

Status of the victim in the adversary proceeding: Experience from Russia and recommendation for the Vietnam's criminal procedures

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For citation: Kim Chi Tran, Tuan Vu Tran. 2023. "Status of the victim in the adversary proceeding: Experience from Russia and recommendation for the Vietnam's criminal procedures". *Vestnik of Saint Petersburg University. Law 3*: 721–737. <https://doi.org/10.21638/spbu14.2023.310>

Nowadays, most researchers believe that Russian Federation's Criminal Procedure follows a mixed model instead of the traditional inquisitorial procedure model. Using the Russian Federation as an example, this article raises questions, including: How will the acquisition of adversarial elements affect the victim? Is the victim an independent party to participate in the adversary proceeding? Do the adversarial activities of the victim and the other subjects exist at the pre-trial stages? In Vietnam, with the limitation of the victim to participate actively in the adversary proceeding, it will be difficult for the victim to protect his or her legitimate rights and interests in criminal proceedings. He/she participates in the proceedings passively with the same role as witnesses. This article explores the role and position of the victim in the adversary proceeding of Russia. Analyzing the rights and obligations of the victim in the adversary proceeding, this article found that the victim in the Criminal Procedure Code of the Russian Federation is eligible to participate in the adversary proceeding as an independent party. Based on the results of research on the limitations of the victim's role in Vietnamese criminal proceedings, the article discusses the significance of this study and proposes approaches to improve the victim's participation in the adversary proceeding in Vietnam's criminal justice system.

Keywords: adversary, proceeding, victim, criminal proceedings, mediation, private prosecution, investigation, adjudication.

1. Introduction

Vietnam's judicial reform process has absorbed some elements of the adversarial system. Vietnam's criminal proceedings always consider ensuring the adversarial principle in adjudication as a fundamental principle. The challenge of the recognition of the adversarial nature in criminal proceedings strikes a balance between the various goals of criminal justice, including the effectiveness of crime prevention and protecting the rights of all participants in the proceedings. For the victims, their concern is justice and the restoration of their legitimate rights and interests. Recognizing the victim's rights and obligations in the adversary proceeding secures fulfilled these concerns.

Vietnam's criminal procedure model combines inquisitorial and adversarial, but inquisitorial elements dominate. It is infeasible to develop entire adversarial proceedings as there are not enough conditions to ensure the implementation of adversary and equality in the Criminal Procedure Code¹ (CrPC) of Vietnam (Le Tien Chau 2009, 24–26). Vietnam's Criminal Procedure attaches great importance to the criminal procedure's function of processing crimes, considering adversary proceeding as a way to solve the case, rather than a method for the parties to protect their procedural rights and interests with active steps. This view leads to the popular opinion that adversary proceeding only occur in the adjudication stage at the Court. These issues govern the role and position of the parties when they participate in the adversarial proceeding. In Vietnam, the victim is only evaluated in the assisting role of the prosecution in bringing charges (Le Hong Ngoc 2021, 9–10). Some rights of the victim are not equal to other subjects, including the defense party; the victim's right to be informed has not been fully recognized (Le Hong Ngoc 2021, 9–10), even in prosecution cases at the request of the victim; argument order at court. All in all, the victim's participation in the adversary proceeding is finite and passive.

2. Basic research

2.1. *The status of the victim in adversary proceeding of Russia's criminal proceedings*

2.1.1. *The adversarial nature of the parties in Russian criminal proceedings*

The adversarial nature is an indispensable standard in all stages of Russian criminal proceeding since the mixed procedural model of inquisitorial and adversarial (Koblikov 1999; Kalinovskiy 2002, 77–80) has replaced the traditional inquisitorial model (Boylan 1998). Both Constitution and CrPC of Russia stipulate that the criminal proceedings are carried out based on the adversarial nature of the parties. This principle is a combination of: 1) the operation of prosecution, defense, and adjudication functions must be kept independent of each other and must not be assigned to the same authority or officer; 2) the judicial function of the court must be independent and not in favor of the prosecutor or the defense, but only allow other entities to exercise their rights and obligations; 3) equality before the court of the prosecutor and the defense. It is necessary to implement the principle of the adversarial nature of the parties not only at the adjudication stage but also at the pre-trial stages of criminal proceedings (initiation and preliminary investigation of criminal cases) (Stelmakh 2016, 293–295). However, the scope of rights of parties may change at different stages based on the specific goals and characteristics of each respective stage². Thus, in different stages, the adversary proceeding manifests itself differently (Zentsova 2021, 276; Popova, Ivanova 2020, 115). For example, at the pre-trial stage, the adversary proceeding is shown to the least extent, while at the adjudication stage, the adversary proceeding is mostly expressed.

¹ Bộ luật tố tụng hình sự Việt Nam. 2015. Hereinafter all the Vietnamese acts and court decisions are cited from <https://congbao.chinhphu.vn>. Accessed June 25, 2023.

² Resolution of the Constitutional Court of the Russian Federation of February 14, 2000 No. 2-P. Hereinafter all the Russian acts and court decisions are cited from SPS "ConsultantPlus". Accessed June 25, 2023. <http://www.consultant.ru>.

The adversary proceeding in Russia's Criminal Procedure includes some basic features. Firstly, the operation of the criminal proceedings functions are separate from each other. These functions are distributed among separate entities to ensure the implementation of these functions independently. The nature of the adversary proceeding is the contrast of the prosecution and defense functions, performed under the control of an independent court (Katomina 2018, 52–53). Two opposing judicial functions cannot be identical to each other and cannot be performed by one subject. Investigators, heads of investigation authority, investigation authority, prosecutors, procuracies, procurators heads, victims, and victims' representatives perform the prosecution function. The accused person, the accused's representative, and the defense attorney perform the defense function. And the function of solving criminal cases belongs to the court (Shestakova 2018, 99). Secondly, the adversary proceeding also requires the parties to have a balance in right and procedures to protect their interests. The adversarial nature includes not only the opposition between the accusing parties and the defense but also needs to be broadly understood as the balance of legal status, antagonism of rights and interests of all subjects in one stage of the proceedings, as well as these subjects need to be fully recognized with legal status to claim legitimate rights and interests (Gorsky, Mai Van Thang 2017, 74–75). Thirdly, the maintenance of such equality and independence is executed by the independence, impartiality, and objectivity of the judicial function. This is also a prerequisite to securing the adversary. Therefore, the court's functions of jurisdiction must be separated from the other procedural functions.

Russian legal scientists consider adversary proceeding as a “legal combat” of professional lawyers representing the parties who consider the same legal event based on different perspectives and based on the law. “These ‘combats’ allow the court to determine the nature of the case and make a legal, reasonable, and accurate decision to resolve the case” (Akulinicheva 2015, 331). The adversary proceeding of Russia is not just only a dispute procedure but a process where the participants conflict with each other about their interests and are willing to negate each other's views. The role of the court, with its independent and objective position in resolving conflicts between the parties, is an important factor. The adversary proceeding is reflected not only in the division of independent functions of prosecution, defense, and case resolution but also in providing equal opportunities to those who perform those functions in providing the court with the views, arguments, and evidence to achieve the final judgment they desire.

The adversary proceeding is the movement and struggle between opposing procedural functions in the criminal proceeding, so it exists objectively in the criminal proceedings of any country. At any stage and at any time of the criminal procedure, if there is opposition, conflict, or contention between the parties, it is inevitable that the adversarial nature of the parties will arise. Thus, the adversarial nature of the parties' activities in Russian criminal procedure is not only manifested at the adjudication stage, but it is a basic feature of the entire procedural activity.

2.1.2. The victim's participation in the adversary proceeding of Russia's criminal proceedings

In Russia's Code of Criminal Procedure of the Russian Federation 2001, the victim participates in the adversary proceedings independently, including the natural person or

legal entities to whom a crime has caused damage directly to physical, property, spirit, or reputation. A public legal entity, considered a part of the State of Russia, can not participate in criminal proceedings as a victim when it suffered damage by crime. In the case of a crime causing damage to a state or a city, the damage is caused to the public interests, according to Art. 42 (9) of Russia's CrPC, neither Russia, nor the constituent entities of Russia, nor municipalities can be recognized as victims in a criminal case³. So, it is not legal to identify a Russian public entity as a victim in a criminal case. Art. 42 of Russia's CrPC does not regulate issues related to protecting the legal interests of the state and local self-government affected by a crime. But it also does not deprive the right to demand recognition as victims in the event of a crime causing damage directly to their property or business reputation⁴. According to Art. 44 (3) of Russia's CrPC, only the prosecutor, as a representative of Russia, can initiate a civil lawsuit to protect the interests of the State.

Although the determination of a person as a victim is based on the actual status of the person who suffered the crime⁵, the recognition by the judicial authorities is a formalization of the procedure for providing the victim the legal protection to participate in the adversary proceeding. In essence, a person becomes a victim of the damage caused by a crime, not as a result of a decision on recognize him as a victim⁶. The victim recognition decision must be taken immediately from the moment of initiating a criminal case. If at this time, there is no information about the person who was harmed by the crime, the decision to recognize as a victim shall be made immediately after receiving information about this person. By this decision, the victim shall have more grounds to be more proactive in the adversary proceeding. Failing or refusing to recognize a person harmed by a crime as a victim can be appealed. In case a person has been clearly identified as a victim in a criminal case but in fact, is not recognized, the Court must correct this mistake by recognizing that person as a victim, explaining his/her rights and obligations, and creating favorable conditions for that person to access the case documents and other rights in Art. 42 of Russia's CrPC.

The expansion of awareness about the adversary proceeding as mentioned above has also shaped the character of the victim's adversary proceeding. The scope of the adversary proceeding is the entire adjudication stage. For this reason, the victim's participation in the adversary proceeding is unified, taking place during the entire criminal proceedings. Mr. Gorsky and Mr. Mai Van Thang announce that: as the accusers, the victim can start the legal acts from the investigation authority to initiate criminal cases, from the moment he/she has been notified of an offense that relates to him/her (Gorsky, Mai Van Thang 2017, 76). Classified as an accuser based on adversarial function, the victim is also a subject of the adversary proceeding. The victim's participation in an adversary proceeding is actively struggling with the subject, who has a conflict of interest in performing the function of the charge and protecting his/her legitimate rights and interest. In this proceeding, the victim is independent of other parties under the principle of the adversary. The victim can participate in this process for a variety of purposes, which can be

³ Letter of the Ministry of Finance of the Russian Federation of August 9, 2006 No. 08-04-14/4048.

⁴ Determination of the Constitutional Court of the Russian Federation of December 4, 2007 No. 812-O-O.

⁵ Determination of the Constitutional Court of the Russian Federation of November 17, 2011 No. 1555-O-O.

⁶ Resolution of the Constitutional Court of the Russian Federation of June 13, 2019 No. 23-P.

exposing the person who committed an offense against him/her, demanding prosecution for criminal liability, claiming compensation, or can be for any reason, such as mediates with the offender (Gorsky, Mai Van Thang 2017). How the victim does his/her job in the adversary proceeding depends on the degree of relevance between his/her opinion and the opinion of the investigator or the prosecutor. Therefore, the victim's interests in opposing the defense may become opposing with the competent authority. The victim's role is not only independent and equal to the defense but also to the investigation authority and the procuracy. However, the victim must not interfere with the activities of these authorities. The legislator has consistently expanded the list of rights that enable the victim to be an active and independent subject in criminal prosecution (Vetrova 2017, 33–34). The victim's accusations are first to protect the legitimate rights and interests of himself and also to protect public interests. This accusatory activity of the victim is independent of the public prosecutor, who performs his function consciously and purposefully (Gorsky 2020, 75). The victim determines the objectives and level of charges during the adversary proceeding of a particular case and does not depend on the Prosecutor (Vetrova 2017, 33). In accordance with the principle of presumption of innocence, the responsibility to prove the defendant's criminal acts remains with law enforcement authorities in the proceedings. However, the independence of the victim still serves the victim's accused role in adversary proceeding with the defense.

2.2. Rights and obligations of victims when participating in the adversary proceeding in Russian criminal proceedings

2.2.1. Victim's rights in the investigation stage

The CrPC of Russia recognizes a series of rights to ensure victims's adversarial activities. As a party of the adversary proceeding, the victim has more proactive adversarial rights than a witness. The victim not only has the right to be informed and explained of the rights and obligations similar to the witnesses but also must be informed and explained primarily about the rights of the victim from the beginning of the investigation process. In addition, during the adversary proceeding, victims have the right to know, see, receive, copy, and record many issues directly related to implementing the adversarial activities. Victims also have the right to participate in investigative activities including confrontation, identification, forensic examination, search, and seizure (Kushkhov 2016, 115) when their request for participation is accepted by the Investigator or the Inquiry officer. It should be noted that the participation of the victim, for example, in the inspection of the scene, will greatly facilitate the investigation. In many categories of criminal cases, it becomes necessary to involve the victim at the scene of the incident (Kushkhov 2016, 116). Additionally, there is a special right of the victim, which not only demonstrates the principles of the adversary but also includes the principle of presumption of innocence. That is the right to refuse to testify against himself/herself, his/her spouse, and other close relatives. If the victim agrees to testify, he/she must be warned that his/her testimony can be used as evidence in a criminal case, including in the event of his/her subsequent denied this testimony. This is an indispensable right in any proceedings to protect the parties involved in the adversary proceeding, including the victim.

The victim's basic rights to exercise the adversary proceeding directly include the right to collect and present the evidence, to participate in several activities in forensic examination, and to participate directly in adversary in both proceedings: Judicial investigation and Debate of the parties or in Special order of adjudication. The victim has the right to collect and submit written documents and objects for inclusion in the criminal case as evidence. However, these documents and objects only become evidence of criminal cases through the activities of inquiry officers, investigators, procurators, or courts (Sinenko 2015, 96–97). These documents and objects may not only relate to criminals but also relate to the other components of crime, such as the nature of the offense and the extent of damage that the offense has caused. If the victim knows exactly who has taken offense, he/she can provide information confirming the relevance of that person and sometimes (depending on the type of specific crime) can confirm the degree of fault, motive, and purpose of that person's behavior. This information and evidence are vital to convince competent authorities about the need to investigate, initiate, prosecute, and adjudicate the criminal case. All these activities of the victim are the participation in the adversary's proceedings. The collection and presentation of evidence is a form of practicing the constitutional principles of adversary and equality of the parties. However, the method of collecting evidence of the victim is not specified as clearly as the defender. For the defense counsel, measures to exercise the right to collect evidence are specified quite specifically: 1) receiving objects, documents, and other information; 2) interviewing people with their consent; 3) requesting certificates, characteristics, other documents from state authorities, local authorities, public associations, and organizations obliged to provide the requested documents or copies of them. The victim evidence collection process is the search, discovery, collection, reception, and correction of evidence information in the form of information, documents, or objects in ways not prohibited by applicable law (Ibragimov 2012; Potokina 2016, 50–51). The CrPC of Russia only stipulates that the victim does not have the right to carry out investigative measures as an investigator, but does not provide a restriction on the collection and submission of evidence of the victim. Therefore, the victim's right to collect and hand over evidence is guaranteed, and this right cannot be restricted by anyone. Furthermore, authorities and authorized procedural persons must, upon request, create conditions for victims to exercise this right (Pustovaya 2013, 31). For the collection of evidence to prosecute a private prosecution case, the victim as a private prosecutor has the right to collect evidence and to be assisted by the competent judicial authorities if he/she is unable to collect it on him/her own⁷. In fact, the victim may also use the defense counsel's methods to gather evidence (Potokina 2016, 50–51). The victims are allowed to use private detective services to gather evidence⁸. Thus, although there is no regulation about this right, the victim can still conduct legal activities to collect and hand over evidence without being restricted by law.

⁷ Resolution of the Constitutional Court of the Russian Federation of June 27, 2005 No. 7-P.

⁸ Art. 3 (2 (7)) Law of the Russian Federation of March 11, 1992 No. 2487-1-I. Accordingly, within 24 hours from the time of signing a detective service contract with the victim, a private detective must notify the investigator about the investigation in that criminal case by a document. Objects and documents obtained during his investigation must be handed over to investigators for inclusion in criminal case files.

2.2.2. Victim's rights at the adjudication stage

In the adjudication stage, the victim is equal to the defendant in exercising the rights related to filing challenges and petitions, presenting evidence, participating in the examination, speaking in judicial debates, and presenting written formulations to the court⁹. The adjudication stage is the center stage of the proceedings. In this stage, court proceedings, typically at first instance, take place after the Preparatory and Preliminary Hearing procedures. This procedure includes five steps: the Preparation of the trial, the Judicial investigation, the Debate and the final words of the accused, the Deliberation part, and the Sentencing part. In Judicial investigation, to perform the function of the charge directly, the victim participates in the questioning of other victims, witnesses, defendants, and experts. The victim also participates in requesting to summon more witnesses and experts, interrogating an expert, and requesting repeated or additional forensic examination. In the Debate, the victim performs the charge function completely independently and equally with the procuracy and other parties of the debate. Based on his/her perception of the case and his/her expectation, the victim can make requests and arguments about the case's evidence which prove that the behavior and the fault of the defendant really happened and should be punished; or may request for mediation with the defendant, relieve or exempt the defendant from criminal penalties. As one of the subjects of the prosecution side, the victim has the right to participate in the Debate. Russia's CrPC also clearly stipulates the order of parties' statements when conducting debates, including statements of the "accuser" and the defense counsel. The court establishes the order of parties' statements at the court hearing. However, the accuser's statement must be the first and the accused with their defense counsel must be the last. Therefore, the victim always has the right to make statements before the accused and the defense. These rights show that the victim is an independent adverse party with other subjects. This has great implications for protecting all the victim's interests through the adversarial proceeding.

2.2.3. Victim's rights in mediation proceedings and in a private prosecution criminal case or public-private prosecution criminal case

The victim can seek a favorable outcome through mediation proceeding with the accused and the private-public prosecution order or the private prosecution order. A mediation model has been prescribed in the CrPC of Russia that significantly helps increase the role of the victim, almost taking a major role in the adversary proceeding. The mediation proceeding is completely bilateral, demonstrating the willingness of both the victim and the accused or the defendant to terminate the criminal proceedings. In this proceeding, there is the participation of the mediator and the voluntary and unified intention of both the victim and the accused based on the accused's repentance and compensation for the victim's damage are required. The private prosecution proceeding in Russia's CrPC is a form of prosecution (initiating the criminal case) in which the victim independently decides whether to press charges or to discontinue the prosecution without state intervention (Gachechiladze 2020, 88–89). This proceeding no longer means prosecution at the request of the victim, that the prosecution depends on state authority, but it is the form

⁹ Resolution of the Plenum of the Supreme Court of the Russian Federation of June 29, 2010 No. 17 (as amended on May 16, 2017).

of a victim's accusation in which he/she is officially given the appropriate rights to initiate a criminal case of private prosecution. In this procedure, the victim participates in proceedings as a private prosecutor after applying to the court to initiate a private prosecution case against the crimes specified in Art. 115 (1), 116¹ and 128¹ of Russia's CrPC. A private prosecutor is responsible for proving the crime and has the right to use all means and methods authorized by law as well as requesting the courts to assist for that purpose. He/she also directly exercises the right of the accuser in the private prosecution court. In private-public prosecution cases, criminal investigation and prosecution are also carried out by prosecutors as well as inquiry officers and investigators in the name of the state. However, these cases can only be initiated upon the victim's request for the crimes listed in Art. 20 (3) of Russian CrPC. When the victim's request to initiate the case is accepted, the criminal case of private-public prosecution will be conducted as a usual case with the required participation of the Procurator in exercising the right of prosecution. Unlike the criminal case of private prosecution, the criminal case of private-public prosecution will not be suspended, unless the procuracy agrees in accordance with Art. 25 of Russian CrPC (even in cases where the victim successfully mediates with the accused, it is not suspended). The proceeding procedures and rights of the victim in the criminal case of private-public prosecution are the same as in normal case proceedings.

2.2.4. Victim's obligations when participating in the adversary proceeding

In the adversary proceeding, besides the rights, the victims also have to be present under the inquiry officer's, the investigator's, or the court's summons. Stemming from the victim's role in resolving criminal cases, the CrPC of Russia stipulates the legal consequences when the victim is absent at the hearing without reasonable reason. For a criminal case of private prosecution, the absence of the victim without a good reason is a ground for suspending the private criminal case due to "no fact of crime"¹⁰ according to Art. 24 (1) of Russia's CrPC. For a criminal case of public prosecution, the victim's absence in court may cause postponing the hearing, or publishing of the victim's testimony or evidence that has been submitted by the victim. The presence of the victim is mandatory in the trial of the case according to special order in Chapter 40 of Russian CrPC, as one of the conditions for applying this special order is the victim's consent.

The victim's most important obligation is to provide testimony and to take responsibility for the truthfulness of the information he/she has provided. Victims do not have the right to refuse to give testimony or give false testimony. If the victim intentionally gives false testimony, he/she shall be liable for the crime of "Intentionally false denunciation" under Art. 306 of Russia's Criminal Code 1996 or the crime of "Intentionally giving false testimony" under Art. 307 of Russia's Criminal Code. If the victim refuses to provide testimony, he/she will be held criminally responsible for "Refusing to provide testimony" under Art. 308 of Russia's Criminal Code. The victim who has given false testimony shall be exempt from criminal liability only in cases they voluntarily declare that testimony was untrue before a court verdict or a court decision is made. The exception to this responsibility is the right to refuse to testify against himself or herself, spouse, and other relatives of the victim, within the scope defined in Art. 5 of Russian CrPC. If the victim agrees to

¹⁰ Resolution of the Constitutional Court of the Russian Federation of April 13, 2021 No. 13-P.

testify, he/she must be warned that his/her testimony can be used as evidence in a criminal case, including in the event of his/her subsequent refusal of this testimony. This provision shows that providing testimony is not only a right but also a victim's obligation (Pristavka 2020, 2). The violation of this obligation forces the competent authorities to verify the information presented by the victim when the information is not real, costing law enforcement competent authorities' resources and time, possibly leading to the unreasonable application of coercive measures, especially for the accused. It may lead to the prosecution, detention, conviction, and execution of the innocent (Lesnikov, Kopytkin 2018, 281–282). It can be seen that Russia's Criminal Procedure considers that the victim's obligation to provide testimony and to provide accurate information is important and the violation of these obligations is an offense.

2.3. Experience in improving regulations on the status of the victim in the adversary proceeding of Vietnam's criminal procedures

2.3.1. Overview of the elements of the adversary proceeding and the status of the victim in the Vietnamese criminal procedure model

Throughout history, Vietnamese criminal proceedings absorbed the procedural models of France and the Soviet Union (Tran Thu Hanh 2015, 16; Doan Duc Luong, Nguyen Ngoc Kien 2015, 5), thereby forming an inquisitorial model. All three of Vietnam's CrPC¹¹ in this development recognize the characteristics of the interrogation procedural model, such as the main purpose of criminal proceedings is to find the truth of the case in order to protect the security, detect, and suppress crimes (Dao Van Cuong 2018, 63), without distinguishing procedural subjects according to procedural functions; the procuracy and the court both have the function of accusing, the court's active role in the proceedings, the case file of the competent authorities is vital in the case's settlement; the documents and evidence collected by the competent authorities from the pre-trial stage are important evidence for the adjudication. In this procedural model, the victim is the accuser (Nguyen Duc Thai 2015, 9), but his/her role is not independent but only supporting the official prosecution activities of the procuracy.

Current Vietnam's CrPC¹² 2015 has absorbed some elements from adversary proceedings (Vo Minh Ky 2020, 16) based on studying and absorbing legislative experiences of countries around the world, including Russia. Vietnam has first stipulated the adversarial principle shall be guaranteed in the adjudication in Art. 26 of the CrPC 2015. The content of the adversarial principle focuses largely on the court's adjudication at the trial. Although Art. 26 of the CrPC 2015 mentions equality of subjects in all stages of criminal proceedings, that equality is limited to presenting evidence, evaluating evidence, and making claims without recording other adversarial activities. This content shows that Vietnam's CrPC has not completely absorbed all the adversarial elements (Vo Minh Ky 2020, 16). Therefore, the Vietnam Criminal Code 2015¹³ has not fully promoted the role of the victim as a party of the adversary proceeding, making the victim's role only a participant in the proceedings, not an accusing party (Kim Thi Bich Ngoc 2017, 32).

¹¹ Vietnam's CrPC in 1988, Vietnam's CrPC in 2003 and Vietnam's CrPC in 2015.

¹² Bộ luật tố tụng hình sự Việt Nam 2015.

¹³ Bộ luật Hình sự Việt Nam 2015.

2.3.2. Shortcomings of the status of the victim in the adversary proceeding of Vietnam's CrPC based on comparison with Russia's CrPC

Based on comparing the legal position of the victim in the Vietnamese's CrPC with Russia's CrPC, the victim's participation in the adversary proceeding in Vietnam's CrPC has the following weaknesses that need to be overcome:

Firstly, victims do not have equal status with other subjects as they do in Russia's criminal proceedings. Although this equal status is the factor to ensure the victim's participation in the adversary proceeding, the current practice of adversary proceeding in Vietnam shows that the victim is not proactive and balanced with other entities. For example, when participating in the proceedings, the victim is not recognized by any procedural decision or action. In fact, the recognition of the victim in Vietnam is conducted by the investigation authority, the procuracy, and the court, but not by any unified document or procedural decision. It is indirectly expressed in different documents, at different times, and in the proceedings (Tran Thi Lien 2017, 35). This prevents the victim from being able to know exactly the moment when they receive the status of a victim to participate in the criminal proceedings as well as the adversary proceeding in particular and depends entirely on the summons of the competent authority. So this affects the preparation and the quality of the victim's adversarial activities. In addition, Vietnam's CrPC 2015 classifies the entities participating in the adversary proceeding as competent authorities and participants in the proceedings, not based on the proceedings function of the entities, and lacks consistency in recognizing the independent operation between procedural functions. These features are characteristic of Vietnam's traditional inquisitorial system (Ngo Cuong 2021). Therefore, the victim is still considered a participant in the proceedings and cannot independently and equally perform the function of the charge. Along with the traditional theoretical background, this regulation partially limits the role of the victim's participation in the adversary proceeding, making the operation of the victim's function of the charge largely dependent on the investigation authority and the procuracy.

Secondly, Vietnam's CrPC does not fully recognize the adversarial nature of the entire proceedings like Russia's CrPC, which only records this nature in the adjudication stage. Specifically: the documents and evidence in the case file transferred by the Procuracy to the court, the presence of the parties at the trial, the court's responsibilities in creating conditions for the parties to conduct the adversary proceeding, the assessment of evidence at the trial, the decision-making of the court. Meanwhile, the activities of other procedural functions are not mentioned in this principle. The recognition of equality between subjects at other stages, if any, is only considered as "preparation" for the adversary proceeding in the adjudication stage. This limitation, combined with the failure to ensure equality between the victim and other entities in the criminal procedure as described, leads to some shortcomings in the provisions and implementation of the victim's rights and obligations in the adversary proceeding. Additionally, the victim's right to collect and submission of evidence is more limited than the defense counsel. The defense counsels have the right to collect and present evidence, document, object, and request¹⁴. Meanwhile, the defender of the victim and the involved party does not have the right to collect evidence but only has the right to present evidence. At the court hearing, unlike the defense counsel, the

¹⁴ Art. 73 (1, h) of the Vietnam's CrPC: "The defense has the right to: ...Collect and present evidences, documents, objects, requests..."

victim is not allowed to question the authorized persons and the others participants in the proceedings directly but only requests the presiding judge to ask the defendant and others to attend the court hearing¹⁵. During the Oral arguments in the court, the victim makes a statement after the procuracy and the defendant¹⁶. For the trial of the case which has been initiated at the request of the victims, victims only state and supplement arguments after the prosecutor's present and concludes¹⁷, but the victim does not have the right to present the charges against the defendant¹⁸. The victim could not initiate a criminal case by himself or herself, or take part in the adversary proceeding with the defendant before the court as a private prosecutor in order to charge a person who committed a crime against a specific crime, but only takes an assisting role, while the investigation authority and the procuracy are still the implementing authority. The victim also has not been uniform guidance on the procedures, orders, and authority to conduct the mediation.

Thirdly, unlike the CrPC of Russia, the CrPC 2015 of Vietnam does not attach importance to the obligations of the victim in the adversary proceeding. The role and impact of the victim on other subjects in the adversary proceeding are underestimated, such as, regarding ensuring the victim's obligation to be present under competent authorities to institute legal proceedings' summons, Vietnam's CrPC is limited at the measure of forced escort the victim who is intentionally absent without reason of force majeure or objective obstacles¹⁹ and the trial panel may decide to suspend the trial or continue the trial, depending on the panel's assessment²⁰. Because in Vietnam, the declaration, providing information, and cooperation with the investigation authority are rights, not the obligation of the victim, Vietnam's criminal justice shall not apply criminal responsibility for them. There are no provisions on the responsibility of the victim to ensure the authenticity of the information provided to competent authorities to institute legal proceedings. The victim is not criminally responsible for their acts of providing false documents or making false statements, but only a person who commits the act of accusing a person of a fabricated crime report to take criminal responsibility for slander under Art. 156 of Vietnam's Criminal Code 2015. It can be seen that Vietnam's CrPC does not properly assess the rights and obligations of the victim in the adversary proceeding. In fact, the information provided by the victim can be the basis for the initiation, investigation, prosecution, and adjudication of the competent procedural authorities (Nguyen Duc Thai 2015, 10). For that reason, the victim has the right to testify, but to secure the fairness of the victim's participation in

¹⁵ Art. 307 (2) of the Vietnam's CrPC: "When questioning each person, the presiding judge of the court session shall ask questions first, and then decide to let the judge, juror, procurator, defense counsel, and defense counsel of the involved parties' legitimate rights and interests carry out the questioning".

¹⁶ Art. 320 (3) of the Vietnam's CrPC: "Victims, involved parties, and their representatives present their opinions to protect their rights and interests; if there is a person to protect their legitimate rights and interests, this person has the right to present and supplement opinions...".

¹⁷ Art. 320 (4) of Vietnam's CrPC: "If the case is initiated at the request of the victim, the victim or their representative shall present and supplement opinions after the impeachment presents of the procurator".

¹⁸ Art. 62 (3) of Vietnam's CrPC 2015: "If the case is prosecuted at the request of the victim, the victim or their representative shall present the accusation at the court hearing".

¹⁹ Art. 62 (4, a) of Vietnam's CrPC 2015: "...The victim is obliged to: To be present under the summons of the person competent to conduct the proceedings; in case of intentional absence without force majeure or objective obstacles, he/she may be escorted".

²⁰ Art. 292 (1) of the Vietnam's CrPC: "If the victim... is absent, depending on the case, the Trial Panel shall decide to postpone the trial or still proceed with the trial...".

the adversary proceeding as well as the legitimacy of the criminal proceeding, the victim must secure the authenticity of the information that they have provided to the authorities conducting the proceedings. Thus, it is not reasonable to exclude the victim from the scope of persons who may be accused of making false statements under Art. 382 of the Criminal Code.

The difference of the moment when the adversary proceeding begins stems from different awareness of the adversarial nature in the two countries. As mentioned, the Criminal Procedure of Russia recognizes that adversarial nature exists in all stages of the criminal procedure. Meanwhile, Vietnamese criminal justice legal science often considers adversary proceeding as “an argument in the proceedings” (Nguyen Van Diep, Le Van Quyen 2015, 4) rather than “a legal combat” between parties with opposing activities. Therefore, this “argument” is assumed to exist only between the parties in court and requires arbitration by the court. This point of view is also the basis of the fact that Vietnam’s Criminal Procedure considers adversary proceeding as a “tool” or a “way” to solve a case, rather than “the nature”, “the historical form of the criminal proceedings” as in the CrPC of Russia. Consistent with this point of view, the policy of Vietnam is to absorb only the elements of the adversary proceeding in the adjudication stage. Implementing that policy, Vietnam’s CrPC provides for “adversary proceeding in adjudication”, not “adversary proceeding in criminal proceedings”, although it still recognizes equality at some stages of the pre-trial stage. However, as a procedure for public debate in court or activity of the parties to prove their point of view, in the adversary proceeding, the procedural functions must fight to oppose each other through procedural activities. Wherever there is an accusation, there is a defense (Ton Thien Phuong 2016, 42), and wherever there is a conflict between the accuse function and the defense function, there must be the adversary proceeding (Pham Tien Dai 2019). With this approach, the adversarial nature is an objective rule that exists in the criminal procedure of any country, regardless of whether that country follows any procedural model, even if that country does not recognize the principles of the adversary in the CrPC. Therefore, it is necessary to recognize the adversarial nature in the entire criminal procedure as a condition for the subjects, including the victim, to conduct the adversary proceeding in a fair, equal, and objective manner.

Some limitations of the victim’s participation in the adversary proceeding in Vietnam’s criminal procedure compared with Russia’s criminal procedure are also the result of the state’s and society’s perception of the interests of the victim in the criminal proceedings. For example, Vietnam’s criminal procedure has not recognized the private prosecution proceeding because of the common view that: The Procuracy plays a decisive role in the prosecution, the prosecution’s activities of the procuracy are more professional than the victim, and the victim’s accusation is only for his/her own interest (Nguyen Duc Thai 2015, 9–10). Meanwhile, as an independent party of the adversary proceeding and is guaranteed the right to access justice, the victim in Russia’s criminal procedure is entitled to initiate a private prosecution case without state intervention and to end the process by mediation in appropriate statutory cases²¹.

²¹ “Generalization of judicial practice in the consideration of private prosecution criminal cases by justices of the peace for 2017”. *Svetlogorsk city Court of Kaliningrad Region*. 2021. Accessed June 25, 2023. http://svetlogorsky.kln.sudrf.ru/modules.php?name=docum_sud&id=427.

2.3.3. Experience for Vietnam Criminal Procedure in improving regulations on the status of the victim in the adversary proceeding

Theoretically, the recognition of adversarial principles should not only focus on the argument at the adjudication stage as presented, but it is also necessary to absorb and recognize the basic characteristics and progress of the adversarial principles in the entire proceedings. Thus, we have the following suggestions:

First, it is necessary to absorb the experience of Russia's CrPC in stipulating responsibilities and procedures for recognizing the status of victims in Vietnamese criminal proceedings by adding the following contents to Art. 62 (2) of the CrPC 2015:

Investigation authority, procuracy, and court are responsible for identifying and recognizing the victim. The recognition of the victim decision must be issued at the time of initiating criminal cases or at the time of receiving information about the individual or legal person who has been harmed by the crime.

Second, the Vietnamese criminal procedure should classify the subjects in the proceedings base on the adversarial function to make the adversary proceeding balanced and equal among the subjects. Therefore, it is necessary to supplement this provision in the CrPC 2015:

The prosecution parties include investigation authority, head of the investigation authority, procuracy, head of the procuracy, investigator, procurator, victim, legal representative, defense counsel of legitimate rights and interests of the victim, civil plaintiff, and legal representatives of the civil plaintiff. Defense parties include the accused person, arrest, detainee, suspect, defendant, legal representative and defense of legitimate rights and interests of the accused person, arrested, detainee, suspect, defendant.

Third, in addition to recognizing the victim as a subject performing the accusing function, it is necessary to supplement these rights for the victim by supplementing or amending relevant provisions in Art. 62 (2) of the CrPC 2015 as follows:

Perform the accusing.

Refuse to testify against himself/herself or a relative according to the first inheritance, refuse to admit guilt. If the victim agrees to testify, he/she must be warned that his/her testimony can be used as evidence against himself/herself in this criminal case or in another criminal case, including in the event the victim refuses this testimony later.

Collecting and presenting evidence, document, object and request not contrary to the provisions of this Code.

Join the trial; present opinions, ask defendants and others to participate in the trial; debate in court to protect their legitimate rights and interests; get acquainted with court records.

The victim has the right to read and make copies of the materials of the criminal case after the investigation conclusion was issued; receive copies of the decision to initiate a criminal case, the decision to recognize or deny recognition him/her as a victim, the decision to suspend the case or dismiss the case.

Fourth, it is necessary to provide victims with the right to conduct court proceedings by adding the provision that the victim is the subject of the questioning in Arts 309, 310, 311, 318 of Vietnam's CrPC and re-determine the order of statements in oral argument before the court in the order: prosecutor, the victims, the litigants, their representatives, and finally the defendants, the defendant's representative, and the defense counsel; where the case is initiated at the request of the victim, the victim or his/her representatives shall present the charges immediately after the prosecutor's impeachment. Therefore, we propose to amend Art. 320 of Vietnam's CrPC as follows:

Article 320. The sequence of statements when arguing

1. After finishing the interrogation, the procurator presents the impeachment; if finding there are no grounds to convict, then withdraw the entire prosecution decision and request the Court to declare the defendant not guilty.
2. Victims, involved parties, and their representatives present their opinions to protect their rights and interests; if there is someone to protect their legitimate rights and interests, this person has the right to present and supplement opinions.
3. The defendant presents a defense; the defense presents the defense for the defendant; the defendant, the defendant's representative has the right to add defense opinions.
4. Where the case is prosecuted at the request of the victim, the victim or their representative shall present the accusations immediately after the procurator presents the impeachment.

Fifth, Vietnam's criminal procedure should develop an institution for the victim's accusation through private prosecution, in which the victim can proactively initiate the case and bring this case to the court without going through the investigation authority or the procuracy. It is essential to only apply this proceeding to less serious crimes so that the victim has the ability and conditions to gather evidence and prove the case. According to the experience of Russia's CrPC, the criminal case of private prosecution may also be conducted through a special procedure. The initiation of the criminal case of private prosecution can be filed directly in court and the case will be resolved through a judge. This proceeding does not deprive the parties' right to search for a mediation. The victim and his/her representative take the role of private prosecutor exercising the right to accuse at trial. The procedure for resolving a private prosecution case should be more compact procedure than a normal proceeding, but it must ensure the right in adversary proceeding of the accusing party and the defense at the hearing. If the accusing party in a criminal case of private prosecution is absent from the court hearing without a plausible reason, the private prosecution case shall be dismissed.

On the other hand, it is vital to study and build a procedure for accepting the mediation agreement between the victim and the accused or the defendant as one of the grounds for suspending the criminal case for private cases and for some less serious crimes. The principle of the adversary in criminal procedure includes an important content which is the guilty plea between the accuser and the accused (Luu Binh Duong 2017, 132–133). The experience of Russia CrPC about the following principles of the mediation institution should be applied: the victim must be explained to the right of mediation with the accused or the defendant at the time that the person is recognized as the victim and at the time of trial preparation; for the mediation to be accepted, the parties must reach a mediation

before the trial panel enters the deliberation room; in case of mediation before the court hearing, the mediation agreement must be made in writing, in which recording the rights and obligations of the parties; mediation arrangements must be conducted in the presence of a third party as arbitrator, which may prescribe that the third party is either a procuracy or a court, or a legal service provider; mediation at the court hearing is specified in the court's minutes; the case shall be suspended only if the parties, especially the accused person, have fulfilled their obligations in the mediation agreement; the termination of the private prosecution case by the parties to mediate themselves must be approved by the procuracy.

Sixth, Vietnam's CrPC needs to add some obligations to the victim to ensure that the adversary proceeding is conducted in the fairest and equal way among the subjects. We recommend adding the following obligations for the victim by amending and supplementing the corresponding provisions in the CrPC 2015: "If the victim agrees to testify, the victim must truthfully provide the facts he/she knows about the case. If the victim provides the information and documents he/she knows are untrue, he/she will be liable for criminal liability in accordance with Art. 382 of the Criminal Code unless otherwise specified in point... paragraph... this article" [14]. At the same time, we recommend adding the following content to Art. 382 (1) of the Criminal Code 2015: "The victim who provides the statements or documents that he knows to be untrue will be warned or fined from... dong²² to... dong"²³.

3. Conclusion

In Russia's criminal proceedings, the victim is an independent adversary, participating in the adversary proceeding by himself/herself to protect his/her legitimate rights and interests. In Vietnamese criminal proceedings, the victim is not an independent adversary but only assists the accuser. The function and independent adversarial position of the victim has not been recognized by Vietnamese law. In the context of Vietnam's judicial reform to improve the quality of adversary in criminal proceedings, this article compares the provisions on the adversary of the victim in the laws of Russia and Vietnam and draws some experience to improve the provisions on the adversary proceeding in criminal proceedings in Vietnam.

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²² "Dong" is the Vietnam's currency unit.

²³ The "..." sign in this regulation refers to the highest and lowest levels for which a fine can be imposed on this offender. We recommend applying the fine in this regulation because it matches the serious nature of this victim's behavior, and can apply this penalty for legal persons that has committed this crime.

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Received: March 10, 2022

Accepted: May 2, 2023

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