

VICTIM'S PARTICIPATION IN ADVERSARY PROCEDURE OF THE RUSSIAN FEDERATION'S CRIMINAL PROCEDURE CODE AND LESSONS FOR VIETNAM

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Abstract

Some countries that mainly follow the inquisitorial system, such as Russia, France, and Vietnam, tend to absorb some features of the adversarial system. Using the Russian Federation as an example, this article raises questions including: How will the acquisition of adversarial elements affect the position, role, rights and obligations of the victim? Is the victim an independent party to participate in the adversary procedure? 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 procedure, it will be difficult for the victim to protect his or her legitimate rights and interests in the 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 procedure of the Russian Federation. While analyzing the rights and obligations of the victim in the adversary procedure, we found that the victim in the Criminal Procedure Code of the Russian Federation is eligible to participate in the adversary procedure as an independent party. The article discusses the significance of this study and proposes approaches to improve the victim's participation in adversary procedure in Vietnam's criminal justice system.

Keywords: *adversary, proceeding, victim, criminal proceedings, Russian Federation*

Vietnam's judicial reform process has absorbed many elements of the adversarial system, which is a common trait of many modern criminal procedure models. Vietnam's criminal proceedings always consider ensuring adversarial principle in trial as a fundamental principle, searching for the effectiveness of the proceedings and protecting the legitimate rights and interests of all citizens. Currently, the recognition of adversarial nature in criminal proceedings has attracted the attention of many countries, especially countries with a background in inquisitorial systems¹. This process's challenge is maintaining a balance between the various goals of criminal justice, including the effectiveness of crime prevention and maintaining legislation with protecting the rights of all participants in the proceedings, including the victim. For the victims, their concern is justice and the restoration of their

¹ Today, many countries belonging to the continental legal system with the traditional inquisitorial system have absorbed and combined some reasonable elements of adversarial system to form a mixed procedural system: half - adversarial system: For example: French Republic has promulgated the "Law on the presumption of innocence and increasing the rights of the victim" which has added a number of contents of the adversary procedure in order to strengthen the role and the right of the parties at the trial and better ensure the principle of adversary. See: Nguyen, D. M. (2009), 'Đặc điểm của mô hình tố tụng tranh tụng và phương hướng hoàn thiện mô hình tố tụng hình sự ở Việt Nam', *Tạp chí Tòa án nhân dân*, số 12/2009 [Features of the adversarial model and the direction to perfect the criminal procedure model in Vietnam', *Journal of People's Court*, No. 12/2009], p. 2.

legitimate rights and interests. Recognizing the victim's rights and obligations in the adversary procedure ensures fulfilment of these concerns.

Like many other countries in the world, Vietnam has been implementing a comprehensive reform of criminal justice. One of this reform's central tasks is the recognition of adversarial elements in criminal trials. The adversarial elements were initially mentioned in the content of Resolution 08/NQ-TW, Resolution 49-NQ/TW of The Politburo of Vietnamese Communist Party, and were concretized in the 2013 Constitution and the 2015 Criminal Procedure Code. However, the acquisition of the adversarial elements is only in the trial stage. Some proceedings between accuser² and defense party³ in the pre-trial proceedings, although include adversarial features, are only considered preparations for adversary procedure in court. According to Mr. Le's point of view: "This policy stems from a mixed inquisitorial and adversarial model that has had a lot of influence on the Vietnamese criminal justice system".⁴ Vietnam's Criminal Procedure Code attaches great importance to the criminal procedure's function of processing crimes, considering adversarial proceeding as a way to solve the case, rather than a method for the parties to actively protect their procedural rights and interests. This view leads to the popular opinion that adversary procedure only occurs in the trial stage under the management, supervision, and judgment of the Court. These issues govern the role and position of the parties when they participate in the adversarial procedure.

In Vietnam, the victim's participation in the adversary procedure is limited and passive. The victim is only identified as assisting role of the prosecution in bringing charges. One of the main purposes of the victim when participating in the criminal proceeding is to protect and restore the legitimate rights and interests that criminal acts have infringed upon or threatened. However, the victim is not considered a party of the criminal proceedings. In particular, some rights of the victim are not really equal to other subjects, including the defense party: the victim's right to be informed has not been fully recognized, the victim's passive participation in the adversary procedure even in prosecution cases at the request of the victim, and argument order at court. These limitations affect the effectiveness of the victim's participation in the criminal justice process.

There are some special characteristics in the victim's participation in adversary procedure in the Criminal Procedure of the Russian Federation.

2 Accuser: The person by whom an accusation is made. See: Black, H. C. (1990), *Black's law Dictionary*, 6th Edition. St. Paul: Minn. West Publishing Co, p. 39.

3 Defense party: including suspect, accused, defendant, civilly liable party, and their representatives.

4 Le, T. C. (2002), 'Tìm hiểu các hình thức tố tụng hình sự', *Tạp chí Khoa học pháp lý*, số 8/2002 [Research the types (forms) of criminal proceedings', *The Vietnamese Journal of Legal Sciences*], No. 8 (15), pp. 37 -40.

Even in countries with adversarial systems, the victim rarely takes the role of the accuser and actively takes part in the adversary procedure. In these countries, the victim's role in criminal proceedings does not differ from the role of the witness. The principal roles involved in adversary procedures are still the prosecutor and the defense. The court takes an adjudicator role and the victim, as well as the witness, are the objects for the adversarial parties to "cross-check" each other's views and evidence.⁵ Meanwhile, the Russian's criminal justice considers that the victim is more independent in adversary procedures. This is based on the first mission of Russia's criminal proceedings: to protect the legitimate rights and interests of individuals and organizations, victims of crimes.⁶ Since its promulgation in 2001 and amendments and supplements until now, the Criminal Procedure Code of the Russian Federation shows revolutionary and fundamental changes. Mrs. Do wrote that: "this is the change of Russian criminal justice model from an inquisitorial system in which the prosecution has an advantage to an adversarial system that is based on equality, fairness and protecting individual rights".⁷ The criminal justice model of this country also provides jurors who are ordinary citizens with the right to decide guilty or innocent in serious criminal cases. The role of the competent authority and the parties in proving the crime also changes in the direction that defendants and prosecutors participate equally in the proceedings, judges from an active role in the charged with the transition to the role of a neutral arbitrator. As the Procuracy University pointed out in its special number of journal, "criminal proceedings of the Russian Federation have both the basic elements of the adversarial procedural model and the characteristics of the inquisitorial criminal proceedings".⁸ Therefore, besides other basic principles of inquisitorial criminal proceedings, Russia's criminal proceedings attach special importance to adversary principle. However, unlike countries that completely use the adversarial procedural model, when absorbing the elements of the adversary procedure, the new Criminal Procedure Code stills retains the factors consistent with the

5 For example, in the criminal proceedings of England and Wales, the victim is not a party to the proceedings, victims of crime had no role in the criminal trial process unless they appeared as witnesses for the prosecution. Similar provisions are also found in Australian's law, Canada's law, USA's law (both federal and state). See: Gordon, J, Gordon, A (2020), *The role and rights of victims of crime in adversarial criminal justice systems: Recommendations for reform in England & Wales*, Victims Commissioner for England and Wales, London.

6 Article 6 Criminal Procedure Code of the Russian Federation.

7 Do, H. C. N. (2019), *Quyền của bị hại: nghiên cứu so sánh pháp luật tố tụng hình sự liên bang Nga và kinh nghiệm cho Việt Nam*, Luận văn thạc sĩ. Thành phố Hồ Chí Minh: Trường Đại học Luật Thành phố Hồ Chí Minh [Do, H. C. N, (2019), *The right of the victim: a comparative study of Russian federal criminal procedure law and experience for Vietnam*, Master's thesis, Ho Chi Minh City University of Law, City Ho Chi Minh City, Vietnam], p. 16.

8 Đại học Kiểm sát (2011), *Mô hình tố tụng hình sự Liên bang Nga*, Thông tin khoa học kiểm sát, (1+2) Số chuyên đề năm 2011, (1+2) Số chuyên đề năm 2011 [Procuracy University (2011), *Model of Criminal Procedure of the Russian Federation*, Journal of Procuratorial Science Information, (1 + 2) Number of topics journal in 2011]. Retrieved from: <https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/145> [accessed 9 May 2021].

conditions of Russia. One of these factors is the importance of the victim's role and position in the criminal proceedings and the adversary procedure.

The experience of the Russian criminal proceeding on this issue is very consistent with the current reform orientation of the criminal procedure model of Vietnam. According to the Supreme People's Procuracy, the orientation is continuing to maintain and promote the advantages of the inquisitorial model of criminal proceedings, selectively gaining the rational elements of the adversarial procedural model, which are consistent with cultural traditions, specific conditions of the politics, economy, and society in Vietnam.⁹ In order to contribute to improving the efficiency of the victim's participation in adversary procedure, we choose the criminal procedure of the Russian Federation to refer to the legislative experience on this issue. The reference to experience from the criminal proceedings of the Russian Federation must base on the following grounds: *Firstly*, like the criminal proceedings of the Russian Federation, Vietnam is still in the process of judicial reform from a procedural model that attaches importance to many elements of the inquisitorial system to absorb more appropriate features of adversary procedure. *Secondly*, Russian and Vietnamese criminal proceedings share common features of the traditional procedural model, however, the Russian Federation has succeeded in absorbing the appropriate features of adversarial system. *Thirdly*, the comparative study of criminal proceedings of Vietnam and the Russian Federation related to the victim's participation in the adversary procedure is to meet the needs to create conditions for Vietnam in learning and drawing experience to select, issue, amend, supplement and appropriately apply provisions on adversary procedure of the victim. On that basis, Vietnam can improve the effectiveness of the role and position of the victim when participating in the adversary procedure and contribute to improving the efficiency of the criminal proceedings.

This article does not approach adversary procedure based on the viewpoints of traditional Vietnamese criminal procedure, but studies this concept as an objective feature in all legal proceedings. If approaching adversary procedure as a process of fighting between opposing procedural functions, then this process is an objective law which exist in the criminal procedure of any country, regardless of whether the country is under which model of proceedings, even if that country does not recognize the adversary principle in the Criminal Procedure Code. The recognition of the adversary principle or elements of adversary procedure in the Criminal Procedure Code is a condition for adversary procedure to take place in a truly fair, equal and objective manner. First, the article clarifies the

9 Viện kiểm sát nhân dân tối cao (2015), Báo cáo thực tiễn 10 năm thi hành Bộ luật tố tụng hình sự năm 2003, Viện kiểm sát nhân dân tối cao, Hà Nội [The Supreme People's Procuracy (2015), *Report on 10 years practical implementation of the Criminal Procedure Code 2003*, The Supreme People's Procuracy, Hanoi], p. 28.

adversarial nature of the Russian Federation's criminal proceedings. Relevant documents, including legal documents, textbooks, dissertations, scientific articles, are reviewed, using the content analysis and comparative methods. This stage of study aims at determining the necessary elements to ensure the adversary procedure of the parties in the criminal proceedings of the Russian Federation. Second, based on that theory, this article clarifies the victim's role in the adversary procedure by comparing aspects of the victim's rights and obligations when participating in the adversary procedure of the Russian Federation's Criminal Procedure Code and Vietnam's Criminal Procedure Code. The following methods have been applied:

(1) Content analysis is employed systematically to examine the adversary procedure recorded in the victim's rights and obligations in criminal procedure of the Russian Federation and Vietnam.

(2) Synthesizing analyzed factors on the basis of the adversary principle in order to clarify the position and role of victims in the adversary procedure of each country. This synthesis also allows us to clarify the advantages and limitations related to the victim's participation in the adversary procedure in Russian law in order to find the appropriate experience for the victim's participation in the adversary procedure in Vietnam.

(3) The comparative method takes an important role in this article, allowing us to explore the strengths and weaknesses of the Vietnamese legal framework on the victim's participation in adversary procedure. These findings allow us to make recommendations on possible improvements of the Vietnam's Criminal Procedure Code to improve adversary procedure in general and the participation of the victim in the adversary procedure in particular.

1. The victim's participation in adversary procedure in criminal proceedings of the Russian Federation

1.1. The adversarial nature of the parties in the Russian criminal proceedings

The adversarial nature is an indispensable standard of Russian criminal proceedings, and it exists not only in the adjudication stage but also in all stages of Russian criminal proceedings. Article 123 of the Constitution of the Russian Federation and Article 15 of the Criminal Procedure Code of the Russian Federation stipulates that adversarial nature is a constitutional principle in this country's criminal prosecution. These rules also affirm that Russian criminal proceedings are carried out on the basis of the adversarial nature of the parties. The adversary principle in the Russian Federation criminal proceedings is a combination of three main conditions: (1) The prosecution, defense and adjudication functions must operate independently of each other and cannot 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.

The adversary procedure in the Russian Federation's Criminal Procedure includes a number of basic features. *Firstly*, the criminal proceedings functions are operated separately from each other. These functions are distributed among separate entities to ensure the implementation of procedural functions independently, avoiding the overlap between functions that are the foundation of the adversary procedure. This provision stems from the nature of the adversary procedure that is the contrast of the prosecution and defense functions, performed under the control of an independent court. The conflict between the functions in the adversary procedure is completely consistent with the objective law of unity and the struggle between opposing sides. Therefore, two opposing functions cannot be identical to each other, cannot be performed by one subject, in particular the judicial function. Shestakova states that: "... the prosecution function is performed by investigators, heads of investigation authority, investigation authority, prosecutors, procuracies, procurators heads, victims, victims' representatives. The defense function is performed by the accused person, the accused's representative, the defense attorney. And the function of solving criminal cases belongs to the court".¹⁰ In any stage and at any time in criminal proceedings, if there is any opposition, conflict, or struggle between the parties, the adversary procedure will inevitably appear. Thus, the adversarial nature of the parties in Russian criminal proceedings is not only present in the adjudication stage, but it is a fundamental feature of the entire proceedings. *Secondly*, the adversary procedure also requires the parties to have the right and procedures to protect their interests. As Mr. Vadimovich and Mr. Mai point out, "... 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".¹¹ The proceedings are only truly objective and ensure the adversarial nature when based on equality between the parties in providing evidence, participating in the preliminary investigation stages and in the proceedings at the trial, in examining and evaluating evidence, in debating and disproving the other's views. *Thirdly*, the maintenance of the above equality and independence is executed by

10 Шестакова, П. Т. (2018), 'Состязательность и равноправие сторон как принцип уголовного судопроизводства', *Молодой ученый*, [Shestakova, P. T. (2018), 'Competitiveness and equality of the parties as a principle of criminal proceedings', *The Journal of Young Scientists*], No. 8, pp. 99-101.

11 Vadimovich, G. V. & Mai, T. V. (2017), 'Chiến thuật tham gia, bảo vệ của luật sư đại diện bị hại trong Tố tụng hình sự ở Nga và những gợi mở cho Việt Nam trong bối cảnh hiện nay', *Tạp chí Khoa học Đại học Quốc gia Hà Nội* [Vadimovich, G. V. & Mai, T. V. (2017), 'Participation and protection tactics of attorneys representing victims in criminal proceedings in Russia and suggestions for Vietnam in the current context', *Journal of Science - Hanoi National University*], No. 1, pp. 73-81.

the independence, impartiality and objectivity of the judicial function. This is also a prerequisite to secure adversary. Therefore, the court's functions of adjudication must be separated from the other procedural functions. The court only has a duty to fairly resolving the conflicts between the parties, provide the parties with an equal opportunity to defend their interests, and therefore cannot undertake the other proceedings functions of the parties.

Russian legal scientists consider adversary procedure as “a combat”, but as Mrs. Akulinicheva observed, “it is a legal “combat” of professional lawyers representing the parties who consider the same legal event based on different perspectives and based on the provisions of the law. In fact, such a “combat” allows the court to determine the nature of the case and make a legal, reasonable and accurate decision to resolve the case”.¹² The jurisprudence of the Russian Federation considers adversary procedure not only as just a dispute procedure but as a process in which 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 judicial reform process of the Russian Federation shows that the criminal proceedings should be built on the basis of adversarial criminal proceedings. The Congress of People's Deputies of the Russian Soviet Federative Socialist Republic (RSFSR) and the Supreme Soviet of the RSFSR pointed out: “This process 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”.¹³

1.2. The victim's activities in the adversary procedure of the Russian Federation's criminal proceedings

In the Criminal Procedure Code of the Russian Federation, the victim is the subject having the capacity to participate in the proceedings independently, including natural person or legal entities to whom a crime has caused damage. These damages must be direct damage, including physical, property, and spiritual damage to a natural person or damage to property or reputation of a legal entity. A public legal entity, considered as a part of the State of the Russian Federation, cannot participate in the criminal proceedings as a victim when it suffered damage by crime. In the case of a crime causing damage to a state, a city,

12 Акулиничева, О. С. (2015), ‘Реализация конституционного принципа состязательности и равноправия сторон при осуществлении правосудия по уголовным делам’, *Молодой ученый* [Akulinicheva, O. S (2015), ‘Implementation of the constitutional principle of adversariality and equality of the parties in the administration of justice in criminal cases’, *the Journal of Young Scientist*], No. 16, pp. 330-332.

13 Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР (1991), *Концепция судебной реформы в РСФСР*, No. 44, М: s.n. [Bulletin of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, *Concept of judicial reform in the RSFSR*, M, 1991. No. 44].

the damage is caused to the public interests, as Smirnov and Kalinovsky pointed out, “the State of the Russian Federation is neither the object of crime nor can be recognized as a victim, including the Russian Federal Ministry of Finance or its subsidiary as a legal entity”.¹⁴ Only the prosecutor can initiate a civil lawsuit to protect the interests of the State.¹⁵ The victim’s adversarial status is established only when there is a decision on recognition by the competent authority in the proceedings. Mrs. Shiryayeva stated that: “The role of this decision on recognition is very important to the person harmed by the offense, because only after being recognized as victims, he/she and his/her representatives shall have the right to participate and protect his/her legitimate interests in criminal proceedings”.¹⁶ A person harmed by a crime becomes the subject of criminal proceedings only when there is a decision on recognition as a victim made by an inquiry officer, investigator, judge, or a court ruling. This decision must be taken immediately from the moment of initiation of a criminal case. If at the time of the initiation of a criminal case, there is no information about the person who was harmed by the crime, the decision on recognition as a victim shall be made immediately after receiving information about this person. Mrs. Shiryayeva states that: “... the moment of recognition as the victim is a new provision that was amended in 2013 of the Russian Federation’s Criminal Procedure Code. This provision is considered to better guarantee the rights of victims in criminal proceedings, avoid abuse of the state’s power and ensure the right to access justice of the victim”.¹⁷ Based on this decision, the victim will be aware of when he/she is allowed to participate in the proceedings and exercise his/her legal rights and obligations in the proceedings, so becoming more active in the adversary procedure. From this decision, the victim has a basis to participate in the proceedings and especially in the adversary procedure from the first stage of the investigation, in the preliminary investigation, and official investigation.

The expansion of awareness about the adversary procedure as mentioned above has shaped the character of the adversary procedure in the Russian Federation’s criminal justice. The scope of the adversary procedure is no longer limited in the trial stage but to the entire adjudication stage. The adversary procedure is not only intended for the investigation authority, the procuracy, the

14 Смирнов, А. В., Калиновский, К. Б. (2008), *Уголовный Процесс, дом печати – вятка*, Москва [Smirnov, A.V. & Kalinovsky, K.B. (2008), *Criminal Procedure*, Press House – Vyatka, Moscow], p. 119.

15 Clause 3, Article 44 of the Russian Federation’s Criminal Procedure Code.

16 Николаевич, В. Н. (2005), *Правовое положение потерпевшего в уголовном процессе России, канд юрид наук*,. *Российская Судебная Академия*, Москва [Nikolaevich, V. N. (2005), *Legal status of victims in Russian criminal proceedings: Doctoral thesis in jurisprudence, Russian Judicial Academy*, Moscow], p. 20.

17 Ширяева, Т. И. (2014), ‘Правовое положение потерпевшего в уголовном судопроизводстве России на современном этапе’, *Фундаментальные исследования* [Shiryayeva, T. I. (2014), ‘Legal status of the victim in criminal proceedings in Russia at the present stage’, *Journal of Basic research*], No. 9(8), pp. 1896-1900.

accused, and the defendants. Based on judicial functions, the Criminal Procedure Code of the Russian Federation classifies the subjects of the criminal proceedings participating in adversary procedure into entities performing the function of the charge and entities performing the defense functions. In Section II, Part I of the Russian Federation's Criminal Procedure Code, the victim is classified into a group of entities performing the function of the charge. Therefore, the victim is also a subject of the adversary procedure. The victim's participation in adversary procedure in Russian criminal proceedings is also the victim's active struggle with the other subject, who has a conflict of interest in performing the function of the charge and protect his/her legitimate rights and interest. When participating in adversary procedure, the victim is independent of other parties in accordance with the content of adversary principle in the Russian Federation Criminal Procedure Code. As Mr. Vadimovich and Mr. Mai announce that "victims can participate in this process for a variety of purposes, which can be exposing the person who committed an offense against him, demanding prosecution for criminal liability, claiming compensation for the damages that the crime has caused or can be for any reason, agrees to the offender or mediates with the offender"¹⁸. How the victim does his or her job in the adversary procedure depends on the degree of relevance between the opinion of the victim and the opinion of the investigator who investigates the case or the prosecutor exercising the right of prosecution about a number of issues at any stage in the case. That can completely make the victim's interests from opposing the defense to opposing with the competent authority. The victim's accusing role in this situation is not only independent and equal with the defense but also independent and equal to the investigation authority and the procuracy. The victim's participation in charges is active but independent and must not interfere with the activities of the criminal procedure law enforcement agencies. Mr. Nikolaevich stated that "the victim's participation should not even be considered as a support for agencies conducting investigations and prosecutions, although comments and information from the harmed side can be accepted to support the process of detecting and prosecuting offenders more smoothly. In accordance with the principle of presumption of innocence, the responsibility to prove the defendant's criminal acts remains with law enforcement agencies in the proceedings"¹⁹. However, the independence of victim still serves the victim's accused role in adversary procedure with the defense.

In the Russian criminal proceedings, the victim's participation in adversary procedure is unified, taking place not only at the trial but also during the entire criminal proceedings. Mr. Vadimovich and Mr. Mai

18 The Supreme People's Procuracy (2015), *supra* note 9

19 Smirnov, A.V. & Kalinovsky, K.B. (2008), *supra* note 14, p. 60.

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".²⁰ The victim's status is officially established when the decision to recognize the victim is issued, and this decision officially starts the adversarial activities of the victim. When the opposition about the rights and interests in the proceedings is no longer present, the adversary procedure also ends.

2. Rights and obligations of victims when participating in adversary procedure in Russian criminal proceedings

As an accuser party, the victim participates in the proceedings from the time he/she is notified of a crime committed in connection with him/her. The accusing nature of the victim at this stage is clearly shown in the rights to be recognized the legal status of the victim in the adversary procedure. From the basis of being legally recognized as a victim, he/she will be given the victim's adversarial rights. Victims prescribed the following rights aim to be recognized as victims, creating a basis for victims to restore rights and interests which have been infringed by the criminal act: the right to reporting the crime and being given prosecution request for competent authority to initiate criminal cases, the right to request to initiate directly criminal cases of private-public prosecution and initiate criminal cases of private prosecution. Attached to these rights is the right to make and defend a claim of the victims about compensation for damages - one of the destinations of the victims' participation in proceedings. This right is shown during the periods: initiation of a criminal case, investigation, trial, and execution. This is one of the manifestations of the fundamental theories of adversarial nature in Russian criminal proceedings: adversarial nature exists not only in court but also in pre-trial stages.

2.1. Victim's rights in the investigation stage

The Criminal Procedure Code of the Russian Federation also recognizes a series of rights to ensure adversarial activities of the victim. As a party of the adversary procedure, the victim has the right to be more proactive than a witness to exercise his/her adversarial rights. The victim not only has the right to be informed and explained of the rights and obligations similar to the witnesses in Articles 306, 307, 308 of Russia's Criminal Procedure Code but also must be informed and explained primarily about the rights of the victim from the beginning of investigation process. In addition, during the adversary procedure, the victim has the right to know, see, receive, copy and record many issues directly related to implementing the adversarial activities specified at the points 10,11,12, 13, 17, 20 of paragraph 2 of Article 42 of the Russia's

²⁰ The Supreme People's Procuracy (2015), *supra* note 9

Criminal Procedure Code. The recognition of these rights of prosecution also means prescribing the respective obligations to the authorities conducting the proceedings. Any breach of one of these rights may cause the cancellation or amendment of the sentence. Thus, in order to create the victim's initiative when participating in the adversary procedure in each stages, the Criminal Procedure Code of the Russian Federation attaches great importance to providing the above information to the victim. Victims also have the right to participate in investigative activities including confrontation, identification, as well as search and seize when their request for participation is accepted by the Investigator or the Inquiry officer. In some situations, the victim's participation in investigative activities has a positive impact on the effectiveness of the investigation. For example, Mr. Nikolaevich stated that "the victim's participation in the search process can help identify physical objects that are an objective element of crime, which can be identified for capture as evidence of the case and should be recognized as an effective method of investigation".²¹ In addition, one of the special rights recognized by the Criminal Procedure Code of the Russian Federation for victim, which not only demonstrates the adversary principle but also the principle of presumption of innocence, is the right to refuse to testify against himself/herself, his/her spouse (his wife/ her husband) and other close relatives, listed in Clause 4, Article 5 of the Russian Criminal Procedure Code. 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 refusal from this testimony. This is an indispensable right in any proceedings to protect the parties involved in the adversary procedure, including the victim.

The victim's basic rights to exercise the adversary procedure directly include the right to collect and present the evidence, the right to participate in several activities in forensic examination, and the right to participate directly in adversary in both proceedings: judicial investigation and debate of the parties or in special order of trial. According to Article 86 of the Russian Criminal Procedure Code, the victim has the right to collect and submit written documents and objects for inclusion in the criminal case as evidence. However, as Mr. Andreevich pointed out: "... deciding whether they are evidence is through the proceedings of the investigator, the inquiry officer, the prosecutor or the court".²² Victims collect and submit evidence

21 Smirnov, A.V. & Kalinovsky, K.B. (2008), *supra* note 14, p. 82.

22 Андреевич. С.С (2014), Обеспечение справ изаконных интересов потерпевшего в уголовном судопроизводстве: Теоретические, законодательные и правоприменительные проблемы, доктора юридических наук. Москва: ФГКОУ ВПО Московский университет Министерства внутренних дел МВД России. [Andreevich, С.С (2014), *Ensuring the rights and legitimate interests of the victim in criminal proceedings: Theoretical, legislative and law enforcement problems*, Legal science doctoral thesis, Federal State Educational Institution of Higher Professional Education Moscow- University of the Ministry of Internal Affairs of Russia, Moscow], p. 115.

related not only to criminal but also events related to the other components of crime, such as the nature of the offense and extent of damage that has caused by the offense. 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 crimes) can confirm the degree of fault, motive, purpose of that person's behavior. This information and this evidence are very necessary to convince competent agencies about the need to investigate, initiate, prosecute and adjudicate the criminal case. All such activities of the victim are nothing but participating in the adversary procedure. However, the way to collect evidence of the victim is not specified as clearly as the defense. Therefore, this right of victim is somewhat more limited than that of the defense. In their textbook, the experts of the South Ural State University explained that: "... the Criminal Code of the Russian Federation only stipulates that the victim does not have the right to carry out investigative measures as an investigator, but does not provide for the restriction on the collection and submission of evidence of the victim. The victim's right to collect and hand over evidence is therefore 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".²³ In fact, the victim may also use the defense counsel's methods to gather evidence. Mr. Kozlowski also stated that: "... in essence, the ability to collect information that can be used as evidence by defense counsels and other participants in the proceedings is the same".²⁴ The main issue is not how the victim collects the evidence, but whether this method is legal or not so that the information can be accepted as evidence. The law of the Russian Federation also allows victims to use private detective services to gather evidence. 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.²⁵ Thus, the spirit of the Criminal Procedure Code of the Russian Federation is that,

23 Южно-Уральский государственный университет (2013), *Процессуальный статус потерпевших – физических лиц и особенности его реализации в досудебных стадиях уголовного процесса*. Южно-Уральский: Издательский центр ЮУрГУ [South Ural State University (2013), *Procedural status of victims - individuals and peculiarities of its implementation in the pre-trial stages of criminal proceedings*, Textbook, South Ural State University Publishing Center], p. 31.

24 Козловский, П. В. (2013), *Виды доказательств в уголовном судопроизводстве: эволюция, регламентация, соотношение*, канд. юрид. наук.. Омская академия, Омская [Kozlowski, P. I. (2013), *The types of evidence in criminal proceedings: the evolution, regulation, value*, PhD jurid sciences thesis, Omsk Academy, Omsk], p. 20.

25 Point 7, Clause 2, Article 3 of the Russian Federation's Law dated 11 March 1992 No. 2487-I "On private detective activities and security in the Russian Federation".

although there is not regulation about this right, the victim can still conduct the legal activities and activities without being restricted by law to collect and hand over evidence.

2.2. *Victim's rights at trial*

In the trial, the victim is equal to the defendant in exercising the rights related to forensic examination, as well as independent from other subjects and as defined by Mr. Nikolaevich: "... independent from the Procurator in terms of the right to present evidence, to participate in the evidence examination and to given the requirements as well as the other rights of participants in the trial".²⁶ The trial phase is a center stage of the proceedings. The adversary procedure in court, especially at the first instance court hearing, includes two procedures: judicial investigation and debate proceedings. In judicial investigation proceedings, as a party participating in the proceedings directly performing the function of the charge, the victim participates in questioning the other participants in the court proceedings like questioning of other victims, witnesses, defendants, and experts (Articles 275, 276, 277, 278, and 282 of Criminal Procedure Code of the Russian Federation). The victim also participates in other activities at the trial, such as requesting to summon more witnesses and experts, interrogating an expert, requesting repeated or additional forensic examination. In the debate proceedings, the victim performs the charge function completely independently and equally with the prosecution function of the procuracy as well as other parties to the debate. Based on his/her perception of the evidence in the case, the severity of the offense, and his/her desire for criminal liability to be applied to the defendant, as well as to compensate for damages, the victim exercises his/her right to 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 the victim may also request for mediation with the defendant, relieve or exempt the defendant from criminal penalties. As one of the subjects of prosecution side under Article 5 of the Russian Criminal Procedure Code, the victim also has the right to participate in the debate proceedings. Article 292 of the Russian Criminal Procedure Code 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, in all cases, 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 the statements before the accused and the defense. The rights in the adversary procedure in particular and the other related victim's rights in the Russian Federation's Criminal Procedure show that

²⁶ Smirnov, A.V. & Kalinovsky, K.B. (2008), *supra* note 14.

the victim is an independent adverse party with other subjects. This has great implications for protecting all the victim's interests through adversary procedure.

2.3. Victim's rights in a private prosecution criminal case and in a public-private prosecution criminal case

The Russian Criminal Procedure Code also allows the victim to search for favorable outcome through mediation proceeding with the accused. Mediation model in some cases has been prescribed in the Criminal Procedure Code of the Russian Federation that significantly helps increase the role of the victim, which almost takes a major role in the adversary procedure. 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, the participation of a third party as a mediator, the voluntary and unified intention of both the victim and the accused based on accused's repentance and compensation for the victim's damage are required. In addition, the Russian Federation Criminal Procedure Code also provides for the adversarial rights of the victim in private-public prosecution order and private prosecution order. In the case of private prosecution order, the victim participates in proceedings as a private prosecutor after filing an application to the court to initiate a private prosecution case against the crimes specified in Clause 1 Article 115, Articles 116.1 and 128.1 of the Russian Criminal Procedure Code. The private prosecutor is the main subject that takes an accusatory role in the private prosecution case, studying case files on his/her own and preparing for his/her participation in the trial process. He/she has the right to request the courts to assist in gathering evidence, to request the court to testimonies from witnesses, the other crime victims, interpreters, to present evidence and to participate in the examination of evidence, to give their views on the nature of the accusation as well as on other issues arising in the trial process, to petition the court on the application of criminal law and penalties to the defendant, and to initiate civil lawsuits in the criminal case. A special feature of the criminal cases of private prosecution is that these case may be initiated only at the request of the private prosecutor and can be terminated in case the private prosecutor and the accused or defendants achieve the mediation under Clause 2, Article 20 of the Russian Criminal Procedure Code. As a private prosecutor, they are responsible for proving the crime. Mr. Nikolaevich pointed out: "The purpose of the private prosecutor's adversary procedure is to restore fully and effectively his/her legitimate rights and interests that the offense has compromised. He/she has the right to use all means and methods authorized by law for that purpose".²⁷ For example, in collecting evidence, the private prosecutor can conduct it himself or, have

²⁷ Smirnov, A. V. & Kalinovsky, K. B. (2008), *supra* note 14.

the right to assistance from the private detective service and the attorney. The judge may also gather evidence in a private prosecution case at the request of the parties, including the private prosecutor. In the private prosecution court, the victim must directly consider and evaluate the evidence by himself/herself, clarify the relevance and necessity of each evidence for resolving the case. In case there is a physical injury which is necessary a forensic examination, the court will appoint an examination. After that, the victim can be examined directly and study the examination results. The private prosecution proceedings in the Criminal Procedure Code of the Russian Federation no longer means “a form of prosecution at the request of the victim, that the prosecution depends on state agencies” as in previous decades in the opinion of Mr. Pabanov and Mr. Petrova²⁸, but now it takes the form of an accusation of the victim. The victim is not only a subject of the proceeding but is also given the appropriate rights to initiate a criminal case of private prosecution. In private-public prosecution case, criminal investigation and prosecution are also carried out by prosecutors as well as Inquiry officer 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 clause 3, Article 20 of the Russian Criminal Procedure Code. When the victim’s request to initiate the case is accepted, the criminal case of private-public prosecution will be conducted as the 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 Article 25 of the Russian Criminal Procedure Code (even in cases where the victim successfully mediate 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.

2.4. Victim’s obligations when participating in the adversary procedure

In adversary procedure, besides the exercise of rights, the victims also have to be abided by certain obligations, such as the obligation to be present under the inquiry officer’s, the investigator’s or court’s summons. Stemming from the victim’s role in the timely, objective and direct resolution of the criminal cases, the Criminal Procedure Code of the Russian Federation clearly 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 the basis to suspend the case under clause 3, Article 249 of the Russian Criminal Procedure Code. Criminal justice of

28 Пабанов, К. & Петрова, Н. (1998), ‘Тернистый путь дел частного обвинения’, *Российская юстиция* [Pabanov, K. & Petrova, N (1998), The thorny path of private prosecution cases, *Russian Justice*], No. 5, p. 26.

the Russian considers this case to be a lack of *Corpus Delicti*,²⁹ so it should lead to suspending the case. For a public prosecution criminal cases, the victim's absence in court may cause postponing the hearing, or publishing testimony previously given by the victim, or publishing evidence that the victim has given in the cases specified in clause 2, Article 281 of the Russian Criminal Procedure Code. The presence of the victim is mandatory in the trial of the case according to special order in chapter 40 of the Russian Criminal Procedure Code, 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. The refusal to give testimony or giving the false testimony can be made in the following forms:

- (1) Reporting of events that are completely unreal,
- (2) Denying events that actually took place, without replacing them with events that are not real,
- (3) Denying events that actually took place, and replace them with events that are not real;
- (4) Hiding a section on real events,
- (5) Hiding a section on real events, and replacing them with bogus facts;
- (6) Completely hiding an offense in the Penal Code of the Russian Federation. If the victim intentionally gives a false testimony, he/she shall be liable for the crime of "Intentionally false denunciation" under Article 306 of the Russian Criminal Code or the crime of "Intentionally giving false testimony" under Article 307 of the Russian Criminal Code. If the victim refuses to provide testimony, the victim will be held criminally responsible for "Refusing to provide testimony" under Article 308 of the Russian Criminal Code. Victims who have given false testimony shall be exempt from criminal liability only in cases where, before a court verdict or a court decision is made, they voluntarily declare that testimony was untrue. 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 paragraph 4 of Article 5 of the Russian Criminal Procedure Code. 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 refusal from

29 Criminal Justice of the Russian Federation uses the Latin term "*Corpus delicti*": or "the fact of a crime having been actually committed", referring to the principle that a crime must be proved to have occurred before a person can be convicted of committing that crime. In this case, the private prosecutor is absent, so the crime is not proven. This situation is a lack of "*Corpus delicti*" and the case must be suspended. See: Black, H. C. (1990), *Black's law Dictionary 6th Edition*, St. Paul,: Minn. West Publishing Co, p. 344.

this testimony. As explained by experts from the South Ural State University: “This provision shows that in the Russian Criminal Procedure Code, providing testimony is not only a right but also a victim’s obligation”.³⁰ The Criminal Code of the Russian Federation considers the violation of the victim’s obligation to provide testimony is a violation of the law because it violates the normal operation of the procedural agencies. As explained by Kudymkarsky City Court of the Perm Territory: “... the violation of this obligation forces the procedural agencies to verify the information presented by the victim when the information is not real, costing law enforcement agencies’ resources, time and effort, possibly leading to the unreasonable application of coercive measures, especially for the accused”.³¹ It can be seen that the Russian Federation Criminal Procedure considers that the victim’s obligation to provide testimony and to provide accurate information is very important and the violation of these obligations are offenses.

During the adversary procedure of the Russian Federation Criminal Procedure, a victim is recognized a lot of rights and obligations. In some cases, the rights and obligations of the victims conflict with each other. So besides improving the law, the criminal justice of the Russian Federation focuses on professional studies based on modern theories of adversary procedure. This also brings experiences in the current context of promoting the implementation of the base adversary principle in Russia and Vietnam.

3. Experience in improving the provisions on the victim’s participation in adversary procedure in the Criminal Procedure Code of Vietnam

The Criminal Procedure Code of Vietnam has a similar theoretical background as well as a reference to and an acquisition of legislative experience from the Criminal Procedure Code of the Russian Federation. Vietnam has stipulated in the 2013 Constitution the principle: “The adversarial principle shall be guaranteed in trials” and concretizing this principle in the 2015 Criminal Procedure Code. However, the content of this principle is only a part of the adversary procedure as mentioned. This limitation of awareness has affected development of theory and practical implementation of the Criminal Procedure Code, including provisions on the victim’s participation in the adversary procedure.

3.1. Shortcomings in the Criminal Procedure Code of Vietnam regarding the victim’s participation in the adversary procedure on the basis of comparison with the Criminal Procedure Code of the Russian Federation

Firstly, victims in Vietnam’s criminal proceedings have not been guaranteed

30 Andreevich, C.C (2014), *supra* note (21), p. 56.

31 Pabanov, K. & Petrova, N (1998), *supra* note (28).

equal status with other subjects as in the Russia's criminal proceedings. The victim's balanced and equal status with other entities participating in adversary procedure are the factors to ensure the victim's participation in the adversary procedure. The current practice of adversary procedure shows that the victim is not proactive and balanced with other entities when participating in this proceeding. For example, when taking part in the proceedings, the victim is not recognized by any procedural decision or action.³² The recognition of the victim in Vietnam is conducted by both the investigation authority, the procuracy, and the court. But there is no clear official provision that this procedure is under the authority and main responsibility of any authority. This procedure also is not officially expressed by a unified document, procedural decision, but is indirectly expressed in different documents, at different times, in the proceedings. This prevents the victim from being able to know exactly the moment when they are involved in the criminal proceedings as well as the adversary procedure in particular and depends entirely on the summons of the competent authority. So this affects the preparation and the quality of the victim's activities in adversary procedure in the stages of criminal proceedings. In addition, the 2015 Criminal Procedure Code classifies the entities participating in the adversary procedure as competent authority and participants in the proceedings but not based on the proceedings function of the entities. The Criminal Procedure Code also lacks consistency in recognizing the independent operation between procedural functions. Therefore, the victim still only be considered participants in the proceedings and does not have the capacity to 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 adversary procedure, makes the operation of the victim's function of the charge largely dependent on the investigation authority and the procuracy.

Secondly, the Criminal Procedure Code of Vietnam does not fully recognize the adversarial nature in the entire proceedings like the Criminal Procedure Code of the Russian Federation, but only records the adversarial nature in the trial stage. Although the trial is the center of the proceedings and is a typical example of an adversary procedure, only recognizing and guaranteeing the adversarial nature in the trial and ignoring the other stages of criminal proceedings will not guarantee the fairness, equality, and objectivity of the adversary procedure. This limitation, combined with the failing

32 Examples: Persons held in custody are identified by decisions on urgent detention, by being caught or by self-confession or surrender (Article 58 of the Vietnam Criminal Procedure Code 2015), the accused are identified by decisions to prosecute (Article 58 of the Vietnam Criminal Procedure Code 2015). Article 60 of the Vietnam Criminal Procedure Code 2015), the defendant is determined by the decision to bring the case to trial (Article 61 of the Vietnam Criminal Procedure Code 2015).

to ensure equality between the victim and other entities in the criminal procedure as described, also leads to some shortcomings in the provisions and implementation of the victim's rights and obligations in adversary procedure. For example, Vietnam's Criminal Procedure Code has not yet recognized victims of the right to commit charges, the right to refuse to testify against themselves, spouses, and relatives; the right to know that their statements could be used as evidence in this criminal case and in other cases. The victim's right of collection and submission of evidence is more limited than the defense counsels. At the court hearing, unlike the defense counsel, the victim is not allowed to directly question the authorized persons and the others participants in the proceedings, but only request the presiding judge to ask the defendant and others to attend the court hearing. During the oral arguments in the court order, the victim makes a statement behind the procuracy and the defendant. For the trial of the case which has been initiated at the requests by the crime victims, according to the procedures specified in clause 4 Article 320 of Vietnam's Criminal Procedure Code, victims only state and supplement arguments after the prosecutor presented and draw conclusions, but the victim does not have the right to present the charges against the defendant as prescribed in clause 3, Article 62 of Vietnamese 2015 Criminal Procedure Code. Procedures such as private prosecution proceedings, mediation between the victim and the person who committed the crime are not specified in the Vietnamese Criminal Procedure Code. The victim could not initiate a criminal case by himself or herself, or take part in adversary procedure 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 has not been uniform guided on the procedures, order, and the authority to conduct the mediation.

Thirdly, unlike the Criminal Procedure Code of the Russian Federation, the 2015 Criminal Procedure Code of Vietnam does not attach importance to the obligations of the victim in the adversary procedure. This also shows that the role and impact of the victim on other subjects in the adversary procedure is underestimated. Regarding the victim's obligation to be present under competent authority to institute legal proceedings' summons, the Vietnamese Criminal Procedure Code only stops at the measure of forced escort the victim and halt the trial, depending on the assessment of the panel. Because in Vietnam, the declaration, providing information and cooperation with the investigation authority are rights, not obligations of the victim, Vietnam's criminal justice shall not apply criminal responsibility for them as the Russian Federation's criminal justice. The Vietnamese Criminal Procedure Code also

stipulates the responsibility of the victim in ensuring the authenticity of the information provided to competent authorities to institute legal proceedings. Vietnam's criminal law does not force the victim to be responsible for their acts of providing false documents or making false statements, but only accuses the person who commits the act of accusing a person of a fabricated crime report it to the authorities to take criminal responsibility for slander under Article 156 of the Vietnamese 2015 Criminal Code. It can be seen that the Vietnamese Criminal Procedure Code does not properly assess the rights and obligations of the victim in the adversary procedure. In fact, the information provided by the victim can be the basis for the initiation, investigation, prosecution and trial of the competent procedural authorities. For that reason, the victim has the right to testify, but in order to secure that the fairness of the victim's participation in adversary procedure as well as legitimacy of the criminal proceeding, the victim must secure the authenticity of the information that they have provided to the authorities conducting the proceedings. Therefore, it is not reasonable to exclude the victim from the scope of persons who may be accused of making false statements under Article 382 of the Vietnamese 2015 Criminal Code.

The difference of the moment when the adversary procedure begins stems from different awareness of the adversarial nature in the two countries. The Criminal Procedure of the Russian Federation recognizes that adversarial nature exists in all stages of the criminal procedure, on the basis that this is the nature of the procedural process, the process of resolving conflicts and oppositions between independent and equal legal status parties. Meanwhile, Vietnamese criminal justice legal science often considers adversary procedure as "argument in the proceedings"³³ rather than a "fight" between parties with opposing activities. Therefore, Mr. Le stated that "this 'argument' only happens between the parties in court and requires a trial by the court".³⁴ This point of view is also the basis of the fact that the Vietnam's Criminal Procedure Code considers adversary procedure as a "tool" or a "way" to solve a case, rather than "the nature", "the historical form of the criminal proceedings" as in the Criminal Procedure Code of the Russian Federation. Consistent with this point of view, the policy of the Vietnamese Communist Party³⁵ and State³⁶ of Vietnam is to

33 Tran, V. Đ. (2004), 'Bản chất của tranh tụng tại phiên tòa', *Tạp chí Khoa học pháp lý*, Số 4/23/2004 [Tran, V. D. (2004), 'Nature of litigation at trial', *Vietnam Journal of Legal Science*, No. 4/23], pp. 17-22.

34 Le, T. C. (2003), 'Một số vấn đề về tranh tụng trong tố tụng hình sự', *Tạp chí Khoa học pháp lý*, số 01/16 [Le, T. C. (2003), 'Some issues of litigation in criminal proceedings', *Vietnam Journal of Legal Science*, No. 1/ 16], pp. 41-44.

35 This policy is shown in Resolution No. 49-NQ/TW dated June 2, 2005 of the Politburo on the judicial reform strategy up to 2020: "improving the quality of adversary procedure at trial, considering this a breakthrough in judicial activities"

36 Clause 5, Article 102 of Vietnam's Constitution 2013, Article 26 of the Vietnam's Criminal Procedure Code 2015.

absorb only the elements of adversary procedure in the trial stage. However, we do not approach adversary procedure as a procedure for public debate in court or an activity of the parties to prove a point of view, but as a process in which the procedural functions must fight to oppose each other through procedural activities. Wherever there is an accusation, there is a defense, and wherever there is a conflict between the accuser function and the defense function, there must be adversary procedure. 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 adversary principle in the Criminal Procedure Code. 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 procedure in a really fair, equal and objective manner.

Some limitations of the victim's participation in adversary procedure in Vietnam's criminal procedure compared with the Russian Federation's criminal procedure are also the result of the state's and society's perception of the interests of the subjects, including the victim, in the criminal proceedings. For example, in the recognition of the criminal cases of private prosecution, the proceedings of the Russian Federation are built on the basis that the victim is an independent party of the adversary procedure and is guaranteed the right to access to justice. Therefore, in appropriate statutory cases, he/she is entitled to initiate proceedings without state intervention and to end the process by mediation. Mikhailovich announces that: "this procedure is not a primary measure to hold offenders criminally accountable and impose punishments on them, but rather a way of resolving conflicts between parties in the criminal field, with the highest purpose of is towards mediation and termination of criminal cases".³⁷ That is the reason the private prosecution cases are resolved by the Court of Mediation and the Judge of Mediation. Meanwhile, in Vietnam's criminal procedure, private prosecution case has not been recognized. Mrs. Do pointed out that "... the state and society of Vietnam still maintain the main view that: the subject with the power to accuse can only be the procuracy, 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".³⁸ The approach of the Russian Federation's Criminal Procedure is very suitable for less serious cases. The recognition of this regulation will contribute to restricting the inflexibility of traditional criminal justice and offering new solutions to achieve the purpose of criminal proceedings.

37 Михайлович, Т. П. (2021), *Уголовное судопроизводство по делам частного обвинения*, кандидат наук, Уральский юридический институт Министерства внутренних дел Российской Федерации, Екатеринбург [Mikhailovich, T.P. (2021), *Criminal proceedings in cases of private prosecution*, Ph.D., Ural Law Institute of the Ministry of Internal Affairs of the Russian Federation, Yekaterinburg], pp. 3-4.

38 Do, H. C. N. (2019), *supra* note 7, p. 29.

3.2. Lessons learned for Vietnamese Criminal Procedure Code by absorbing the experience from the Russian Criminal Procedure Code on the victim's participation in adversary procedure

From the study of the victim's participation in adversary procedure in the Criminal Procedure Codes of Russia and Vietnam, we recommend some experiences to ensure adversarial nature in criminal procedure.

In terms of theory, the recognition of adversarial principles should not only focus on ensuring the argument at the trial 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, such as to ensure equality of adversarial subjects, including victim, in all stages of the proceedings. In terms of regulation, the equality between the accusing party and the accused party is not only manifested in the debate but also must be guaranteed for the parties in the entire proceedings to protect their interests. From that basis, we have the following suggestions:

- To add the following contents to Clause 2 Article 62 of the Criminal Procedure Code 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".

- To add the following provision in the Criminal Procedure Code 2015: "The prosecution parties include: investigation authority, head of the investigation authority, procuracy, head of procuracy, investigator, procurator, victim, legal representative, defense counsel of legitimate rights and interests of victim, civil plaintiff, and legal representatives of 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, arrest, detainee, suspect, defendant".

- To add the following provision of the victim's rights by supplementing or amending relevant provisions in Clause 2, Article 62 of the Criminal Procedure Code 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 evidences, documents, objects and requests 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”.

- In addition, it is necessary to provide the victim rights to conduct adversary procedure in court, such as the right to question the defendant, to question other victims, to question the involved parties, and the witnesses. Moreover, it is necessary to re-determine the order of statements in oral arguments 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. Furthermore, it is necessary to study and develop an institution for the victim's accusation through a criminal case of 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. As Mrs. Do pointed out in her thesis: “... in Vietnam, there are some difficulties in building this institution such as the level of knowledge and awareness of the law of the majority of Vietnamese people is still limited, the number of lawyers in Vietnam is still quite inadequate compared with the countries in the region and the world..., mainly in Hanoi and Ho Chi Minh City”.³⁹ She also cites some notion that: “... this problem reduces the quality of the victim's prosecution, and if it is recognized, it will overload the authority receiving the victim's private prosecution and create difficulties for the victim”. However, in order to improve the position and initiative of the victim in the adversary procedure, it is necessary to recognize the victim's right to initiate in some cases. Recognizing this regulation will also contribute to burden sharing for the State, help the competent authority to effectively focus their resources on fighting more serious crimes. To facilitate the victim's participation in the adversary procedure, we should only apply this proceeding to less serious crimes that the victim has the ability and conditions to gathering evidence and prove the case, such as deliberate infliction of bodily harm upon another person (in Clause 1, Article 134 of the Vietnamese 2015 Criminal Code), Insults to another person, crimes causing damage to intellectual property rights. In addition, a private prosecution proceeding can be effective if it is recognized

³⁹ Do, H. C. N. (2019), *supra* note 7, p. 30.

in cases where: (1) The victim believes that he or she has sufficient evidence to prove that the case should be prosecuted, but the competent authority did not initiate the case, (2) The case is related to the personal secret of the victim, (3) The victim and the person who committed the less serious crime have family or kinship relationships. In the above cases, the victim should have the right to decide to initiate the case or/and stop the case through mediation without the assistance of a competent authority. According to the Russian Criminal Procedure Code, 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. The initiation of a private prosecution case does not deprive the parties' right to search for a mediation. The victim and his/her representative takes a role of private prosecutor exercising the right to accuse at trial. The procedure for resolving a private prosecution case should be defined as a more compact procedure than a normal proceeding, but it must ensure the right in adversary procedure 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 necessary to study and develop a procedure to accept the mediation agreement between the victim and the accused or the defendant in order to suspend the criminal case in accordance to the provisions of clause 3, Article 29 of the Vietnamese 2015 Criminal Code because, as Mr. Nguyễn stated: "... the adversary principle in criminal procedure includes a very important content that is the guilty plea between the accuser and the accused".⁴⁰ In addition, this procedure is both to guide the consistent application of the Vietnamese Criminal Code's provisions on mediation, and to provide the victim with a legal guarantee in recognizing the agreement between the victim and the offender. If the victim is successfully mediated with the offender but then the offender fails to fulfill his obligations in this agreement, the victim has grounds to cancel the mediation agreement and request handling of the offender. The experience of the Russian Federation's Criminal Procedure Code about the following principles of the mediation institution should be applied: the victim must be explained about 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

40 Nguyễn, T. T. (2010), 'Một số vấn đề về sự tham gia tranh tụng của người bị hại và nguyên đơn dân sự tại phiên tòa hình sự sơ thẩm theo yêu cầu của cải cách tư pháp', *Tạp chí Luật học* [Nguyễn, T. T. (2010), 'Some issues about participation in adversary of the victim and civil plaintiffs at first instance criminal court at the request of judicial reform', *Jurisprudence Journal*], No. 03, pp. 47-57.

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.

- To add the following obligations for the victim by amending and supplementing the corresponding provisions in the Vietnamese 2015 Criminal Procedure Code: "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 Article 382 of the Criminal Code, unless otherwise specified in point..., paragraph... of this Article".⁴¹ At the same time, we recommend to add the following content to clause 1, Article 382 of the Vietnamese 2015 Criminal Code: "*The victim who provides the statements or documents that he knows to be untrue will be warned or fined from ... VND to ... VND*".⁴²

Conclusion

During the adversary procedure, the victim holds an independent and proactive position in performing the function of the charge. Ensuring the correct and active position of the victims in adversary procedure can help them to achieve his/her purpose in adversary procedure and to protect the legitimate rights and interests of his/her own; while contributing to help the authority agencies to clarify the content of the case through contested by victims and other stakeholders, and to settle of the case in a timely, accurate, objective, democratic and fair condition. In the process of developing the Criminal Procedure Code of Vietnam and the provisions on the victim in particular, being affected by factors of the Criminal Procedure model that Vietnam has chosen, a number of rights and obligations of victims in the adversary procedure have not been paid attention to. Vietnam's legal science has not yet recognized the victim's functions and the right of the charge

41 The "..." sign in this regulation refers to the right: "Not required to testify against oneself or a relative according to the first inheritance line, no obligation to admit to guilt" of the victim.

42 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.

through the adversary procedure. Criminal liability in Vietnam's criminal justice remains the responsibility of the offender before the state, not the victim. The state remains the only entity that has power to prosecute and hold offenders criminally responsible. With the current requirement in judicial reform: "improving the quality of adversary procedure at trial, considering this as a breakthrough stage of judicial activities",⁴³ Vietnam issued the 2015 Criminal Procedure Code with many new regulations including provisions on harms, rights and obligations of victims in the proceedings. However, in the victim's participation in the adversary procedure, there are still many limitations, not consistent with the implementation of the adversary principle. For this reason, based on the similar characteristics of the legal tradition as well as the procedural model, we chose the Criminal Procedure Code of the Russian Federation to compare provisions on the victim's participation in adversary procedure, and to learn experiences in order to improve the provisions on the victim's participation in adversary procedure in the Criminal Procedure Code of Vietnam. ●

References

- [1] Акулиничева, О. С. (2015), 'Реализация конституционного принципа состязательности и равноправия сторон при осуществлении правосудия по уголовным делам', *Молодой ученый* [Akulinicheva, O. S (2015), 'Implementation of the constitutional principle of adversariality and equality of the parties in the administration of justice in criminal cases', *the Journal of Young Scientist*], No. 16
- [2] Андреевич, С.С (2014), Обеспечение прав изаконных интересов потерпевшего в уголовном судопроизводстве: Теоретические, законодательные и правоприменительные проблемы, доктора юридических наук. Москва: ФГКОУ ВПО Московский университет Министерства внутренних дел МВД России. [Andreevich, C.C (2014), *Ensuring the rights and legitimate interests of the victim in criminal proceedings: Theoretical, legislative and law enforcement problems*, Legal science doctoral thesis, Federal State Educational Institution of Higher Professional Education Moscow- University of the Ministry of Internal Affairs of Russia, Moscow]
- [3] Black, H. C. (1990), *Black's law Dictionary 6th Edition*, St. Paul,: Minn. West Publishing Co
- [4] Ведомости Съезда народных депутатов РСФСР и Верховного Совета РСФСР (1991), *Концепция судебной реформы в РСФСР*, No. 44, М: s.n. [Bulletin of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, *Concept of judicial reform in the RSFSR*, M, 1991. No. 44]
- [5] Do, H. C. N. (2019), *Quyền của bị hại: nghiên cứu so sánh pháp luật tố tụng hình sự liên bang Nga và kinh nghiệm cho Việt Nam*, Luận văn thạc sĩ. Thành phố Hồ Chí Minh: Trường Đại học Luật Thành phố Hồ Chí Minh [Do, H. C. N, (2019), *The right of the victim: a comparative study of Russian federal criminal procedure law and experience for Vietnam*, Master's thesis, Ho Chi Minh City University of Law, City Ho Chi Minh City, Vietnam]
- [6] Đại học Kiểm sát (2011), *Mô hình tố tụng hình sự Liên bang Nga*, Thông tin khoa học kiểm sát, (1+2) Số chuyên đề năm 2011, (1+2) Số chuyên đề năm 2011 [Procuracy University (2011), *Model of Criminal Procedure of the Russian Federation*, Journal of Procuratorial Science Information, (1 + 2) Number of topics journal in 2011]. Retrieved from: <https://tks.edu.vn/thong-tin-khoa-hoc/chitiet/79/145> [accessed 9 May 2021]
- [7] Gordon, J, Gordon. A (2020), *The role and rights of victims of crime in adversarial criminal justice systems: Recommendations for reform in England & Wales*, Victims Commissioner for England and Wales, London

43 Resolution 49-NQ/TW dated June 2, 2005 of the Political Bureau of the Communist Party Central Committee on judicial reform strategy to 2020.

- [8] Козловский, П. В. (2013), *Виды доказательств в уголовном судопроизводстве: эволюция, регламентация, соотношение*, канд. юрид. наук.. Омская академия, Омская [Kozlowski, P. I. (2013), *The types of evidence in criminal proceedings: the evolution, regulation, value*, PhD jurid sciences thesis, Omsk Academy, Omsk]
- [9] Le, T. C. (2003), 'Một số vấn đề về tranh tụng trong tố tụng hình sự', *Tạp chí Khoa học pháp lý*, số 01/16 [Le, T. C. (2003), 'Some issues of litigation in criminal proceedings', *Vietnam Journal of Legal Science*, No. 1/ 16]
- [10] Le, T. C. (2002), 'Tìm hiểu các hình thức tố tụng hình sự', *Tạp chí Khoa học pháp lý*, số 8/2002 ['Research the types (forms) of criminal proceedings', *The Vietnamese Journal of Legal Sciences*], No. 8 (15)
- [11] Михайлович, Т. П. (2021), *Уголовное судопроизводство по делам частного обвинения*, кандидат наук, Уральский юридический институт Министерства внутренних дел Российской Федерации, Екатеринбург [Mikhailovich, T.P. (2021), *Criminal proceedings in cases of private prosecution*, Ph.D., Ural Law Institute of the Ministry of Internal Affairs of the Russian Federation, Yekaterinburg]
- [12] Nguyen, D. M. (2009), 'Đặc điểm của mô hình tố tụng tranh tụng và phương hướng hoàn thiện mô hình tố tụng hình sự ở Việt Nam', *Tạp chí Tòa án nhân dân*, số 12/2009 ['Features of the adversarial model and the direction to perfect the criminal procedure model in Vietnam', *Journal of People's Court*, No. 12/2009]
- [13] Nguyễn, T. T. (2010), 'Một số vấn đề về sự tham gia tranh tụng của người bị hại và nguyên đơn dân sự tại phiên tòa hình sự sơ thẩm theo yêu cầu của cải cách tư pháp', *Tạp chí Luật học* [Nguyễn, T. T. (2010), 'Some issues about participation in adversary of the victim and civil plaintiffs at first instance criminal court at the request of judicial reform', *Jurisprudence Journal*], No. 03
- [14] Николаевич, В. Н. (2005), *Правовое положение потерпевшего в уголовном процессе России*, канд. юрид. наук., Российская Судебная Академия, Москва [Nikolaevich, V. N. (2005), *Legal status of victims in Russian criminal proceedings: Doctoral thesis in jurisprudence*, Russian Judicial Academy, Moscow]
- [15] Пабанов, К. & Петрова, Н. (1998), 'Тернистый путь дел частного обвинения', *Российская юстиция* [Pabanov, K. & Petrova, N (1998), The thorny path of private prosecution cases, *Russian Justice*], No. 5
- [16] Шестакова, П. Т. (2018), 'Состязательность и равноправие сторон как принцип уголовного судопроизводства', *Молодой ученый*, [Shestakova, P. T. (2018), 'Competitiveness and equality of the parties as a principle of criminal proceedings', *the Journal of Young Scientist*], No. 8
- [17] Ширяева, Т. И. (2014), 'Правовое положение потерпевшего в уголовном судопроизводстве России на современном этапе', *Фундаментальные исследования* [Shiryayeva, T. I. (2014), 'Legal status of the victim in criminal proceedings in Russia at the present stage', *Journal of Basic research*], No. 9(8)
- [18] Смирнов, А. В., Калиновский, К. Б. (2008), *Уголовный Процесс, дом печати – вятка*, Москва [Smirnov, A.V. & Kalinovsky, K.B. (2008), *Criminal Procedure*, Press House - Vyatka, Moscow]
- [19] Южно-Уральский государственный университет (2013), *Процессуальный статус потерпевших – физических лиц и особенности его реализации в досудебных стадиях уголовного процесса*. Южно-Уральский: Издательский центр ЮУрГУ [South Ural State University (2013), *Procedural status of victims - individuals and peculiarities of its implementation in the pre-trial stages of criminal proceedings*, Textbook, South Ural State University Publishing Center]
- [20] Tran, V. Đ. (2004), 'Bản chất của tranh tụng tại phiên tòa', *Tạp chí Khoa học pháp lý*, Số 4/23/2004 [Tran, V. D. (2004), 'Nature of litigation at trial', *Vietnam Journal of Legal Science*, No. 4/23]
- [21] Vadimovich, G. V. & Mai, T. V. (2017), 'Chiến thuật tham gia, bảo vệ của luật sư đại diện bị hại trong Tố tụng hình sự ở Nga và những gợi mở cho Việt Nam trong bối cảnh hiện nay', *Tạp chí Khoa học Đại học Quốc gia Hà Nội* [Vadimovich, G. V. & Mai, T. V. (2017), 'Participation and protection tactics of attorneys representing victims in criminal proceedings in Russia and suggestions for Vietnam in the current context', *Journal of Science - Hanoi National University*], No. 1
- [22] Viện kiểm sát nhân dân tối cao (2015), Báo cáo thực tiễn 10 năm thi hành Bộ luật tố tụng hình sự năm 2003, Viện kiểm sát nhân dân tối cao, Hà Nội [The Supreme People's Procuracy (2015), *Report on 10 years practical implementation of the Criminal Procedure Code 2003*, The Supreme People's Procuracy, Hanoi]