the trial while argumentation accounts for a very modest part.

responsibility of the judge which is to keep the session running, objectively and facilitate the parties presenting their full arguments without any time limitation.

Recommendation 6: the right of the accused to remain silent should be recognized and provided for. Accordingly the investigator is obliged to inform and explain to the accused his/her right to remain silent until the presence of his/her hired or appointed defense counsel. The investigator is only allowed to take testimonies without the presence of defense counsel after the accused has waived the right to defense counsel.

Recommendation 7: there should be amendments of some articles of the Criminal Procedure Code in order to create favorable conditions for the defense counsel participating in a trial, as follows:

First, clause 2(b), Article 58 of the CCP should be amended to impose an obligation on the litigating authorities to give prior notice of the time and place for taking the accused's testimony. It should be clearly stated that the defense counsel has the right to be notified rather than the vaguely stipulated right which suggests he be informed as is currently provided by the Code.

Secondly, the law should impose an obligation on the authorities to receive and accept evidence provided by defense counsel as well as the responsibility to support the latter in dealing with any agencies, organizations or individuals needed to collect evidence. The defense counsel should also be entitled to be informed of any request for an expert witness as well as the expertise conclusions.

Thirdly, the right of the defense counsel to meet and discuss with a client in custody must be stated in the law. At the moment, according to Decree 89/1998/ND-CP dated 7 November 1998, the defense counsel is allowed not more than 1 hour each time he/she meets with client. That is obviously too short for any meeting to be effective, particularly when the detention authorities tend to impede such meetings in the first place.¹⁰⁵ We suggest following German experience on this matter.¹⁰⁶ Accordingly clause 2(e), Article 58 of the CCP should be amended so that the

¹⁰⁵ Opinions of many lawyers at the UNDP - funded international seminar titled "The right to a defense in Vietnamese criminal procedure" held in HoChiMinh City on 02, 03 December 2010.

¹⁰⁶ Art. 148 StPO stipulates that: 1) The accused, also when he is not at liberty, shall be entitled to communicate with defense counsel in writing as well as orally; 2) If an accused is not at liberty and if the subject of the investigation is a criminal offense pursuant to section 129(a) of the Penal Code, documents or other items shall be rejected if the sender does not agree to their being first submitted to a judge. The same shall apply under the conditions set out in the first sentence to written communications between the accused and defense counsel in other proceedings governed by statute.

defense counsel is entitled to unlimited meetings with his/her client. Communication between the two people can also be conducted via postal services, except for the client who is being detained or held in custody for state security offences.

Fourthly, the requirement of a defense counsel certificate and the procedure for issuing it must be abolished. At the moment, according to clause 4, Article 56 of the CCP, the defense counsel must obtain a defense counsel certificate from the investigating agency, procuracy or the court in order to be able to participate in a particular criminal case. According to the law, those authorities can refuse to issue the certificate, but they must state clearly the reason for doing so. One may think that the rationale for such a requirement is linked to the fact that not only practicing lawyers but also people's advocate or legal representatives of the accused can also participate in a criminal case as defense counsel. The people's advocates and the legal representatives of the accused are not law professionals nor are they obliged to possess a full range of knowledge of the law. It is therefore necessary that these people are certified before they can participate in a criminal case as defense counsel. It is a known practice, however, that in order to get such a certificate they have to present to the authorities a request for their service from the accused and, in the case of people's advocates, a letter of recommendation from the competent Vietnam Fatherland Front Committee. The litigating authorities will review those papers and decide whether or not to issue a defense counsel certificate for the applicant. The Grand Panel of the Supreme People's Court adopted Resolution 03/2004/NQ-HDTP on 2 October 2004 which provided a template for the defense counsel certificate as well as the template for the decision to withdraw the defense counsel certificate should the bearer violate the Criminal Procedure Code's provisions on defense activities. It should be noted, however, that the decision is binding only on courts. That means that there has not been guidance for the investigating authorities or the procuracy on this issue. This is indeed a loophole in the current criminal procedure laws which need to be urgently rectified. The lack of clear and concrete regulations on defense counsel formalities tempts the authorities to create difficulties for defense counsel,¹⁰⁷ notably due to delayed issuance of the

¹⁰⁷ See *supra* Chapter 2 (section 2.2.3.1).

defense counsel certificate.¹⁰⁸ These practices pose severe problem for the defense counsel.

In several countries, a lawyer's certificate is the only paper a lawyer must present in order to participate in a criminal case. There are no additional papers or administrative formalities to fulfill. The lawyer's certificate provides a sufficient legal basis allowing the lawyer to participate in a case as defense counsel. Vietnamese law has indeed made the related administrative formalities more complicated, thereby affecting the effectiveness of the defense counsel's services, or even causing damage to the legitimate rights of the accused. We are of the opinion that the law should provide more favorable conditions for the defense counsel so that the client can be defended effectively. A communications channel must be set up between the authorities and the Bar associations as well as the Fatherland Front Committees that provide information on the current status of the lawyers and people's counsels. Such a communication channel can help spot defense counsels who are indeed not qualified to provide defense services. We suggest that the practice of issuing defense counsel certificate be abolished. The defense counsel should only be required to present to the litigating authorities the following:

- Letter of request from the detainee, accused or defendant (this letter is waived in case of appointed defense counsel);
- Lawyer's certificate (in case of lawyer);
- Letter of introduction from a lawyer office or a relevant Vietnam Fatherland Front Committees (in case of people's advocate).

Fifthly, more effort should be spent on developing the number of defense counsel so that the needs of the legal aid system can be met. The following aspects should be taken into immediate consideration:

Training practicing lawyers: as everywhere, practicing lawyers form the core group providing legal services in general and participating in criminal proceedings in particular. Unfortunately, the current number of practicing lawyers in Vietnam is

¹⁰⁸ According to clause 4, Art. 56 of the CCP, within three days (24 hours in case of keeping person in custody) counting from the date of receiving the request of the defense counsel enclosed with papers related to the defense, the investigating bodies, procuracies or courts must consider and grant them the defense counsel's certificate. If refusing to grant such certificates, they must state clearly the reasons therein.

still very small and falls far behind the actual need for legal services.¹⁰⁹ On 5 July 2011, the Prime Minister adopted Decision 1072/QĐ-TTg to approve the Strategy for the development of the legal profession until 2020. The aim set out in the strategy is that by 2020, there will be from 18,000 to 20,000 practicing lawyers, who will be capable of meeting the increasing need for legal services in Vietnam. The proportion of lawyers in the population would then be 1/4,500. Hopefully, as this strategy is implemented, the need for legal services will be better met. From a legal perspective, there are some amendments that could be immediately made to the current legal framework on lawyers which would allow it to work more effectively:

- The range of people who could be qualified to work as practicing lawyers should be extended to cover lecturers who teach law at universities. Law teachers know the law well. The nature of their work at the university fits that of the legal profession. If law teachers are admitted to the bar, the number of practicing lawyers in Vietnam will be increased immediately and sustainably in terms of both quality and quantity. When the current Law on lawyers came into force on 1 July 2006 and prohibited law teachers from practicing law, law teachers who were practicing lawyers at that time had to make a choice between teaching and practicing law.¹¹⁰ Such a prohibition was considered to be in pursuance to the Ordinance on civil servants and civil officers.¹¹¹ However, the new Law on blue collar civil servants, which will come into force on 1 January 2012, does allow blue collar civil servants (including law teachers at state-owned universities) to provide professional service in accordance with the law.¹¹² Learning from German law,¹¹³ we are of the opinion that the Vietnamese Law on lawyers should be amended so that law teachers at public universities are allowed to practice law.

¹⁰⁹ According to a survey conducted by the Vietnam Bar Federation, by 2009 there were 62 bar associations and 5,000 practicing lawyers and 2,000 paralegals, who are working in about 1,500 law practicing organizations. That survey also points out that the rate of lawyer per population in Vietnam is 1/17,000, which is too low as compared to neighboring countries such as Thailand (1/1,526) Singapore (1/1,000) or Japan (1/4,546).

¹¹⁰ Art. 18 of the Law on Lawyers provides that people who are officials, white-collar civil servants, blue-collar civil servants who have been registered as practicing lawyers must forfeit their lawyer certificates.

¹¹¹ Art. 17 of the Ordinance on civil servants provided that: "officials and civil servants are not allowed to establish, participate in the establishment or management of private enterprises, limited liability companies, joint-stock companies, partnership companies, collectives, private hospitals, private schools, private scientific research facilities." This ordinance, however, has been replaced the Law on civil servants, which is applicable as of 1 January 2010.

¹¹² Art. 14 of the Law on blue-collar civil servants.

¹¹³ The German Criminal Procedure Code provides that university professors, paralegals and the accused's relatives are allowed to participate in the defense.

- Training focused on legal practice and substantive legal knowledge should be encouraged. International collaboration with foreign bar associations should be strengthened for the sake of exchanging experience.

- Fee for appointed defense counsel should be raised. The current daily rate of 120,000 Vietnamese Dong (about US\$ 6) is claimed by many as too low.¹¹⁴ Given the current economic inflation and in order to ensure the quality of the service, such a one-rate-fits-all mechanism should not be continued and there should be more flexibility in the way the fee for appointed defense counsel is determined.

Developing legal aid providers: According to Article 2 of the Law on Lawyers, a lawyer provides services on the request of individuals, state agencies or organizations. However, the service may be unaffordable for indigents or people who live in mountainous or remote areas. That is why legal aid providers are needed to help the indigent and ethnic minorities protect their legitimate rights and benefits. For that to happen, there must be measures to increase the number of state-funded legal aid providers and encourage them to participate in criminal cases so that there may be defense counsel at each and every criminal trial as required by the judicial reform process.

Improving the regulations on people's advocates: the service and title of people's advocate was regulated for the first time by Ordinance 69/SL of the President dated 18 June 1949.¹¹⁵ However, since Bar associations were reestablished in 1989 people's advocates have almost disappeared and the title only really exists in the law. At the moment, there are no legal regulations providing for the establishment, organization, management and development of people's advocates. Therefore, the Ministry of Justice needs to report to the Government and the Central Judicial Reform Steering Committee so that a policy of developing people's advocates is adopted, and associations of people's advocates should be established by the Vietnam Fatherland Front Committees with the Ministry of Justice responsible for training. General support should also be provided by the State to help the people's advocates function effectively.

¹¹⁴ Clause 1, Art. 11 of Decree No. 28/2007/ND-CP dated 26 Feb 2007 guidelines for implementation of some articles of the Law on Lawyers.

¹¹⁵ The Ordinance No. 69/SL dated 18 June 1949 recorded "From now, before the courts of first instance and appellate court, except the Military Court at the Front, the accused can ask a citizen, who is not a lawyer, to defend him/her. Citizens must be acknowledged by the Chief Justice."

To conclude, the above-mentioned recommendations are proposed by the author in order to improve Vietnamese law on the right to defense counsel. The recommendations are made on the basis of the legal practice in Vietnam as well as from the study of the best practices in the two selected countries, namely Germany and the United States of America. I do believe that this would be great experience to Vietnamese law-makers while implementing the judicial reform. In parallel with international standards on human rights in criminal procedure, Vietnamese laws have shown that certain rights of the accused have not been recognized, for example, right to silence, the right of which no one shall be subjected without his free consent to give evidence against himself, many issues of the right to defense have not specifically provided. Nevertheless, in recent years, Vietnam has made many efforts in improving the quality of guaranteeing human rights in criminal procedure. The 2009 Report of the Supreme People's Court had given the assessment: the awards of the Court are based mainly upon the results of litigation, in an objective and comprehensive consideration of evidences investigated at the court trials, as such, the quality of hearing is guaranteed. Chapter 5 concludes this research. Traditional cultural elements and socio-economic condition of Vietnam have also been taken into consideration when making the recommendations. It is the author's sincere hope that the recommendations proposed will prove useful in the improvement of Vietnamese laws on the right to defense counsel.

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