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# APPOINTED COUNSELS IN VIETNAMESE CRIMINAL LAWS AND PRACTICE

## **PREAMBLE**

The Survey of “Appointed Counsel in Vietnamese criminal laws and practice” is conducted by NHQuang&Associates within the framework of the UNDP-supported Project “Strengthening capacity of Vietnam Lawyers Association.” The Research Team of NHQuang&Associates includes:

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## **ABBREVIATIONS**

In this Report, there are some abbreviations as follows:

- Bar Association	BA
- Certificate of Defence	COD
- Criminal Code	CC
- Criminal procedure	CP
- Criminal Procedure Code	CPC
- Fatherland Front	FF
- International Covenant on Civil and Political Rights	ICCPR
- Investigation Body	IB
- Law office	LO
- Legal aid	LA
- Legal Aid Centre	LAC
- Legal Consultancy	LC
- Legal Consulting Centre	LCC
- Ministry of Justice	MOJ
- People's Court	PC
- People's Procuracy	PP
- Socialist Republic	SR
- Supreme People's Court	SPC
- Supreme People's Procuracy	SPP
- United Nation Development Program	UNDP
- United Nations	UN

## **Some definitions**

- **Appointed counsel** mean counsel appointed by provincial bar associations to participate in the proceedings in mandatory death cases.
- **Arrestee** means the accused or defendants who are subject to an arrest order for temporary detention by litigation authorities: to prevent the commission of a crime; because there are grounds to believe that they may an the investigation, prosecution or trial; because they may continue committing offenses; or to ensure the enforcement of a judgment.<sup>1</sup>
- **Certificate of Defence (COD)** means a document granted by the investigating bodies, procuracies or courts to an individual who is qualified as provided for by law certifying that he/she can perform the defence in a particular case.<sup>2</sup>
- **Counsel for protecting interests of concerned parties** may comprise of all people protecting the interests of the victims, civil plaintiffs, civil defendants or each of them.
- **Counsel** means a person who acts to protect the legitimate rights and interests of arrestees, accused or defendants.<sup>3</sup>
- **Defendant** means a person against whom criminal proceedings have been initiated<sup>4</sup>
- **Detainee** means a person arrested in emergency circumstances; offenders caught red-handed; persons arrested under an order, or asa result of a confession or self-surrender and offenders against whom custody decisions have been issued.<sup>5</sup>
- **Invited counsel** means private counsel who are invited by concerned parties to protect their legitimate rights and interests in criminal cases, civil cases, administrative cases or invited by an accused, defendant, arrestee or their legal representatives to defend in criminal cases.<sup>6</sup>
- **Judicial body** means a state agency which performs the judicial power, one of three powers of the state. Judicial bodies have to protect the law by dealing with civil, economic, labour, and administrative disputes between natural persons or between natural persons and legal entities, and must also issue judgments and awards in the name of the state which ensure the legitimate rights and interests of natural persons

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<sup>1</sup> *CPC*, Article 80 and Article 88.

<sup>2</sup> *CPC*, Article 56.4.

<sup>3</sup> *CPC*, Article 58.3(b).

<sup>4</sup> *CPC*, Article 49.1.

<sup>5</sup> *CPC*, Article 48.1.

<sup>6</sup> *CPC*, Article 56.1, Article 59.1; Civil Procedure Code, Article 63.2 2004 and Law on Administrative Procedures, Article 55.2.

and legal entities.<sup>7</sup> In this Research, a reference to Judicial bodies is a reference to the 'judicial power' invested in courts, procuracies and investigation agencies.

- **Judicial officials** means officials of judicial bodies or officials of the bodies conducting proceedings
- **Judicial support organisations** mean agencies and organisations providing the services of lawyers, legal consultancy, examination, notary and criminal record<sup>8</sup>
- **Law office** means an organisation which is set up by a lawyer, is organized and operates in the form of a sole proprietorship.<sup>9</sup>
- **Legal aid collaborating counsel** means counsel who voluntarily participate in legal assistance, collaborating with state legal assistance centers; they are qualified and have been recognised and granted with collaborator cards by Director of the Department of Justice.<sup>10</sup>
- **Legal aid centre (LAC)** means a state legal aid centre, which is under the management of a provincial department of justice and which has been set up by provincial people's committees to provide free legal services for the poor; persons who have contributed to the revolution, lonely elderly persons, the handicapped and children without support (homeless); ethnic minorities who have a permanent residence in areas with exceptionally difficult socio-economic conditions.<sup>11</sup>
- **Legal aid consultant** means state officials, working at state legal aid centers, who have been granted a legal aid card by the chairman of the provincial people's committee upon the request of the director of the provincial department of justice.<sup>12</sup>
- **Legal consulting centre (LCC)** means an organisation set up by a socio-political organisation, a socio-politico-professional organisation, a socio-professional organisation, specialized law training establishment or law research institute registered to operate with competent state agencies to carry out the activities of legal consultancy on a not-for-profit basis.<sup>13</sup>
- **Legal practising office** means a working office of a legal practising organisation, including its head, branch and transaction offices.

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<sup>7</sup> Law Dictionary – Judicial Publishing House – Encyclopedic Dictionary Publishing House, 2006, p.201 and 202

<sup>8</sup> Law Dictionary – Judicial Publishing House – Encyclopedic Dictionary Publishing House, 2006, p.72

<sup>9</sup> *Law on Lawyers*, Article 33.1.

<sup>10</sup> *Law on Legal Aid*, Articles 22.1 and 23.

<sup>11</sup> *Law on Legal Aid* 2006, Article 3, Article 10 and Article 14.

<sup>12</sup> *Law on Legal Aid*, Article 22.2.

<sup>13</sup> *Decree No. 77/2008/ND-CP* dated 16/07/2008 of the Government on legal consultancy, Article 1, Article 3.

- **Legal practising organisation** means an organisation which registers to provide legal services.<sup>14</sup> Legal practising organisation may be a Law office or a Law company.
- **Litigation authorised officers** includes the heads and deputy heads of investigating bodies, investigators; chairmen, vice-chairmen of procuracies, procurators; presidents and vice-presidents of courts, judges, people's jurors, court clerks in criminal cases; and presidents of courts, judges, people's jurors, court clerks, chairmen of procuracies, procurators in civil or administrative cases.<sup>15</sup>
- **Litigation authorities** mean bodies authorised by law to exercise certain procedural powers and duties, including investigation bodies, procuracies and courts in criminal cases, or courts and procuracies in civil or administrative cases<sup>16</sup>
- **Litigation participants** comprise arrestees, the accused, the defendant, the victim, the plaintiff in a civil case, defendant in a civil case, persons with related rights and obligations in the case, witnesses, the counsel, persons protecting the rights and obligations of concerned parties, experts; interpreters in criminal cases; and plaintiffs (the party that institutes a suit in a court), defendants (the party against which an action is brought), persons with related rights and interests, representative of the litigants, persons protecting the rights and obligations of concerned parties, witnesses, experts, interpreters in civil and administrative cases.<sup>17</sup>
- **Mandatory case** means a case where the accused or defendant is charged with offenses punishable by death under the Penal Code or where the accused or defendant is a minor or person with physical or mental defects, but where they or their legal representatives do not seek the assistance of defence counsel. In these latter cases the investigating bodies, procuracies or courts must request bar associations to assign law offices to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organisations to appoint legal counsel for their members.<sup>18</sup>
- **People's Advocate** means a person who is delegated by the Fatherland Front to represent the Fatherland Front's member in a criminal case<sup>19</sup>.
- **Suspect** means an arrestee or detainee being suspected of having committed criminal acts or preparing to commit criminal acts.<sup>20</sup>
- **The accused** means a person whom the courts have decided to bring to trial<sup>21</sup>

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<sup>14</sup> Article 32 and Clause 1 Article 39 *Law on Lawyers* 2006.

<sup>15</sup> *CPC*, Article 33.2; Civil Procedure Code, Article 39; Law on Administrative Procedures, Article 34.2;

<sup>16</sup> Law Dictionary – Judicial Publishing House – Encyclopedic Dictionary Publishing House, 2006, p.201

<sup>17</sup> *CPC*, Chapter IV; Civil Procedure Code, Chapter VI and Law on Administrative Procedures, Article 47.

<sup>18</sup> *CPC*, Article 57.2.

<sup>19</sup> *CPC*, Article 57.3.

<sup>20</sup> *CPC*, Article 71 and Article 81.

<sup>21</sup> *CPC*, Article 50.1.

## PART 1: INTRODUCTION

### I. INTRODUCTION ABOUT THE RESEARCH

#### 1. Necessity

'The right to a fair trial' is a constellation of procedural guarantees to ensure a fair adjudication process, which includes equality before a court, the assumption of innocence; prohibition of ex post facto laws; and prohibition of imprisonment for debt. Each guarantee is regarded as a human right<sup>22</sup>.

The right to counsel is part of the *jus cogens*<sup>23</sup> norm of the 'right to a fair trial'<sup>24</sup>. The constellations of rights that make up the fair trial norm (often referred to as fundamental process rights or minimum guarantees for adjudication in accordance with procedural laws) are articulated in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as follows:

1. *'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.'*

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<sup>22</sup> <http://nhanquyen.vn/modules.php?name=News&op=detailsnews&mid=40&mcid=7> no longer active

<sup>23</sup> A *jus cogens* norm, or peremptory norm of general international law, is defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character' (*Vienna Convention on the Law of Treaties*, 1155 UNTS 331, entered into force 27 January 1980, Article 53). See also, R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9<sup>th</sup> ed. 1992), 7-8; C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976), p. 11.

<sup>24</sup> The right to a fair trial is a category of norm sometimes described as a '*derivative jus cogens norm*', because, while they do not appear in non-derogable provisions of multilateral treaties or other sources, they are essential to the protection of other *jus cogens* norms: see, F.F. Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases, & Analysis* (2006), p. 36 (however, this compartmentalised view does not appear to be of significance to the status of a right such as the fair trial right, that mandates certain conduct by States and others to comply with its content). See generally, Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law* (1989); Antonio Cassese, *Human Rights in a Changing World* (1990).

2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
  - (a) *To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
  - (b) *To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
  - (c) *To be tried without undue delay;*
  - (d) *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
  - (e) *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - (f) *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
  - (g) *Not to be compelled to testify against himself or to confess guilt.*
4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation<sup>25</sup>...*

The ICCPR has been interpreted in judgments of the Human Right Committee and tribunals or councils considering international human rights or criminal matters (for instance, European Court of Human Rights). The right to counsel has also been the subject of comment on human rights. According to international conventions it consists of the following standards:

- (i) *The right to access to counsel of choice;*
- (ii) *The right to adequate time to prepare for trial, including to consult with counsel;*

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<sup>25</sup> *International Covenant on Civil and Political Rights ('ICCPR'), Article 14. Vietnam acceded this Covenant since 1982.*

- (iii) *The right to confidential communication with counsel;*
- (iv) *The right to counsel under legal aid;*
- (v) *The right to an adjournment of proceedings for consulting counsel;*
- (vi) *The right to self-defence;*
- (vii) *The right to counsel as an act of protecting the defendant/accused's interests;*
- (viii) *The right not to proceed with counsel being unqualified or in lack of diligence while the defendant/accused already has relevant counsel;*
- (ix) *The right to counsel at all proceeding stages with respect to capital punishment<sup>26</sup>.*

The right to counsel has been a crucial right of the defendant/ accused/ persons held in custody in criminal procedure ('CP') laws of Vietnam and was instituted in law immediately after Vietnam achieved its independence<sup>27</sup>. It is stipulated in the Criminal Procedure Code ('CPC') that *'the defendant, accused, persons held in custody shall have the right to self-defend or ask other persons to defend them'*<sup>28</sup>.

Studying international standards of the right to counsel, it can be found that the right to counsel contains two approaches: the *'right to positive counsel'* and the *'right to mandatory counsel'* also known as the *'right to appointed counsel'*<sup>29</sup>. The *'right to counsel'* means a right to defence activities depending on the will and desire of the defendant/ accused/ persons held in custody. A defendant/ accused/ persons held in custody could directly invite or authorise their relatives to invite counsel. The international standards include standards (i) to (viii), excluding standard (iv) (set out above). The *'right to mandatory counsel'* refers not only a right for the defendant/ accused/ persons held in custody but also to the responsibility on bodies conducting legal proceedings to enable counsel. This matter has been recognised and generalised under standards (iv) and (ix) mentioned above, based

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<sup>26</sup> See further *'Study on the right to counsel in Vietnamese criminal procedural laws – UNDP Vietnam 2010'*, forthcoming, introduced in the Workshop on 'Right to counsel in Vietnamese criminal laws' held by UNDP and VBF on 2-3 December 2010 in Ho Chi Minh City.

<sup>27</sup> Phan Trung Hoai, *'Some matters on the formulation of lawyer professional culture in Vietnam presently'*, presentation for national level scientific research *'Vietnam's legal culture – From theory to practice'* – Code KX.03/06-10.

<sup>28</sup> CPC, Articles 48, 49, 50.

<sup>29</sup> Nguyen Thai Phuc, *'Compulsory participation of the defender in criminal procedure'*, *Legal Science Magazine*, Volume 4 (41)/2007.

on Article 14 of ICCPR and has been clearly explained via judgments of Human Right Committee and/or of European Court of Human Rights<sup>30</sup>.

According to Vietnamese laws, the ‘*right to mandatory counsel*’ is applied where the ‘*defendant/accused is charged with offences punishable by death penalty as stipulated in the Criminal Code; or where the defendant/accused is a minor or suffers from mental or physical disability.*’<sup>31</sup>

These provisions demonstrate a respect for the international commitments of Vietnam<sup>32</sup>. Vietnam has created a number of policies to implement ‘*the right to a fair trial*’ including Resolution 48/NQ-TW, Resolution 49/NQ-TW and Resolution 17-NQ/TW .<sup>33</sup>

Resolution No. 31/2009/NQ-QH12 of the National Assembly<sup>34</sup> amends a number of laws in relation to criminal proceedings including the Criminal Procedure Code (‘CPC’), Law on Organisation of People’s Court, and the Law on Organisation of People’s Procuracy. Furthermore, the Resolution enacts a number of new laws including the Law on Organisation of Criminal Investigation Agency and the Law on Anti-terrorism. These provide legal provisions which have a close relationship with the right to counsel in proceedings, especially in cases incurring punishments such as life imprisonment or the death penalty.

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<sup>30</sup> Typically as *Benham vs United Kingdom* (1996) (22 EHRR 293, 61) considered by Human Rights Committee.

<sup>31</sup> CPC, Article 57, Clause 2.

<sup>32</sup> According to the National report of Vietnam under the Universal Periodic Review of the Exercise of Human Rights in Vietnam in 2009 (Paragraph 15): ‘Vietnam has acceded most of the major international conventions on human rights, including *International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination against Women*; been the second nation in the world and the first in Asia to participate in the *Convention on Children’s Rights*; ratified 17 conventions of the International Labour Organisation. On 22/10/2007, Vietnam signed the *International Convention on the Rights of Persons with Disabilities* and is now seriously considering signing the *United Nations Convention Against Torture*. Domestic legal documents have been promulgated or amended toward the direction of domestication of international conventions of which Vietnam is a party, without causing any obstacle against the implementation of such conventions (Article 3 and Article 82 of the *Law on Promulgation of Legal Normative Documents 2008*)’.

<sup>33</sup> Resolution 48/NQ-TW of the Politbureau on the Strategy of Construction and Perfection of Vietnam Legal System to 2010 with vision to 2020, Resolution 49/NQ-TW of the Politbureau on ‘Judicial Reform Strategy to 2020’, Resolution No. 17-NQ/TW dated 1 August 2007 of the fifth congress of the 10<sup>th</sup> Central Party Committee, the CPC, Law on Lawyers, Law on Legal Aid and so on.

<sup>34</sup> Resolution No. 31/2009/NQ-QH12 of the National Assembly dated 17 June 2009 adopting 2010 law-and ordinance-making program and supplementing the law-and ordinance-making program of the XIII<sup>th</sup> National Assembly (2007-2011).

In addition, Vietnam is also '*seriously considering the signing of the United Nations Convention Against Torture*'<sup>35</sup>. Therefore, there may be need for research on the right to counsel in proceedings relating to this new development. More particularly, research on the effectiveness of the prevention of the practice of '*statement extortion*' and application of '*corporal punishment*'<sup>36</sup> in Vietnam.

The legislation on the right to counsel in criminal proceedings needs to be studied both theoretically and practically. Therefore, the Vietnam Lawyers Association has conducted research on '*Appointed Counsel in Vietnamese Criminal Laws and Practice*' with the assistance of the United Nations Development Program (UNDP).

## **2. Objectives of the Research**

The primary objective of this Research is to explore the application of the International Covenant on Civil and Political Right of appointed counsel in Vietnam in cases where counsel are required by law. The conclusions drawn from this research shall be fundamental for Vietnam Lawyers Association and drawn upon when making contributions to the draft amendment of the CPC.

In order to study thoroughly the good essence of the legislation on '*the right to mandatory counsel*' of Vietnamese laws and its practical application, practical research on this matter should be conducted. It seeks to understand the approach of international standards in comparison with regulations in Vietnamese laws. The Research on '*Appointed counsel in Vietnamese criminal laws and practice*' aims at the following specific objectives:

This report compares international standards with regulations under Vietnamese law on '*the right to mandatory counsel*'. Specifically, this Report seeks to

- Review and assess the implementation of Criminal Code (CC) provisions on appointed counsel, including:
  - o the right to counsel for the defendant/accused in cases of *mandatory counsel*; and

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<sup>35</sup> *National Report of Vietnam under the Universal Periodic Review of the Exercise of Human Rights in Vietnam in 2009*, Paragraph 15, Ministry of Foreign Affairs of Vietnam, website of the Ministry, <http://www.mofa.gov.vn/vi/nr/040807104143/nr/040807105001/ns090723074537#SVtC9OXCDHwA>

<sup>36</sup> '*Applying corporal punishment*' and '*Extorting statements*' are two crimes stipulated in the CC, Article 298 and Article 299.

- The applicable legal provisions and possibilities of public and private partnership on the guarantee of the right to counsel of the defendant/accused.
- Review and assess cases where counsel has been appointed under the CC, including statistical analysis and factual research in relation to the guarantee of this right to counsel of the defendant/accused .

### **3. Methodology**

#### *a. Desk review*

- The Research Team has studied documents which guide the application of human rights conventions to which Vietnam has acceded and also those under consideration for ratification by Vietnam. The Research Team has also researched material on appointing counsel, including: (i) theoretical research on human rights in general and on the right to counsel in particular and the organisational model of judicial bodies and their procedural models; (ii) legal provisions, policies of the Party and the State with regard to the activities of appointed counsel in criminal cases in both theoretical and practical aspects; (iii) policies and legal provisions in comparison with international treaties to which Vietnam has acceded; (iv) summary operation reports, study reports of the tribunal sector, procuracies, investigation bodies, and legal aid agencies to provide supplementary evaluation and practical insight into the abovementioned studies.

#### *b. Survey*

Questionnaires were sent to lawyers majoring in the criminal field via law practising organisations, Bar Associations ('BA') nationwide and via provincial lawyers' associations. Lawyers specialising in the criminal field were selected as they are the practitioners most involved in the right to counsel in mandatory cases. However, there was some difficulty in collecting survey samples as lawyers do not specifically register their fields of professional practice. The Research Team searched for data from the MOJ, Vietnam Bar Federation and some bar associations, but found no database identifying in which fields lawyers practice. Therefore, the Vietnam Lawyers Association and provincial lawyers' associations were relied upon to send official letters to local BAs requesting their support in delivering questionnaires to lawyers practising in the

criminal field. Each of the 62 BAs were sent 3 questionnaires, and all of them gave feedback (01 questionnaire as the minimum amount). There is a significant difference in the quantity of practising lawyers between the province with the lowest number of lawyers (3 lawyers) and those with the highest number of lawyers (more than 1,100 lawyers, i.e. Ho Chi Minh City Bar Association and Ha Noi Bar Association). Given this variance, additional questionnaires were sent to lawyers practising in criminal field in Ha Noi and Ho Chi Minh City, where the quantity of practising lawyers accounts for almost 50% of the total number of lawyers nationwide.

There were nine (9) provinces/cities selected for in-depth interviews based on the following criteria: (i) representing the North, the Centre and the South of the country; and (ii) bearing typical characteristics in terms of economy, society, and order and security situation. They include Ha Noi, Lang Son, Dien Bien, Ho Chi Minh City, Da Nang, Ha Tinh, Lam Dong, Khanh Hoa and An Giang.

- **Ha Noi:** the socio-political centre of Vietnam and also the most developed city in the North. The number of first instance criminal cases and number of the accused in Ha Noi ranks the second nationwide (following Ho Chi Minh City). The quantity of cases with counsel involved in Ha Noi is also the second highest nationwide (comparing the figures in three recent years 2007-2009). Criminal cases in Ha Noi were diverse and numerous (over 7,000 cases per year in the period from 2007 to 2009). In 2009, there were 524 criminal cases funded through Legal Aid ('LA') in Ha Noi. In Ha Noi, there were 1,495 lawyers with 580 law practising organisations registered their operation with Ha Noi BA (at 31/12/2009).
- **Lang Son:** a northern mountainous border province, Lang Son's speed of economic development and urbanisation is higher than that of other northern provinces and its cross-border trading with China is very strong. Types of criminal cases in Lang Son are characterised by crimes arising due to cross-border trading such as smuggling, narcotics and women trafficking, etc. with the number of first instance criminal cases averaging over 700 cases per year in the period from 2007 to 2009. In 2009, there were 82 criminal cases funded through LA in the province. Lang Son has a relatively high density of ethnic minority populations compared to other provinces<sup>37</sup>. In Lang Son there were 23 lawyers

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<sup>37</sup> Lang Son, *The work of legal assistance for minority ethnic people*, website of the Ministry of Justice, 24/04/2009, [http://vbqpp1.moj.gov.vn/ct/tintuc/lists/t%20php%20a%20phng/view\\_detail.aspx?ItemID=3114](http://vbqpp1.moj.gov.vn/ct/tintuc/lists/t%20php%20a%20phng/view_detail.aspx?ItemID=3114);

- and 8 law practising organisations under the BA of Lang Son Province (at 31/12/2009).
- **Dien Bien:** a poor province in the north. the speed of economic growth and urbanisation of Dien Bien is slow. Typical criminal cases in Dien Bien are illegal trading and transporting of narcotics. In Dien Bien, there are also many ethnic minorities and there are four poor districts out of the sixty-two poorest districts nationwide. The number of first instance criminal cases in Dien Bien was equivalent to those in Lang Son (over 700 cases per year in the period from 2007 to 2009). In 2009, there were 249 criminal cases funded through LA. Dien Bien had only six lawyers and six law practising organisations under the provincial Bar Association (at 31/12/2009).
  - **Da Nang:** the third largest economic city of Vietnam, considered the central point of the central provinces with rapid economic growth. The number of first instance criminal cases of the city is nearly the lowest among the nine provinces researched (comparing figures of from 2007 to 2009) and very low compared to that of the whole country (over 650 cases per year, from 2007 to 2009). In 2009, there were 220 criminal cases that were funded through legal aid. Da Nang has launched several programs for preventing and fighting against crimes that are considered effective. Da Nang has 85 lawyers and 22 law practising organisations under its Bar Association (at 31/2/2009).
  - **Ho Chi Minh City:** the second largest political-economic centre of Vietnam and the most developed city. The number of first instance criminal cases, the number of the accused, and the number of cases with counsels involvement in Ho Chi Minh City ranks highest in the country. First instance criminal cases of this city are diverse and also rank highest nationwide (over 8,000 cases per year from 2007 to 2009). In 2009, 531 criminal cases were funded with legal aid in Ho Chi Minh City. Under the Ho Chi Minh City Bar Association, there were 2,280 lawyers and 1,150 law practising organisations (at 31/12/2009).
  - **Ha Tinh:** a northern coastal province in the central region with underdeveloped economic infrastructure. Ha Tinh is adjacent to Laos, which is in the Golden Triangle, the place being famous for narcotics planting and trading. In Ha Tinh, the typical crime is also narcotics trading and transporting. The number of the first instance criminal cases of the province is low (400 cases per year, from 2007 to 2009). In 2009, 70 criminal cases were funded through legal aid in Ha Tinh. Ha

- Tinh had only 16 lawyers and three registered law practising organisations (at 31/12/2009).
- **Lam Dong:** is a developed province in the Central Highlands, the province has favourable natural conditions to develop its economy in terms of tourism, agriculture and mineral resources. Lam Dong has a relatively dense distribution of ethnic minorities and has one of the poorest districts out of 62 poorest districts nationwide. The number of first instance criminal cases in the province is quite high (over 1,000 cases per year on average, from 2007 to 2009). In 2009, 202 criminal cases were funded through legal aid. Lam Dong Bar Association had 70 lawyers and 29 law practising organisations (at 31/12/2009).
  - **Khanh Hoa:** a coastal province in the south of the centre of Vietnam. Khanh Hoa has a high economic growth rate thanks to tourism and seafood processing activities. The speed of urbanisation in Khanh Hoa is also rapid. The number of criminal cases in Khanh Hoa is high (on average, over 1,000 cases per year, from 2007 to 2009). In 2009, 155 criminal cases were funded through legal aid in the province. In recent years, Khanh Hoa has been known as the province which is strongly determined to break criminal gangs and gangsters<sup>38</sup>. Khanh Hoa Bar Association had 62 lawyers and 23 law practising organisations (at 31/12/2009).
  - **An Giang:** an agricultural province in the west of Ho Chi Minh City, located on the Mekong River Delta and adjacent to Cambodia. An Giang Bar Association had 48 lawyers and 30 law practising organisations (at 31/12/2009). The number of first instance criminal cases in An Giang was at average level compared to that of other localities (over 800 cases per year, from 2007 to 2009). In 2009, 163 criminal cases that were funded through legal aid in the province. In addition, An Giang experiences significant rates of cross-border women trafficking<sup>39</sup>.

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<sup>38</sup> *Gangsters have excessive action in Khanh Hoa [Khanh Hoa, xa hoi den long hanh]*, Tuoi tre online, 16/10/2006, <http://tuoitre.vn/Chinh-tri-xa-hoi/Phap-luat/167321/Khanh-Hoa-xa-hoi-den-long-hanh.html>; *Leaders of gangsters in Khanh Hoa are three entrepreneurs [Cam dau bang xa hoi den o Khanh Hoa la 3 doanh nhan]*, VnExpress, 18/10/2006, <http://vnexpress.net/gl/phap-luat/2006/10/3b9ef6f7/>; *Undisclosed circumstances when arresting well-known criminals in the past (first article) [Tinh tiet chua cong bo khi bat cac trum toi pham noi tieng mot thoi (ki 1)]*, Life and Law Newspaper [Bao Doi song&Phap luat], 15/06/2010; *Organisational criminal situation in Vietnam [Tinh hinh toi pham co to chuc o Viet Nam]*, Dr. Nguyen Van Hoa, National defense and security education [Giao duc quoc phong an ninh], 17/11/2010, <http://quocphonganninh.edu.vn/PrintPreview.aspx?ID=1294>;

<sup>39</sup> *Prevention and fight against women and children trafficking – responsibility of the whole society [Cong tac phong, chong toi pham buon ban phu nu, tre em – Trach nhiem cua toan xa hoi]*, Hoa Binh Judicial Bulletin [Ban tin Tu phap Hoa Binh] Vol. 64, page 1, 2009; *Keeping each inch of ground in border area – the forth article: Breaking a human trafficking case [Giu tung tac dat bien cuong – ki 4: Pha an “buon nguoi”]*, Tuoi tre Online, 05/03/2009,

The number of first instance criminal cases being handled in the 9 surveyed provinces was rather high out of the total 63 provinces (see Table 1).

**Table 1: The settlement of first instance criminal cases from 2007 to 2009**

Source: SPC

	2007			2008			2009		
	Amount of cases	Amount of accused	Cases with Counsel	Amount of cases	Amount of accused	Cases with Counsel	Amount of cases	Amount of accused	Cases with Counsel
Nationwide	61,813	107,696	5,933	61,813	112,387	6,657	66,919	117,867	6,303
9 surveyed provinces	18,846	32,843	1,703	20,594	35,967	1,986	21,252	36,411	1,761
Ratio of 9 surveyed provinces compared to national amount	30%	30%	29%	33%	32%	30%	32%	31%	28%
Ratio of cases and ratio of cases with counsel	10%	6%		11%	6%		9%	5%	
Increased ratio nationwide through years				0%	4%	12%	8%	5%	-5%

### c. Other information sources

To support the study outline and questionnaires, the Research Team held a group discussion amongst lawyers practising in the criminal field, which included lawyers who usually participated in the criminal field and were experienced with mandatory cases.

After the completion of surveying in localities, the Research Team, Vietnam Lawyers Association and UNDP organised two conferences with the participation of representatives from the Institute for Procuratorial Science – The Supreme People’s Procuracy; the Institute for Adjudication Science - The Supreme People’s Court; General

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<http://tuoitre.vn/Chinh-tri-Xa-hoi/Phong-su-Ky-su/304658/Giu-tung-tac-dat-bien-cuong---Ky-4-Pha-an-“buon-nguoi”.html>; Situation and solution to prevent and fight against women and chil trafficking [Thuc trang va giai phap phong, chong toi pham buon ban phu nu va tre em, Conference presentation, posted on Civil legal information blog, <http://thongtinphapluatdansu.wordpress.com/2008/01/13/1241-5/>

Department of People's Police; Legal Committee of the National Assembly; the Government Office; various legal assistance centres of Vietnam Lawyers Association at the local level; several lawyers specialising in criminal field; experts on criminal procedure of Ha Noi Law University; the Law School – Ha Noi National University; and, representatives of some bodies conducting legal proceedings at local level in order to contribute to the perfection of the Research.

At the two conferences, there were several comments on the theory of the legal provisions and the Party and the State's policies on defence work in general and defence in mandatory cases in particular. There was also discussion of the status quo of the work of guaranteeing the right to counsel in mandatory cases.

## **II. GENERAL INFORMATION ABOUT THE LAWYERS PARTICIPATING THE SURVEY**

### **1. General Information**

256 questionnaires were completed and returned (equivalent to 5% of the total number of lawyers nationwide including the lawyers specialising in criminal field and other fields)<sup>40</sup>. During the survey period, the Research Team also carried out in-depth interviews with various individuals including lawyers who had participated in mandatory cases, leaders of BAs and law practising organisations, investigators, prosecutors, judges, and persons who were involved as the defendant/accused, or had experienced an imprisonment sentence in the 9 nominated provinces/cities. The total number of interviews conducted was 103 with 158 interviewees

### **2. Gender**

The ratio of female lawyers participating in the survey was 21% compared to 76% male. This rate does not significantly differ from the male-female ratio of 30/70 of lawyers as studied by Vietnam Bar Federation<sup>41</sup>. In order to ensure gender equality in the study, the Research Team was comprised of female and male researchers. In the in-depth interviews, the Research Team also tried to interview lawyers of both genders to ensure that the opinions collected could represent both genders. It was important to ensure an acceptable gender ratio in the survey given the differences between the two genders in

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<sup>40</sup> According to the statistics of Ministry of Justice, at the end 2009, Vietnam has 5714 lawyers but it does not classify criminal and non-criminal lawyers.

<sup>41</sup> Website of Vietnam Bar Federation,  
[http://luatsuvietnam.org.vn/?option=com\\_lawyer&render=n5684&section=list](http://luatsuvietnam.org.vn/?option=com_lawyer&render=n5684&section=list)

term of the perception, ideas, practising methods and debates about the process of defence work that has been identified<sup>42</sup>.

### 3. Geographical areas

Lawyers from ‘urban’ areas made up 64% of respondents, with 2% of respondents from ‘rural’ and 7% from ‘remote’ areas. This difference may be because a lawyers usually live and work in areas with courts and administrative bodies, from district level upwards. Therefore they are mainly situated in the center of each locality, the capital of each locality. In particular, Ha Noi and Ho Chi Minh City are localities with very high ratio of lawyers living and working in the province (See Table 2).

**Table 2: Comparing figures on quantity of lawyers and quantity of cases in Ha Noi and Ho Chi Minh City with that nationwide<sup>43</sup>**

Year	Locality	Number of lawyer practising organisations		Total number of lawyers in the locality	
		Quantity	%	Quantity	%
2009	Ha Noi and HCMC	1,791	67%	3,644	64%
	Remaining 61 provinces	896	33%	2,070	36%
	Nationwide	2,687	100%	5,714	100%
2010	Ha Noi and HCMC	1,771	66%	3,895	67%
	Remaining 61 provinces	919	34%	1,899	33%
	Nationwide	2690	100%	5794	100%

Being aware of such unequal distribution, the Research Team has tried to conduct more in-depth interviews with lawyers, legal assistants, investigators, and judges in provinces with few lawyers and also in rural and remote areas.

<sup>42</sup> See further Report on *Survey of Gender Equality in the court system of Vietnam and in adjudicating activities*, SPC, 2009; David G. Marr, *The Question of Women in Vietnamese Tradition on Trial: 1920-1945*, 1981; Ulrike Schultz and Gisela Shaw (ed.), *Women in the World's Legal Profession*, HART Publishing, 2003.

<sup>43</sup> Those figures were quoted from website of the MOJ regarding statistics on judicial branch. Accessed on 20 April 2011, <http://moj.gov.vn/Pages/solieuthongke.aspx>.

#### 4. Practising time

The proportion of lawyers practising for 10 years or less made up the majority of those who responded to the questionnaires (72%) (See Figure 1). This ratio also reflects the sudden increase in lawyers after the Ordinance on Lawyers in 2001. Between 2001 and 2008, the number of lawyers increased by 250% (see Figure 2) and most of them are young lawyers<sup>44</sup>.

Figure 1: Time of practising of lawyers

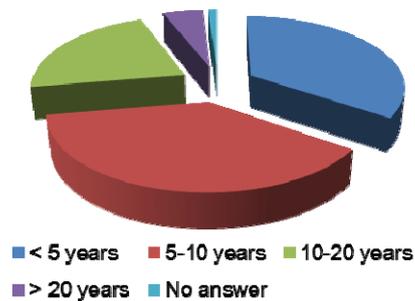
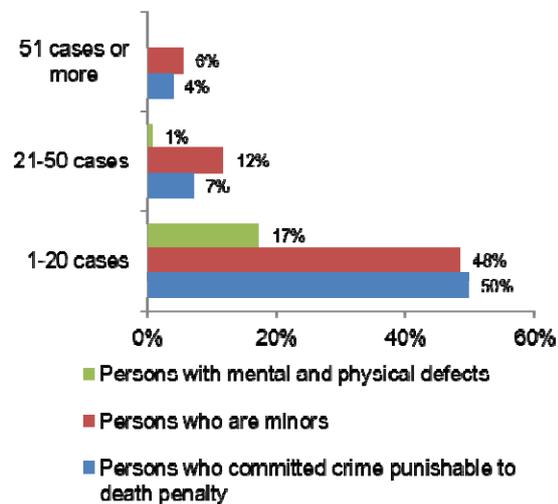


Figure 2: Experience of participation in mandatory cases



#### 5. Collaborators of legal assistance centres

The number of lawyers collaborating with legal assistance centres (LACs) is relatively high, representing 57% of lawyers taking part in the survey.

However, legal aid activities in relation to the criminal defence are currently modest. According to a report of the Department of Judicial Support (2009), from 1 October 2008 to 30 September 2009, the total number of requests for assistance of criminal cases received by LAC was 6,265, accounting for 66% of the total criminal cases funded with legal aid (9,561 cases), of which, the lawyers handled 5,681 cases and legal assistants handled 584 cases. In the remaining criminal cases (representing 34%), the involved parties were advised or represented by LACs<sup>45</sup>.

During in-depth interviews in provinces, with the support of the VLA and local lawyer associations, the Research team also interviewed Legal Consulting Centres ('LCC') of

<sup>44</sup> Project on Development of lawyers team in international economic integration process, MOJ, page 3

<sup>45</sup> Report of the Department of Legal Assistance under form No. 17-TP-TGPL promulgated in attachment with Circular No. 08/2008/TT-BTP, Annex III (from 01/10/2008 to 30/09/2009). Report of the Department of Legal Assistance did not clarify the concept of 'Concerned parties'. But under definition of the CPC 'concerned parties' include victims, civil plaintiffs, civil defendants, persons with interests and obligations related to criminal cases (Article 59)

VLA and local lawyer associations. LACs usually assign their legal consultants or collaborators to deliver legal advice and introduce lawyers to clients (See further Part IV.3 herein).

## **6. Experience of participation in mandatory cases**

Of those lawyers who had been involved in over 50 mandatory counsel cases, 6% of those cases involved representation of minors and 4% of cases were concerned with the death sentence (see Figure 2). Lawyers who were involved with 1-20 mandatory cases per year accounted for 17% of the questioned lawyers.

**Table 3: Number of cases with legal aid that lawyers participated** (% from respondents)

<b>Number of cases</b>	<b>The poor</b>	<b>Persons dedicated to the revolution</b>	<b>Lonely elderly</b>	<b>Handicapped</b>	<b>Support-less children</b>	<b>Ethnic minorities</b>	<b>Persons suffering from HIV/AIDS</b>	<b>Others</b>
1-20	43.8	25.4	12.5	7.8	10.5	14.8	3.9	9.4
21-50	2.7	2.3	0	0	1.2	0.8	0	2.0
51 or more	2.7	0	0	0	0.4	0.4	0.4	2.7

## **PART 2**

### **POLICY AND LEGAL FRAME ON RIGHT TO COUNSEL IN MANDATORY CASES AND TREND FOR REFORMATION**

#### **I. LEGAL PROVISIONS GUARANTEEING THE RIGHT TO COUNSEL IN MANDATORY CASES**

##### **1. The period prior to the Criminal Procedure Code 2003**

The right to counsel of the defendant/accused is a right made up of various standards which are fundamental principles of Vietnamese criminal procedure law<sup>46</sup>. This right has been guaranteed through the Vietnamese Constitution through several provisions and amendments since 1946<sup>47</sup>.

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<sup>46</sup> CPC 2003, Article 11

<sup>47</sup> Constitution 1946, Article 67; Constitution 1959, Article 101; Constitution 1980, Article 133; Constitution 1992, Article 132

It was stipulated in the Constitution 1946 that *'hearings must be public except for special cases. The accused have the right to defend them or ask for lawyers to defend them'*<sup>48</sup> and *'ethnic minorities have the right to use their own language before the court'*<sup>49</sup>. The 1946 Constitution did not regulate the 'right to appointed counsel' (or the right to mandatory counsel) specifically, however, the recognition of the legal profession in the 1946 Constitution created the foundation for the formation of the legal profession in Vietnam from the early years of independence<sup>50</sup>.

Besides the 1946 Constitution, the right to counsel was also recognised in Decree No. 13 dated 24 January 1946 providing regulations on *'the organisation of courts and judge profession'*. The Decree stipulated that *'lawyers have the right to defend before all courts, except for primary courts'*<sup>51</sup>. Decree No. 13 identified that only lawyers have the right to defend the accused or the accused could defend themselves<sup>52</sup>. The Decree also stipulated that unrepresented defendant/accused in cases with a high penalty frame (heavy punishment) were to be assigned a defence lawyer by the Chief Justice<sup>53</sup>. However, only two months later, on 29 March 1946, Decree No. 40/SL was promulgated, extending the scope of counsel, allowing the accused to ask their spouse, father, mother, grandparents, children and grandchildren, natural brothers and sisters, uncle, aunt, and so on to defend them<sup>54</sup>. Decree No. 69 dated 18 June 1949 and Decree No. 144 dated 22 December 1949 continued to extend the scope of the right to counsel, allowing the accused/defendant to ask for other non-lawyer citizens to defend them<sup>55</sup>.

The 1959 Constitution only stated *'the right to counsel of the accused is guaranteed'*<sup>56</sup> but did not provide specified regulations regarding whether the accused had the right to defend themselves or invite others to defend them. There was no explanation on the concept of *'the right to counsel'* under the 1959 Constitution of the Standing Committee of the National Assembly or in any legal regulation. Similarly to the 1946 Constitution, the 1959 Constitution continued to recognise that *'The People's courts guarantee that citizens of*

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<sup>48</sup> Constitution 1946, Article 67

<sup>49</sup> Constitution 1946, Article 66

<sup>50</sup> Nguyen Hung Quang, *'Limitation creating awareness of the society on lawyer profession'*, in *'Vietnam's Lawyers – International Integration'*, Judicial Publishing House, 2007.

<sup>51</sup> Decree No. 13 dated 24/01/1946, Article 46.

<sup>52</sup> Decree No. 13 dated 24/01/1946, Article 44.

<sup>53</sup> Decree No. 13 dated 24/01/1946, Article 44.

<sup>54</sup> Decree No. 40 dated 29/03/1946, Article 11

<sup>55</sup> Decree No. 69 dated 18/06/1949, Article 1; Decree No. 144 dated 22/12/1949, Article 1

<sup>56</sup> Constitution 1959, Article 101

*the Democratic Republic of Vietnam who are [an] ethnic minority shall have the right to use their language and writing before the courts*<sup>57</sup>.

The Law on Organisation of People's Courts 1960<sup>58</sup> provided specified regulations on 'the right to counsel' stipulated in the 1959 Constitution. As determined by the Law, 'in addition to their self-defence, the accused may have a counsel for them. They also have the right to ask for a citizen who is introduced by a people's union or accepted by the PC to defend them. When it is necessary, the PC shall appoint a counsel for the accused'<sup>59</sup>. In guaranteeing the right to use 'ethnic language' and 'writing before the court', the Law on Organisation of People's Courts 1960 guided 'when it is necessary, the PC must appoint an interpreter to guarantee the exercise of such right'<sup>60</sup>

The 1980 Constitution did not regulate specifically on 'the right to counsel' though it confirmed to guarantee this right<sup>61</sup>. The 1980 Constitution supplemented provisions on the operation mechanism of lawyers as 'lawyers' organisation'. On that basis, the State Council (with the same operation mechanism as the present Standing Committee of the National Assembly) promulgated the Ordinance on lawyer practising organisations. In each locality, the MOJ would cooperate with other agencies to set up a local BA.

Inheriting the principle of guaranteeing the equal right of all ethnic groups in adjudication, the 1980 Constitution allowed 'citizens of the Socialist Republic of Vietnam of all ethnic groups to use their own language and writing before the courts'<sup>62</sup>.

The 1992 Constitution and Resolution No. 51/2001/QH10 of the National Assembly dated 25 December 2001 amending and supplementing Constitution 1992 stipulated that 'The right to counsel of the accused is guaranteed. They may plead the case themselves or have others plead for him (...). Lawyer organisations are formed to assist the accused and other concerned parties in defending their legitimate rights and interests and to contribute to the protection of socialist legislation'<sup>63</sup>.

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<sup>57</sup> Constitution 1959, Article 102.

<sup>58</sup> Law on Organisation of People's Court promulgated under Decree No. 19-LCT of the President of the Democratic Republic of Vietnam dated 26/07/1960 (hereinafter referred to as 'Law on Organisation of People's Court 1960').

<sup>59</sup> Law on Organisation of People's Court 1960, Article 7.

<sup>60</sup> Law on Organisation of People's Court 1960, Article 8.

<sup>61</sup> Constitution 1980, Article 133

<sup>62</sup> Constitution 1980, Article 134

<sup>63</sup> Constitution 1992, Article 132

As with previous Constitutions, the 1992 Constitution allowed '*all citizens of the Socialist Republic of Vietnam of all ethnic groups to use their own language and writing before the courts*'<sup>64</sup>

The Criminal Code No. 15/1999/QH10 dated 21 December 1999 which was later amended and supplemented by Law No. 37/2009/QH12 dated 19 June 2009 ('CC') also contained stipulations on the right to counsel of citizens.<sup>65</sup> These provisions guarantee the fundamental rights of citizens accused in a criminal case and required to undergo legal proceedings for clarification of the case's facts. Furthermore, the CC outlines sanctions for organisations or individuals who breach these rights<sup>66</sup>.

After Vietnam's accession into ICCPR in 1982, the Criminal Procedure Code ('CPC') 1988 extended the legislation on counsel. CPC 1988 recognised further the mandatory counsel in specific cases. In such cases, if the defendant, the accused or their lawful representatives do not invite a counsel, the Investigation bodies, Procuracies or Courts must request bar associations to assign them counsel<sup>67</sup>.

In conclusion, Vietnamese law on the right to counsel in criminal procedures has partially conformed to international standards. According to these international standards, accused persons are all equally entitled to the minimum guarantees, including: the right to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choice; to be present in the trials for self-defence or have counsel defend them at their choice; to be informed of their right in case they want to self-defend; and to have counsel free of charge for the sake of justice if they cannot afford their own lawyers<sup>68</sup>.

## **2. The period after the promulgation of the Criminal Procedure Code 2003**

The CPC 2003 has extended the right to counsel to not only the defendant/accused but also to detainees.

Where the detainees, the defendant/accused or their lawful representatives do not invite counsel, the investigation bodies, procuracies or courts are required by the CPC 2003 to

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<sup>64</sup> *Constitution 1992*, Article 133

<sup>65</sup> CC, Article 1.

<sup>66</sup> CC, Chapter XXII Crimes of infringing upon judicial activities.

<sup>67</sup> CPC 1988, Article 37

<sup>68</sup> *International Covenant on Civil and Political Rights ('ICCPR')*, Article 14.

request a defence counsel be appointed through the bar associations, the Vietnam Fatherland Front Committees, or its member organisations<sup>69</sup>.

The right to counsel for criminals who are minors is provided in CPC 2003 through Article 305 which states<sup>70</sup>: *lawful representatives of the detainees, the defendant/accused who are minors may select counsel or defend the detainees, the accused/defendant by themselves*. In the event that the defendant/accused are minors or their lawful representatives cannot find counsel, the investigation bodies, procuracies or courts are required by the CPC 2003 to request a defence counsel be appointed through the bar associations, the Vietnam Fatherland Front Committees, or its member organisations.

Where the accused/defendant is a minor, or of mental or physical defect, or charged with offences punishable by death penalty as the highest frame, the CPC prescribes that a counsel is mandatory. The accused/defendant or their lawful representative is responsible for funding this representation, however, they are unable to afford counsel, the bodies conducting legal proceedings must request BAs to assign and appoint counsel to defend them<sup>71</sup>. Theoretically, this is mandatory counsel, in practice this is referred to as appointed counsel<sup>72</sup>.

The CPC also stipulates that the defendant/accused, detainees have the right to self-defend or to be defended by other people<sup>73</sup>. Previously, legal counsel could only participate during the final stages of investigation; however, the CPC has made significant progress in stipulating the immediate participation of counsel from the initial stages where decisions on temporary detention are made<sup>74</sup>.

The CPC requires mandatory counsel in the cases where the defendant/accused is charged with offences punishable by death penalty as the highest frame; the defendant/accused is a minor or of mental or physical defect. However, at present, there is no legal definition of '*mental or physical defect*'.

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<sup>69</sup> CPC, Article 57

<sup>70</sup> CPC, Article 305

<sup>71</sup> CPC, Article 57

<sup>72</sup> Nguyen Thai Phuc, *Mandatory participation of the defender in criminal procedure*, *Legal Science Magazine*, Volume 4(41), 2007

<sup>73</sup> CPC, Article 48, 49, 50

<sup>74</sup> Nguyen Thai Phuc, *Mandatory participation of defenders in criminal procedure*, *Legal Science Magazine*, Volume 4(41), 2007

## II. LEGAL PROVISIONS GUARANTEEING THE ROLE OF LAWYERS AND LAW PRACTISING ORGANISATIONS

### 1. The role of Lawyers

Several lawyers claimed that they were not assisted by bodies conducting proceedings<sup>75</sup>. They often face several difficulties in exercising the role of counsel at trials<sup>76</sup>. Some legal bodies still assume that legal counsel are only considered ‘necessary’ in a trial for a ‘democratic hearing which ensures citizens’ interests’ in accordance with regulations of laws<sup>77</sup>, even though the Party and the State have policies and legal provisions to protect the participation of lawyers in general and legal counsel in criminal cases in particular.

#### a. Pre-2011 period

Since winning independence in 1945, the Government of the Democratic Republic of Vietnam implemented the law system reform. One month after holding power (October 1945), President Ho Chi Minh promulgated Order No. 46 on ‘lawyer organisation’. This was the first instrument of the new government recognising the existence of the lawyer’s role in judicial operation<sup>78</sup>.

As mentioned above, all Constitutions have confirmed that ‘the right to counsel of the accused is guaranteed’<sup>79</sup>. The concept of ‘lawyer’ was replaced by ‘people counsel’ and operated under the SPC’s governance from 1963 to 1972<sup>80</sup>. In this period, lawyers mainly worked in the criminal field<sup>81</sup>. The governance of the SPC over lawyers in this period partially impacted their independence, as well as the perception of some public servants and the general public about the lawyers’ role in society.

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<sup>75</sup> *The Need of District Court Nationwide*, Judicial Publishing House, 2007 (the survey was conducted by NHQuang&Associates).

<sup>76</sup> *The Need of District Court Nationwide*, *idId*.

<sup>77</sup> Nguyen Hung Quang, *Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality*, trong sách *International Perspectives on the State and Reform in Vietnam*, Stephanie Balme and Mark Side (Eds), Palgrave McMillan Publishing House, 2006.

<sup>78</sup> Phan Trung Hoai, *Perfecting the organization and operations of our lawyers at the present*, State and Law magazine, Volume 5/2002, page 3-11, 2002.

<sup>79</sup> *Constitution 1959*, Article 101.

<sup>80</sup> Nguyen Hung Quang, *Restriction creating social awareness to lawyer career, “Vietnamese lawyers – International integration”*, Judicial Publishing House, 2007.

<sup>81</sup> Phan Huu Thu, *Training and fostering lawyers in the new period*, Democracy and Law Journal, special volume of Ordinance on Lawyers, 2001; Le Hong Hanh (Chief Editor), *Ethnic and skills of lawyers in a socialist oriented market economy*, Pedagogy Publishing House, 2002.

In 1980, the Constitution of the consolidated Vietnam, for the first time, provided lawyer associations as a constitutional mechanism:

'Lawyer association is established to assist the accused and other involved persons in legal aspects'<sup>82</sup>

This provision enabled the formation of professional organisations of lawyers nationally<sup>83</sup>. On the foundation of the 1980 Constitution, the Ordinance on Lawyer Organisation 1987<sup>84</sup> was promulgated to create a legal basis for lawyer activities as an indispensable judicial support activity of a democratic society. Thirty (30) teams of people's advocates were set up with about 400 people's advocates in the 1980s. At the end of 2001, when the Ordinance on Lawyer was enacted, 61 of 64 centrally-run provinces and cities had their own BA with the total of 2,100 lawyers<sup>85</sup>.

Although legal provisions on criminal procedure already determined the role of lawyers in guaranteeing citizens' 'right to counsel', state bodies still administrated lawyer activities as state-owned enterprises or cooperatives<sup>86</sup>. Lawyers were only permitted to practice at BAs and were not allowed to organize themselves into independent lawyer practicing organisations or to practice independently<sup>87</sup>. The restriction led to inflexible operation of BAs and confined activities of lawyers<sup>88</sup>, which went against principles of the free and independent practice of lawyers<sup>89</sup>.

The Ordinance on Lawyer Organisation 1987 provided a rather broad scale of lawyers' professional practice, which is similar to the scope of lawyers' practice then provided in the Law on Lawyers. It ranged from lawyers' participation in proceedings as legal counsel in criminal cases and as representatives for involved persons in civil cases, to legal consultancy and other legal services provided to organisations and individuals<sup>90</sup>.

However, legal provisions at that time were still limited. It was not easy for lawyers to meet with the defendants or accused during the investigation stage while investigations were to be kept secret; lawyers were not permitted to copy materials of the case file to

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<sup>82</sup> *Constitution 1980*, Article 133.

<sup>83</sup> Nguyen Dinh Loc, *Law on Legal Aid – one long step forward of the constitutions of laws on legal aid in Vietnam*, *Id.Id.*

<sup>84</sup> *Ordinance on Lawyer organisation* dated 18/12/1987.

<sup>85</sup> Nguyen Dinh Loc, *Law on Legal Aid – one long step forward of the constitutions of laws on legal aid in Vietnam*, *Id.*

<sup>86</sup> Nguyen Dinh Loc, *Law on Legal Aid – one long step forward of the constitutions of laws on legal aid in Vietnam*, *Id.*; Nguyen Hung Quang, *The judiciary and equality: the changing roles of Lawyers and Prosecutors in Vietnam*, *Id.*

<sup>87</sup> *Ordinance on Lawyer organisation*, Article 7, Article 21.

<sup>88</sup> Nguyen Hung Quang, *Restriction creating social awareness to lawyer career*, "Vietnamese lawyers – International integration, Ph.D. Pham Hong Hai and MA Tran Van Son (Chief Editor), Ha Noi Bar Association, Judicial Publishing House, 2007.

<sup>89</sup> Nguyen Dinh Loc, *Law on Legal Aid – one long step forward of the constitutions of laws on legal aid in Vietnam*, *Id.*

<sup>90</sup> *Ordinance on Lawyer organisation*, Article 13.

study, instead, they were required to study the case file at the office of bodies conducting proceedings.<sup>91</sup>

**b. Post-2001 period and so far**

Since the commencement of the Reform process ('Doi moi', 1986), the Vietnamese Party and Government have promulgated several resolutions and legal normative documents aiming at perfecting the state apparatus and law<sup>92</sup>. Some resolutions of the Party called for studies of procedural litigation formalities<sup>93</sup>, "reform of the way to organize a hearing trial, clearer determination of the position, powers, and responsibilities of persons conducting proceedings and participants in proceedings towards ensuring publicity, democracy, strictness, and impartiality"<sup>94</sup> and "construction and perfection of laws on judicial support (lawyers, public notary, appraisal, judicial police, etc.) towards more sufficiently and conveniently meeting diversified demands for legal support of the people and enterprises; strong socialisation of judicial supporting activities; combination between state governance and self-governance of socio-professional organisations"<sup>95</sup>.

The Ordinance on Lawyers 2001 remarkably changed the practice of lawyers<sup>96</sup>. The BA is no longer the practicing organisation of lawyers, but became a socio-professional organisation of lawyers<sup>97</sup>. Lawyers now practice at lawyer practicing organisations independently from BAs<sup>98</sup>. This regulation has partly promoted the sudden increase in the quantity of lawyers after 2001 (See Table 1). However, as provided by the Ordinance on Lawyers 2001, the scope of lawyers' practice is only extended to 'participating in arbitration for settling disputes'<sup>99</sup>.

The rights of lawyers in proceedings were further extended upon the promulgation of the CPC 2003. The CPC 2003 and Civil Procedure Code 2004 have had fundamental changes regarding proceedings formalities and mechanisms between lawyers and bodies conducting proceedings. These include the grant of COD, grant of the certificate of protector for legitimate rights and interests of involved persons, etc.

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<sup>91</sup> Pham Hong Hai, *Changing the CPC model*, 2003, Publis Security Publishing House, page ???

<sup>92</sup> Hoang The Lien, *Viewpoint of the State and the Party on judicial reform from 1986 up to now*, speech at the Seminar of 'Viewpoint about judicial reform in the context of constructing a socialist country by the people and for the people', MOJ, Ha Noi, 2002.

<sup>93</sup> Nguyen Hung Quang and Kerstin Steiner, *Ideology and Professionalism: the resurgence of the Vietnamese Bar*, trong sách *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform*, John Gillespie & Pip Nicholson. Australia (Chief Editor), Asian Pacific Press, 191-211, 2005.

<sup>94</sup> Resolution No. 49/NQ-TW dated 02/06/2005 of the Politburo on "Judicial Reform strategy to 2020", Paragraph 2.2

<sup>95</sup> Resolution No. 48/NQ-TW dated 24/05/2005 of the Politburo on "The Strategy for constructing and perfecting Vietnam Legal system to 2020", Paragraph II.2.

<sup>96</sup> The Ordinance on Lawyers dated 25/07/2001.

<sup>97</sup> The Ordinance on Lawyers dated 25/07/2001, Article 4, Article 32, Article 33, Article 34 and Article 35.

<sup>98</sup> The Ordinance on Lawyers dated 25/07/2001, Article 3, Article 15, Article 17, Article 18, Article 19.

<sup>99</sup> The Ordinance on Lawyers dated 25/07/2001, Article 14.

The Law on Lawyers 2006 maintained the regulations on scope of lawyer practice as provided in the Ordinance on Lawyer Organisation 1987 and the Ordinance on Lawyers 2001<sup>100</sup>.

## **2. The role of legal assistance**

The Law on Legal Aid provides responsibilities of lawyers as follows:

to participate in proceedings as the lawful representative of the detainees, defendants, accused to conduct defence work; to act as protector of involved persons in criminal cases; to act as representative or protector of legitimate rights and interests of involved persons in civil cases, administrative cases<sup>101</sup>;

A lawyer or lawyer practising organisation wishing to participate in LA must have registered in writing the scope, form, and areas of LA to the Department of Justice to be issued the Permit of Practice<sup>102</sup>.

The Law on Legal Aid clearly sets out the rights and obligations of lawyer practising organisations and legal consulting organisations who participate in LA<sup>103</sup>.

## **III. RESOURCES TO ENHANCE LAWYERS' INVOLVEMENT IN MANDATORY CASES**

### **1. CURRENT RESOURCES PROVIDED BY LAWS**

At present, lawyers participating in mandatory defence are paid by the state, at a rate of 120,000VND per working day<sup>104</sup>. Using the the cooperation model between bodies conducting proceedings and lawyers,<sup>105</sup> compensation is paid to lawyers by bodies conducting proceedings through BAs, VFF, or VFF's member organisation, not paid directly to legal counsel participating in appointed defence work. However, different guidelines are found in an inter-circular of the Ministry of Justice and Ministry of Finance<sup>106</sup>. Accordingly, bodies conducting proceedings in these areas directly pay

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<sup>100</sup> *Law on Lawyers*, Article 22.

<sup>101</sup> *Law on Legal Aid*, Article 21

<sup>102</sup> *Law on Legal Aid*, Article 17

<sup>103</sup> *Law on Legal Aid*, Article 18

<sup>104</sup> *Inter-Circular No. 66/2007/TTLT-BTC-BTP* of the Ministry of Finance – MOJ dated 19/06/2007 providing guidelines for compensation and payment of fee to lawyers where lawyers participate in proceedings at request of the body conducting proceedings, Section II, Point 4 and 5.

<sup>105</sup> The cooperation model provides for 'requesting BAs to assign law offices to appoint a legal counsel or requesting the VFF or member organisations of VFF to appoint counsel for their members' as provided by the CPC, Article 57.

<sup>106</sup> *Inter-Circular No. 66/2007/TTLT-BTC-BTP* of the Ministry of Finance – MOJ dated 19/06/2007 providing guidelines for compensation and payment of fee to lawyers where lawyers participate in proceedings at request of the body conducting proceedings, Section II, Point 4 and 5.

compensation to lawyers. This regulation raises the question of lawyers' 'independence' in defence work, as it seems that legal counsel defend at the request for service provision from bodies conducting proceedings, which does not conform to the standard of 'only protecting the accused's interests' in the 'right to counsel' under international conventions referred to in the first part of this Study.

The CPC has not referred to the role of LACs in participating in mandatory cases; whereas, LACs have a wide range of collaborators and legal assistants who are practising lawyers, legal background persons. They could join this task<sup>107</sup>. This may pose difficulties in mandatory cases which compulsorily request the participation of local BA, especially where several BAs have limited lawyers.

At present, the extension of the sources of legal services has focused on legal consulting work of socio-political organisations, socio-political professional organisations, socio-professional organisations, institutions, professional research institutes with social nature without profit<sup>108</sup>. There has been no legal regulation to promote the source of defence activities.

## 2. "SOCIALISED" RESOURCES

In Vietnam, "socialisation" is interpreted to mean that the state wants "non-state actors", including organisations and individuals, to replace or cooperate with the state actors to participate in some activities/services of the state. Actually, concept of "socialization" in Vietnam is similar to the concept of "public-private partnership" of World Bank and other countries. Meanwhile, 'socialisation', in many other countries, is a psychological concept indicating 'psychology development of an individual when integrating into the social life'<sup>109</sup>.

There is a need to explore ways to attract lawyers to participate in appointed defence work or the possibility of allowing of non-lawyers to join this task. The judicial reform strategy up to 2020 sets forth the agenda to 'strongly socialise judicial support activities'<sup>110</sup>. Therefore, some suggest it is necessary to push up the socialisation of the

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<sup>107</sup> *Law on Legal Aid*, Article 13.

<sup>108</sup> *Decree No. 77/2008/NĐ-CP* of the Government dated 16/07/2008 on legal consultancy, Article 1.

<sup>109</sup> Eleanor E.Maccoby, Historical Overview of Socialization Research and Theory, in the Handbook of Socialization – Theory and Research, Joan E.Grusec and Paul D. Hastings (chief editor), The Guilford Press, 2007; Nguyen Hung Quang, "Socialising the work of law dissemination and education", Democracy and Law Journal, special volumn of "Constructing the Law on dissemination, propagandisation, and education of law", 2010; Dinh Ngoc Vuong, *The role of social organisations, civil organisations in informing, disseminating, and* JUDGE Project

<sup>110</sup> *Resolution No. 49-NQ/TW*, Point 1.2, Section II

sources of appointed defence services<sup>111</sup>. Pursuant to the CPC, those who are not lawyers may participate in defence if they are assigned by the VFF, as in the case of people's advocates<sup>112</sup>. However, the CPC only permits VFF to appoint counsel for its members, not for those who are non-members. This regulation has restricted the participation of VFF and its member organisations in appointed defence work, such as the VLA.

The Law on Legal Aid permits lawyers to cooperate with LACs, namely 'collaborating lawyers'<sup>113</sup>. This relationship is the 'socialised' model of LA activities. The LACs or LA fund will directly pay lawyers participating in protecting rights and interests of the subjects of LA. Theoretically, this mechanism of payment seems to better ensure lawyers' 'independence' than the mechanism of direct payment from those bodies conducting proceedings as discussed above.

The issue of socializing public services has been mentioned in documents showing the policies and lines of the Party and the State in infrastructure construction investment, health, education, sports, and culture<sup>114</sup>, but so far, there have not been any regulations on socialisation in public legal services. The socialisation concept in Vietnam is very different from that in many other countries.

### 3. SUB-CONCLUSIONS

On basis of our study of regulations and policies on socialisation in Vietnam with reference to the public-private cooperation model, the work of socializing appointed defence work and legal aid requires measures to strictly and efficiently implement available regulations. The Research Team hereby proposes 5 measures for consideration and selection for application in Vietnam:

- (i) The State should create financial conditions or other financial preferences (such as preference of corporate income tax, personal income tax) so that social organisations, lawyer practising organisations and legal consulting centres have the ability to participate in mandatory defence and legal aid;
- (ii) The CPC should broaden the sources of legal counsel for mandatory defence, instead of as currently only seeking assistance from BAs or VFF (to protect its members). LACs of such organisations and VLAs (members of VFF) should

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<sup>111</sup> Opinions of some delegates participating the Seminar on Appointed Counsel under CPC dated 30/03/2010, held by Vietnam Law Association and UNDP.

<sup>112</sup> CPC, Article 56 and Article 57.

<sup>113</sup> The *Law on Legal Aid* provides several regulations on participations of lawyers in LA activities.

<sup>114</sup> *Resolution of the fourth Conference of the Standing Committee of Central Party* (Legislature VII), *Resolution of the second Conference of the Standing Committee of Central Party* (Legislature VII) on strategic orientation for education and training development in industrialization – modernization period and duties up to 2000; *Resolution No. 90/NQ-CP* dated 21/8/1997 on orientations and policies for socializing education, health, and culture activities; *Decree No. 73/1999/ND-CP* on socialization encouraging policies with regard to activities in the field of education, health, culture, and sport; See further Tim Dyce and Nguyen Hung Quang, "Public-Private Partnership for the Poor", VCCI-SIDA-ILO, National Politic Publishing House, 2009.

- be permitted to participate. If this recommendation is accepted, the Law on Legal Aid would need corresponding amendment;
- (iii) The MOJ and Departments of Justice need to deploy the system of LA fund. Organisations participating in LA or appointed defence work could offer competitive quotes for conducting this work to the LA budget; or
  - (iv) The budget to pay for appointed counsel should not be paid via bodies conducting legal proceedings but via BAs. Consequently, BAs should give out criteria for selecting lawyers as appointed counsel and an appropriate mechanism for payment devised. If the budget for appointed counsel is generous, lawyers or LOs should offer competitive quotes when they want to participate in this work. In cases of limited budget, the Government, the MOJ, Vietnam Bar Federation and BAs should present awards and honourable titles to lawyers who conduct this work well so that they may advertise themselves in the market.
  - (v) The MOJ, Departments of Justice, Vietnam Bar Federation, BAs and LACs should allow law practising organisations and lawyers practising individually to register and propose other voluntary methods to participate in appointed counsel work or LA.

## PART 3

### THE WORK OF LAWYER APPOINTMENT IN CRIMINAL PROCEDURES

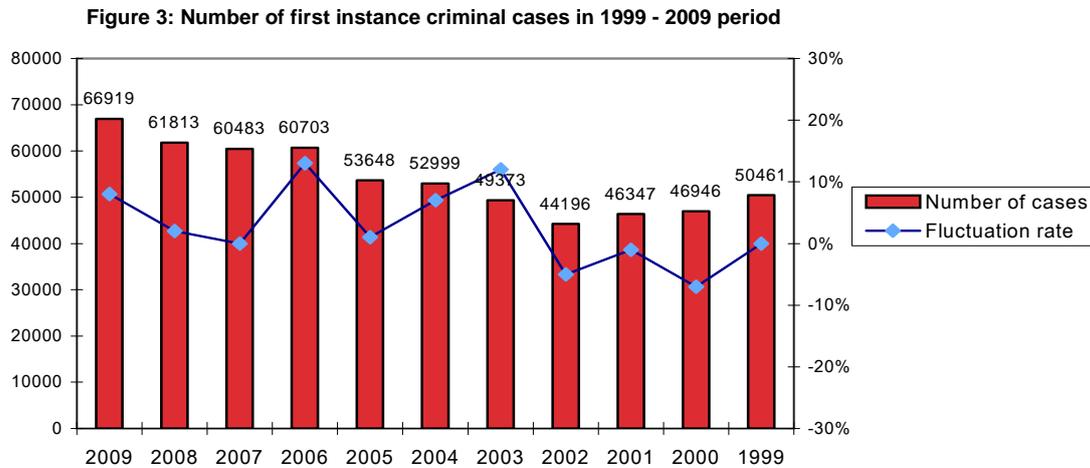
#### I. OVERVIEW OF THE CURRENT WORK OF LAWYER APPOINTMENT

##### 1. Amount of criminal cases

There is a large number of criminal cases handled and adjudicated by courts (See Table 1 and Figure 3), which requires the corresponding development of the amount of lawyers. In 2001, the number of lawyers was about 2,500<sup>115</sup> (despite the fact that some of these lawyers did not participate in criminal defence), thus, each lawyer received 19 criminal cases a year on average. Up to 31 August 2010, when the total number of lawyers was 5,981 persons (an increase of 200%), each lawyer still had 13 criminal cases per year on average.

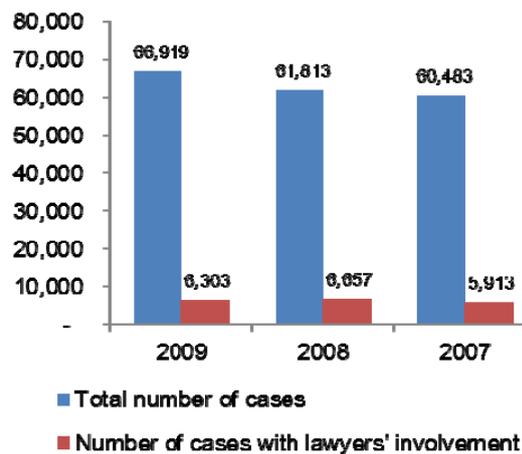
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<sup>115</sup> Nguyen Dinh Loc, 'About the Ordinance on Lawyers 2001', *Democracy and Law Magazine*, special volume on the Ordinance on Lawyers, page 6-17, 2001.



According to the summary of the Ministry of Justice, the total number of criminal cases with participation of lawyers is approximately 60,000 cases<sup>116</sup>, and there are still around 10,000 criminal cases dealt with without lawyers. However, the SPC data over the three years of 2007, 2008 and 2009 (Figure 4) shows less lawyer involvement. According to the SPC on average, only about 10% of first instance criminal cases had counsel.

**Figure 4: Lawyers' involvement in first instance criminal cases from 2007 to 2009**



As revealed by a lawyer at the Ministry of Public Security, annually, the Ministry conducts investigation on over 100,000 criminal cases, and the current number of lawyers is insufficient to meet this demand<sup>117</sup>. According to the Draft Strategy for development of lawyers careers to 2020 of the Ministry of Justice, 'at the present, the rate of lawyers in our country is on average one lawyer

<sup>116</sup> According to the *Draft Strategy for development of lawyer career to 2020*, page 8. However, the Draft does not specify the date of origin of the data. As the Research Team attained the Draft in August 2010, we assume that the data were based on 2009.

<sup>117</sup> The opinion of a lawyer representing the Ministry of Police in the speech made at the Seminar on *Appointed Counsels in Criminal Procedure Code* on 30/03/2010, held by Vietnam Lawyer Association and UNDP.

*per 15,000 people, meanwhile, the relevant rate in Thailand is 1/1,526, in Singapore is 1/1,000, 1/4,546 in Japan, 1/1,000 in France, and 1/250 in the USA*<sup>118</sup>.

The additional factor of unequal distribution of lawyers in different regions needs to be studied thoroughly. Ha Noi and Ho Chi Minh City have the highest concentration of lawyers. Whereas, some other localities have very few or no lawyers. For instance, there are only three lawyers at Ha Giang and Cao Bang Bar Association; Son La Bar Association has four lawyers; Bar Associations in Bac Can and Kon Tum each have five lawyers, 6 lawyers participate in Dien Bien Bar Association but some go practising in other areas; and there are only 7 lawyers at Hau Giang Bar Association. As the Ministry of Justice stated, *'In these areas, the amount of lawyers is insufficient to meet the people's demand for legal services, even in defending cases which request the mandatory participation of lawyers (mandatory cases)*<sup>119</sup>. In practice, several lawyers under big bar associations such as Ha Noi or Ho Chi Minh City also practise in other localities<sup>120</sup>; however, this still cannot meet the demand for lawyers' services in defence work at localities.

A lawyer shortage, in regions with less developed economies, is not only a Vietnamese phenomenon, but also occurs in some other countries, like Japan or Korea<sup>121</sup>.

These factors require the Ministry of Justice and relevant bodies to have appropriate measures to develop the number of lawyers in rural and mountainous areas. Concurrently, it is also necessary to have encouraging measures to increase the ability to participate in the work of defending and advising on laws in localities which lack appropriate numbers of lawyers.

## **2. Types of cases for which counsel is appointed or proposed by LA**

As mentioned above, it is stipulated in Article 57 of the Criminal Procedure Code that in some cases where persons are temporarily kept in custody, the accused, the defendant, or their legitimate representatives do not invite counsel, the investigation body, the people's procuracy, or the Court must request the local Bar Association to assign a law office to appoint counsel. Such persons are the accused and defendant in cases where the

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<sup>118</sup> According to the Draft Strategy for development of lawyer career to 2020, page 9.

<sup>119</sup> According to the Draft Strategy for development of lawyer career to 2020, page 9.

<sup>120</sup> Presentation of Mr. Hoang Van Dzung, lawyer at the Seminar on *Appointed Counsels in Criminal Procedure Code* on 30/03/2010, held by Vietnam Lawyer Association and UNDP.

<sup>121</sup> University of Sydney, *Research studies on the organisation and functioning of the judicial system in five selected countries China, Indonesia, Japan, Republic of Korea and Russian Federation* (Byung-Sun Cho and Tom Ginsburg for Korea Report; Vivienne Bath and Sarah Biddulph for China Report; Kent Anderson, Makoto Ibusuki and David Johnson for Japan Report; Simon Butt for Inonesia Report, William E. Butler for Russia Report)

death penalty applies, as well as those who are minors or who have mental or physical defects.

The survey results demonstrate that cases requiring appointed counsel are mainly those with ‘minors’ and ‘death penalty as the highest penalty’ (see Figure 5).

Lawyers who participated in in-depth interviews, indicated they mainly engaged in mandatory cases where the offences were punishable by the highest penalty (life-imprisonment or death penalty). Only 2 interviewed lawyers said that they had been invited by bodies conducting legal proceedings to be the appointed counsel for the defendant/accused who had mental and physical defects. From the questionnaires, 6 lawyers indicated they had protected the defendant/accused who was thought to have a mental or physical defect as “contracted lawyers”.

Figure 5: Major types of appointed cases

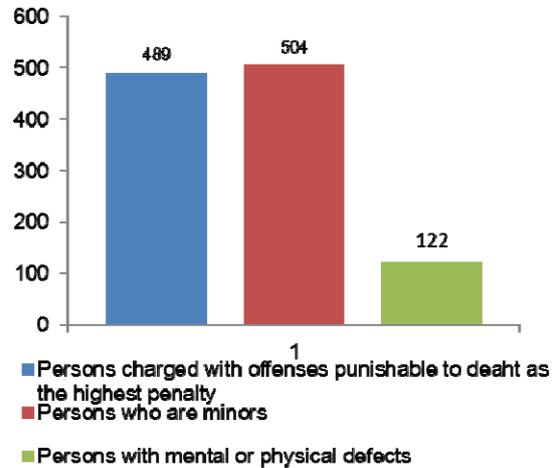
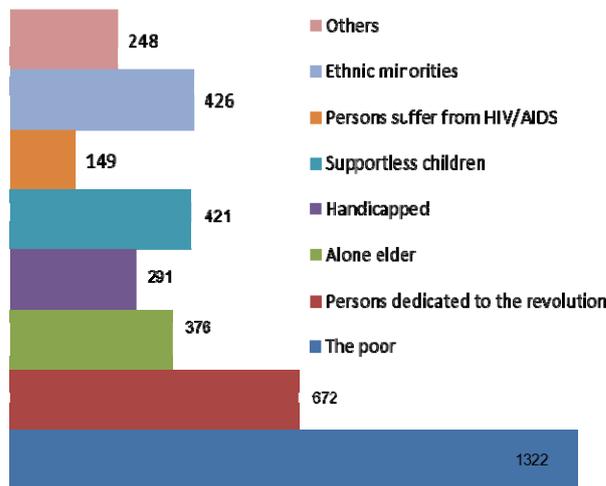


Figure 6: Major types of subjects entitled to legal aid



but just because it is easier for such subjects to fulfil required legal procedures to be eligible to receive LA. However, 3 interviewed lawyers thought that there was a possibility of ‘discrimination in treatment’ from local LA bodies.

Cases subject to LA are more diversified than mandatory cases. The Law on Legal Aid provides for 7 types of people for whom legal aid should be granted.

The lawyers said that the poor received the most legal aid, followed by persons dedicated to the revolution (See Figure 6).

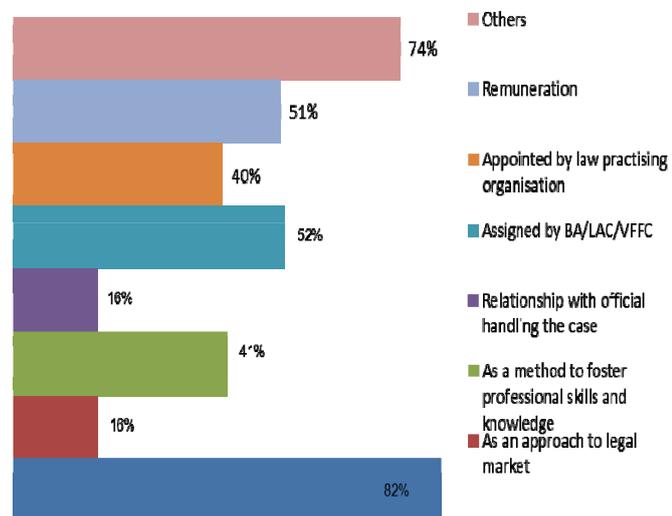
According to the lawyers interviewed in-depth, this is not due to preferential treatment of ‘the poor’ or ‘persons dedicated to the revolution’,

To meet international standards, the Research Team argues that appointed cases are cases where it is necessary to have counsel participating in litigation processes to ensure the rights and interests of the accused or defendant, particularly those who may be punished with highest penalty or who have special defects. The Research Team suggests this should be the case without regard to the accuseds or defendants ability to pay counsel. Such cases are subject to international treaties on human rights in general and on the right to counsel in particular. Regarding cases subject to LA, it entirely depends on the economic situation of the litigants and the policy of the Vietnamese government to those litigants.

### 3. Reasons for lawyers to engage in mandatory cases

The majority of lawyers answering questionnaires said that they participated in mandatory cases because of ‘social responsibility’ (see Figure 7). A similar result was obtained from in-depth interviews with lawyers. However, one interviewed lawyer (the other 3%) believed this statement, that ‘participating in mandatory cases only due to social responsibility’, is just a formal way of speaking. Usually, mandatory cases are complicated ones with serious judgment and dangerous criminals. These cases are often adjudicated under ‘direction’; thus, it is very difficult to plead or argue in such cases. Meanwhile, compensation for lawyers in mandatory cases is ‘nearly zero’. The accused/defendant also do not necessarily persist in having legal services due to several reasons, including their low awareness of this right or ‘influences from external elements’.

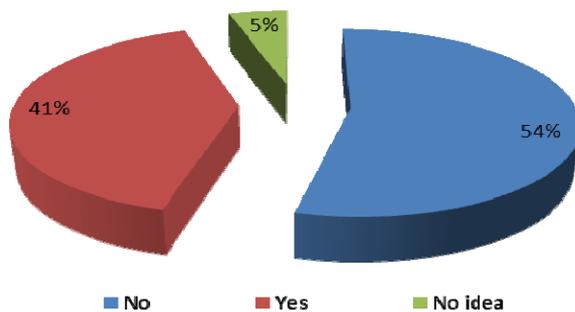
Figure 7: Reasons for a defender to involve in an appointed case



Fifty-one percent of lawyers responding to questionnaires confirmed their participation in mandatory cases was also for compensation, but this suggestion was challenged by interviewed lawyers. They claimed that they often generated a financial loss for participation in mandatory cases. In reality, the current compensation paid to lawyers in

mandatory cases is very low (120,000VND per working day). In several cases where lawyers are only permitted to work half a day to take testimony or to participate in a hearing, they are only entitled to receive 60,000VND. This is a rather low compensation if lawyers have to travel out of their working or living area for their involvement as counsel.

**Figure 8: Differences on working attitude and spirit between appointed counsel and normal counsel**



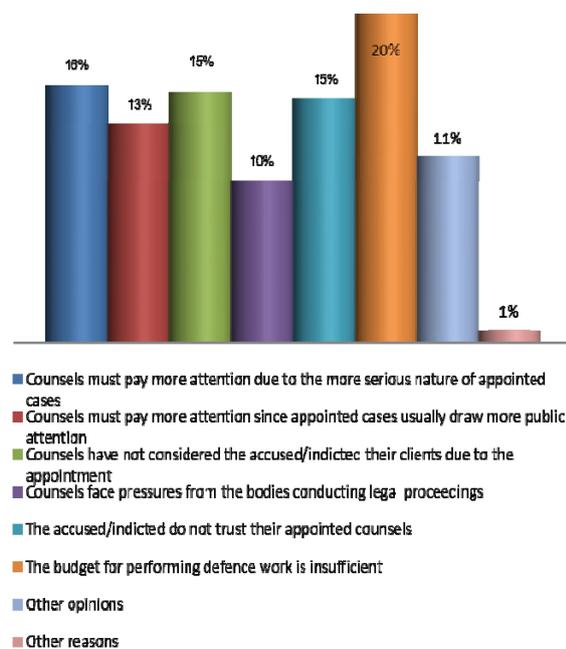
involvement in mandatory cases include *'to gain practising experience', 'to obtain experience in defending big cases, cases drawing the attention of the public', or 'to show the professional stuff'*. Several lawyers thought that their colleagues engaged in mandatory cases as *'they may receive more compensation and tips from family of the defendant/accused', or 'because they did not have many clients, so, they participated in mandatory cases to attract more clients, to keep relationship for doing the new cases or legal aid cases'*.

There has been a concern that counsel in mandatory cases are improper or unenthusiastic about their work. However, 59% of the lawyers thought that there was no difference in working attitude and nor any difference between the spirit of appointed counsel and normal counsel (see Figure 8). Most of the interviewed lawyers stated that once they agreed to participate in mandatory cases; they would try their best to

A further motivation expressed by lawyers in in-depth interviews was to *'maintain good personal relationship with handling officials or relationship between the BA and bodies conducting legal proceedings'*. Other reasons included *'the BA assigned them' or 'they had to defend in accordance with the BA's regulations'*.

Some further reasons for lawyers

**Figure 9: Reasons for differences on working attitude and spirit between appointed counsels and normal counsels**

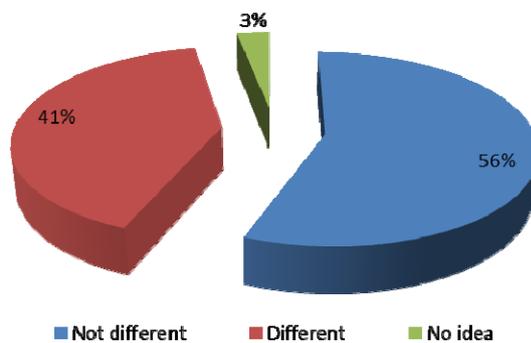


maintain 'their prestige'.

Those who thought that there was some difference in 'working attitude and spirit' of normal counsel and appointed counsel, suggested the reasons as depicted in Figure 9. On the other hand, the lawyers also added further factors, that: (i) the defendant/accused themselves and their family in 'normal cases' support the counsel' work more than those in 'mandatory cases'; (ii) mandatory cases are usually cases with court 'direction for adjudication', thus it is difficult to defend or to achieve good results.

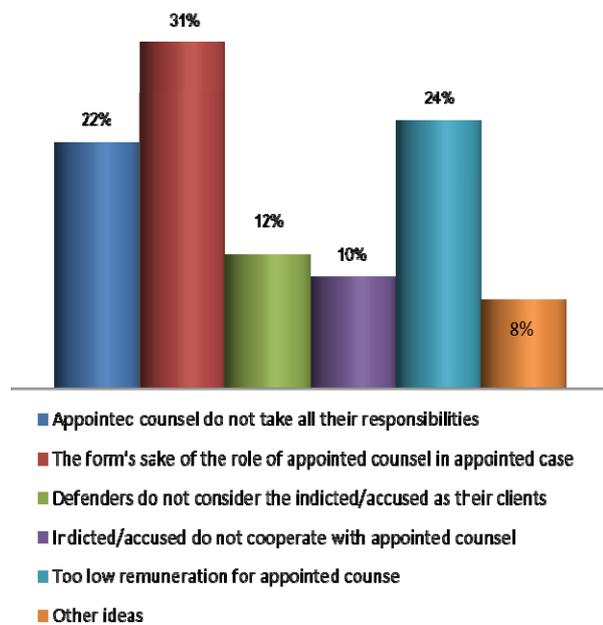
Further to the survey about counsels' attitudes, the Research Team also asked lawyers' about their perception of the quality of counsel in mandatory cases. Up to 56% of lawyers answering questionnaires confirmed that there was no difference in defence quality in mandatory cases and normal cases (See Figure 10).

Figure 10: Difference in defence quality of appointed and normal counsel



In order to have an objective assessment, we should mention the lawyers' opinions about reasons leading to differences (see Figure 11). Lawyers who believed that appointed counsel acted only in of a 'formal nature' represented 31% of the respondents and those who revealed that counsel had 'not yet fulfilled their responsibilities' made up 22% of the respondents.

Figure 11: Reasons for the difference of defense quality between appointed counsel and normal counsel



Some lawyers also indicated that in some mandatory cases, the bodies conducting legal proceedings may ask lawyers to participate in 'the final interrogation' or 'to help to sign some papers' to satisfy the requirements of

the law<sup>122</sup>. This illegal act must be eliminated.

It has not been clearly specified in the Criminal Procedure Code whether a counsel granted with a Certificate of Defence ('COD') from the investigation stage is automatically permitted to defend in subsequent litigation procedures without applying for another certificate of counsel. The interviewed lawyers claimed that they had to re-apply for a COD once the case was transferred to a subsequent proceeding. This has resulted in waste of expenses, time, and effort of counsel since they have repeatedly to perform all procedures to apply for a certificate of defence<sup>123</sup>. One particular participant had to apply for 7 certificates of counsel for the same case, with the same accused.

**Sub-conclusions:**

- Mandatory cases are cases which necessarily require the participation of defending counsel to ensure the rights and interests of the accused or the defendant in accordance with Vietnamese humanitarian policies and international commitments. This requires state bodies, the Fatherland Front Committees, Bar Associations, and each lawyer individually to exercise more effort to better ensure the work of mandatory defence.
- The survey result further asserts that cases requiring appointed counsel in accordance with the CPC are mainly complicated ones: in terms of circumstances, offenders or victims; those which attract the attention of the public; or those which relate to vulnerable groups in society. The nature of such cases require the appointment of highly competent counsel. Therefore, it is necessary to have suitable measures and mechanisms to attract good lawyers to participate in this activity.
- The Ministry of Justice and relevant state bodies need to exercise measures and mechanisms to encourage and facilitate lawyers to work in rural and

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<sup>122</sup> Do Van Duong – *The Supreme People's Procuracy, Defenders in Criminal procedures, a speech at the Seminar 'Appointed Counsels in the Criminal Procedure Code' held by Vietnam Lawyer Association on 30/3/2010*; Hoang Van Dzung, Lawyer, *About the legal frame and institution on appointed counsels in Vietnam*; limitations of laws in execution of regulations of the CPC on appointed counsels and recommendations for change, a speech at the Seminar *'Appointed Counsels in the Criminal Procedure Code'* held by Vietnam Lawyer Association on 30/3/2010; Tran Dinh Trien, Lawyer, speech made at the Seminar *'Appointed Counsels in the Criminal Procedure Code'* held by Vietnam Lawyer Association on 30/3/2010;

<sup>123</sup> The opinion reflected by some lawyers at the Seminar *'Appointed Counsels under provisions of the Criminal Procedure Code'* held by Vietnam Lawyer Association on 30/3/2010 and the Scientific seminar *'Criminal Procedure Code – matters need amending and supplementing'* held by Ha Noi Bar Association in October 2009.

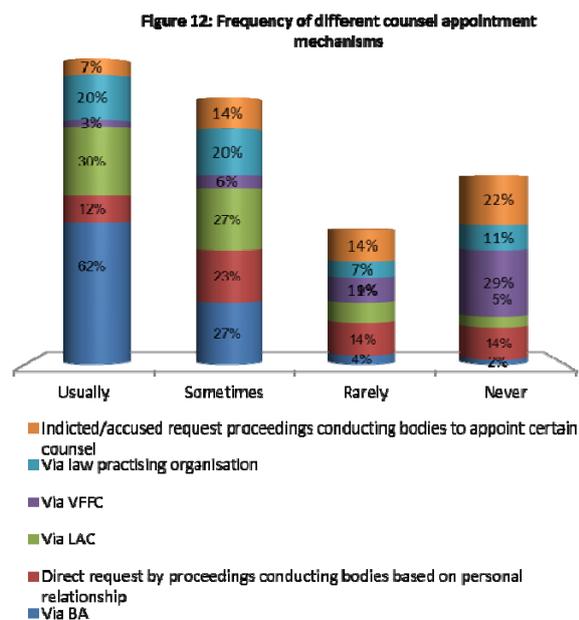
mountainous areas to better ensure mandatory defence in such localities. These measures could include, for instance, the professional development of local lawyers or fostering better working conditions to attract lawyers from other localities.

- There are several factors obstructing lawyers' participation in mandatory cases. Appropriate state bodies should introduce measures to support and encourage lawyers as a way of addressing these factors. As mentioned above in the 'Socialisation' analysis, such support may be in terms of budget, or through the reduction of administrative procedures in proceedings, and in payment to minimise the time and effort spent by lawyers in their defence work.

## II. MECHANISM FOR COUNSEL APPOINTMENT

Pursuant to Article 57 of the CPC, the appointment of counsel to participate in mandatory cases shall be done via BAs or the Fatherland Front committee. However, the survey also showed that lawyers were engaged in mandatory cases for other reasons (See Figure 12).

Lawyers answering in-depth interviews also added that several law practising organisations or lawyers individually had '*personal relationships*' with some handling officials or bodies conducting legal proceedings, and thus they were directly requested to participate in mandatory cases. Once they received a request, law practising organisations or lawyers would request the BA to facilitate their acting by assigning such a case to them for settlement. No BA may object to this practice and it is not considered as violating procedural rules. This direct invitation of appointed counsel is convenient for bodies conducting legal proceedings. However, it also raises a question about the independence of counsel participating in cases where they have been invited to do so by the bodies conducting legal proceedings. It is perhaps controversial



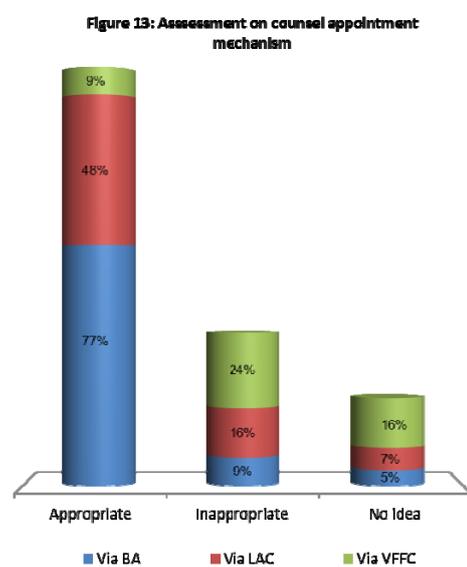
whether the mechanism for appointing counsel via Bar Associations can ensure lawyers' 'independence' in appointed defending work<sup>124</sup>.

From the survey, the majority (77%) of the questioned lawyers assumed that the mechanism of *counsel appointment via BAs* was appropriate, with only 9% of respondents not agreeing to this statement (see Figure 13). The *assignment of counsel by LAC* was also considered appropriate by 48% of lawyers. This has confirmed that the present mechanism of counsel appointment under the CPC and the Law on Legal Aid is judged by many lawyers to be appropriate. Therefore, it requires more strict compliance with laws by the bodies conducting legal proceedings and lawyers.

Some lawyers interviewed in-depth (18/31) reflected that the mechanism of appointment via BAs was rather cumbersome and unnecessary. Furthermore, 2 of the 31 lawyers said that this mechanism would bring about negative factors when the Managing Board of BAs elected to be involved in mandatory cases for self-interest. Sixteen per cent of the questionnaire respondents considered the current appointment mechanism 'complicated and cumbersome', and 23% of the interviewed persons indicated that 'the mechanism of appointment and assignment of counsel was inconsistent among bodies conducting legal proceedings'.

A member of the Management Board of Ho Chi Minh City Bar Association assumed that the process of inviting lawyers through bar associations would take a significant amount of time, but could not ensure all procedural requirements, thus, it should be simplified by direct invitation sent to lawyers by bodies conducting legal proceedings through law organisations<sup>125</sup>

4 investigators and 2 prosecutors also suggested the appointment mechanism via BA contains some shortcomings such as: 'some provincial BAs do not have their own head office,



<sup>124</sup> At the Seminar 'Commenting the Report on the Study on Appointed counsels in Vietnamese Criminal Procedure Code and application practice' held by Vietnam Lawyer Association on 25/05/2010, there were some different opinions on the issue of 'ensuring lawyers' independence' through the mechanism of inviting lawyers to participate in mandatory defence.

<sup>125</sup> Opinion of Mr. Nguyen Van Trung, Lawyer – Vice Head of the Management Board of Ho Chi Minh City Bar association in the Seminar 'The right to counsel in criminal procedure laws' held in Ho Chi Minh City on 2 and 3 of December 2010, through the speech 'The role of local bar associations in supporting the exercise of rights of lawyers participating in proceeding stages – including the assignment in mandatory cases'

so the bodies conducting legal proceedings do not know how to address official letters to the BA', 'the assignment of lawyers to involve in mandatory cases by BAs is too slow, affecting the investigation progress' or 'the Managing Board of BAs does not work positively, as a result, the settlement progress of cases was slow due to no participation of lawyers'.

### Sub-conclusions:

The mechanism of appointing counsel via BA and the Fatherland Front Committee under the CPC and assignment of lawyers to defend in LA cases via LACs is considered to assist to ensure the independence of the appointment of counsel. The matter of concern is how this mechanism can be followed by bodies conducting legal proceedings, Management Board of BAs and lawyers to reserve 'the independence' in the process of assigning lawyers to take part in mandatory cases.

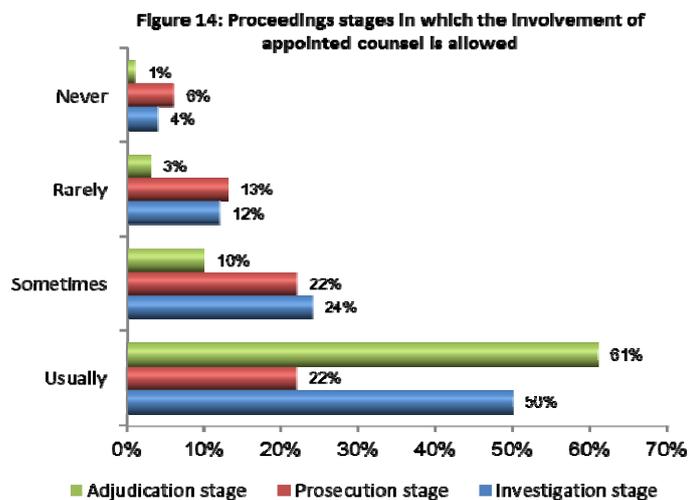
On the other hand, the current mechanism has not extended the involvement of other subjects in mandatory defence work. Consequently, some cases require the participation of defending counsel, but no counsel can be found. This has obstructed the bodies conducting legal proceedings in seeking to ensure the requirements of the litigation process are met.

BAs also need to set up a convenient, prompt, and transparent procedures to assign lawyers in mandatory cases.

### III. ADVANTAGES AND DISADVANTAGES OF APPOINTED COUNSEL IN EACH CRIMINAL PROCEDURAL STAGE

According to the survey, legal counsels are mainly allowed to participate from the adjudication stage (accounting for 61%), while 50% of the respondents are enabled to take part in from the investigation stage (see Figure 14).

This percentage is rather high and reflects the desire of bodies conducting legal proceedings to



create positive conditions for counsel in mandatory cases. Twenty-four of the 31 lawyers interviewed in-depth indicated that they received more assistance to be involved in legal proceedings from the investigation stage in mandatory cases than in a normal cases.

### 1. Investigation stage

All lawyers interviewed wished to be involved in the proceedings from investigation stage, in particular, immediately after the issuance of the decision to prosecute the case and prosecution of the defendant. But in fact, the rate of lawyers' involvement from the investigation stage is rather modest (see Figure 15).

Some lawyers confirmed that they were also permitted to take part 'immediately when the decision on prosecution of the defendant was issued', but it was merely a 'formal' permit; in fact, they were not facilitated in their practise until 'the investigation's conclusion' (see Figure 16).

Moreover, the engagement of lawyers from the investigation stage remained dependent on the grant of a COD. Fifty-two per cent of the questioned lawyers indicated that they usually participated in the investigation stage immediately after receiving the COD, in comparison to 33% of lawyers who admitted to beginning their participation in 'the final interrogation' or 17% of lawyers

Figure 15: Involvement of appointed counsel in investigation stage

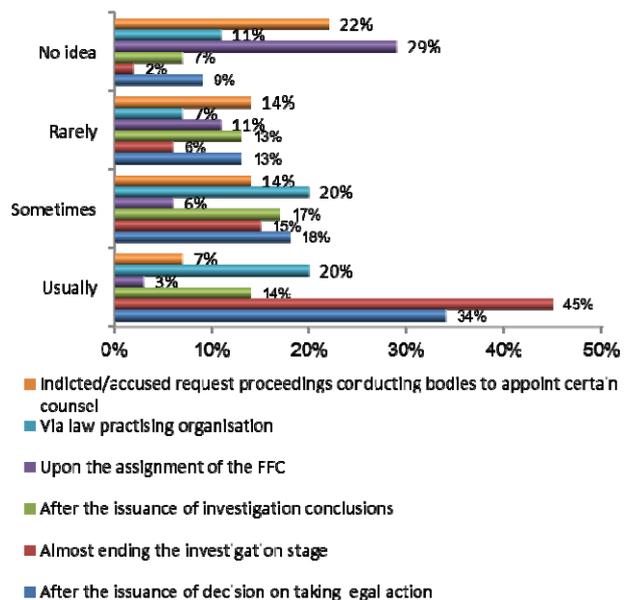
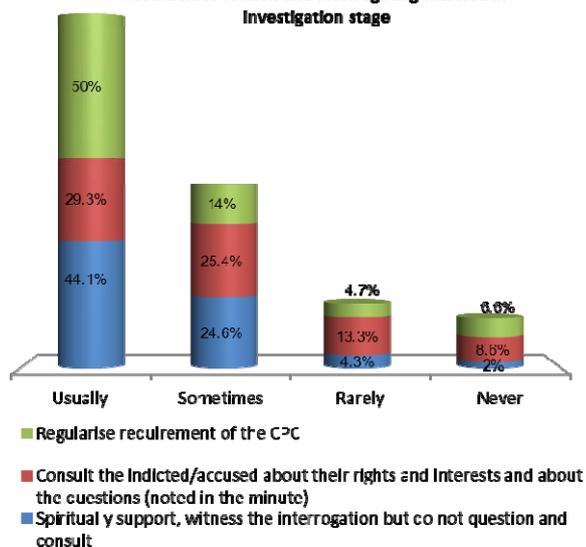


Figure 16: Role of the appointed counsel in taking testimonies session and interrogating Indicted in Investigation stage



who were only involved after issuance of the investigation’s conclusions.

**Table 6: Favourable conditions created by investigation bodies for appointed counsel to participate in investigation activities in relation to the person whom they defend**

(% of the respondents)

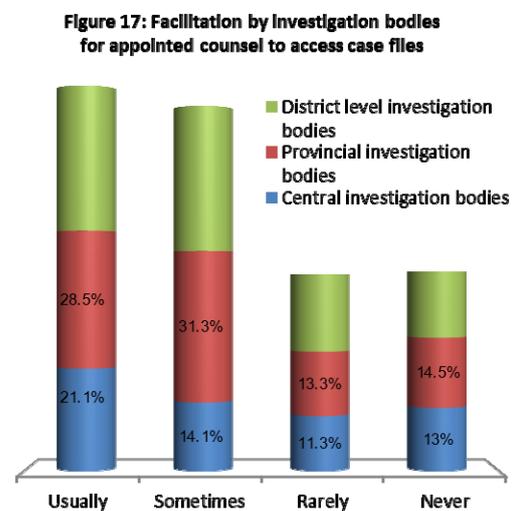
	<i>Usually</i>	<i>Some-times</i>	<i>Rarely</i>	<i>Never</i>
Notice on the time and place for interrogation	39	31	15	10
Notice on the change of temporary detention place	10	15	21	31
Notice on the performance of relevant investigation activities (scene examination and so on)	11	15	27	30
Notice on problem happening to the defendant in temporary detention	8	11	24	33
Delivery of investigation conclusions	25	28	17	15
Scene examination	6	12	24	38
Search, forfeiture and distraint of properties	3	11	21	42
Valuation of properties	4	11	20	40
Appraisal of properties	5	9	21	43
Collection of evidences	5	11	24	40
Participation in confrontation, taking testimonies of the defendant/accused	23	35	20	12
Investigation experiments	5	15	26	32

The survey results mentioned in Table 6 above clearly reflects the level of facilitation by investigation bodies afforded lawyers in mandatory cases. It can be seen that delivery of ‘Notice on the time and place for interrogation’ is the major action taken by investigation bodies (highest frequency of ‘usually’). Whilst, there are still a number of investigation activities in which lawyers could not participate. This requires the improvement of

procedures and improvement of the attitudes of investigation bodies regarding the attendance of lawyers in investigation activities.

During in-depth interviews, investigators said that they always created conditions for lawyers to practise regardless of whether the case is a mandatory or normal case. However, most mandatory cases involve a serious infringement of the law and a dangerous crime. Consequently, in some circumstances investigators need to reserve investigation secrets. Therefore lawyers cannot take part from this early stage. Only when the investigation is relatively finalised and clear would investigation bodies facilitate the participation of lawyers.

According to the lawyers' investigation bodies at district level are those that most frequently create conditions for lawyers (see Figure 17). However, in reviewing the evaluation criteria, it can be seen that district level bodies consistently appear at the high level 'Usually', 'Sometimes', 'Rarely' and 'Never'. With the recent increase of jurisdiction of district courts, their investigation competence increases. Therefore many cases now are undertaken by investigation bodies at district level. According to the 17 lawyers interviewed, cases at district level are usually less serious and sensitive than those at provincial level; thus, it is easier for investigation bodies at this level to facilitate lawyers.



On the other hand, some of the lawyers interviewed in Ha Noi and Ho Chi Minh raised opposing viewpoints. They all said that investigation bodies at the central level also create favourable conditions for lawyers to access the case file at a very early stage.

## 2. Prosecution stage

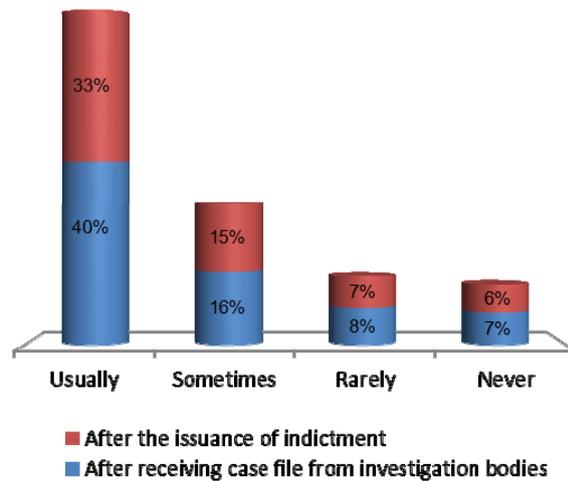
Prosecution stage is a short period in procedural activities, 20 days for less serious crimes and serious crimes, 30 days for very serious crimes and particularly serious crimes, after receiving the case files and the conclusion of the investigation. During this period, the Procuracy must issue one of the following decisions:

- a. Prosecution of the accused before court by indictment;

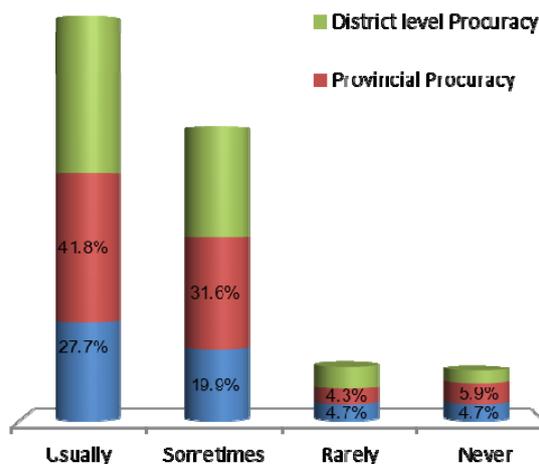
- b. Return the case files for further investigation;
- c. Suspension or temporary suspension of the case<sup>126</sup>.

In the prosecution stage, the rate of lawyers participating in mandatory cases is not high (refer to Figure 12). Forty per cent of lawyers usually took part in cases ‘after receiving the case file from investigation bodies’ and 33% usually became involved when the procuracy ‘issued the indictment’ (see Figure 18). However, questioned lawyers indicated that they rarely took part in the defence work at this stage because in reality this is a very short stage. If the procuracy finds that a case requires an appointed counsel, but no lawyer participates in the investigation stage, the procuracy requests the investigation bodies to re-perform the investigation with the involvement of counsel. Furthermore, in the event that a counsel has participated in the case from the investigation stage, the procuracy would issue the indictment and transfer the case to the court.

**Figure 18: Counsel's Involvement In prosecution stage**



**Figure 19: Facilitation provided by Procuracies for appointed counsel to access case files**



Some prosecutors reflected that as soon as they received a case file from investigation bodies, they send an official letter to the BA or the participating counsel to alert them that the case was under their consideration. According to a prosecutor, on serving the indictment of a mandatory case, he always invited the counsel who participated in the case from the investigation stage to go with him to serve.

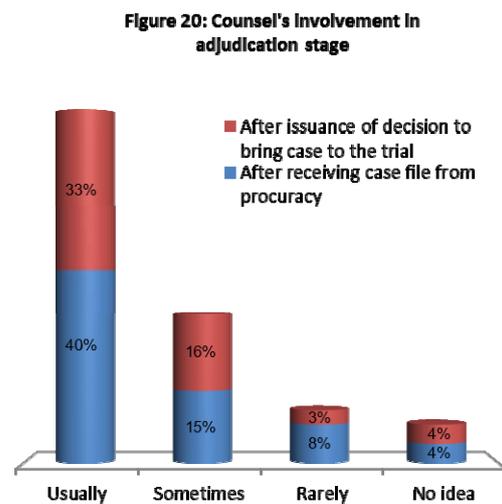
<sup>126</sup> CPC, Article 166.

Most prosecutors thought that lawyers rarely participated actively in the prosecution stage of both mandatory cases and normal cases. In fact, lawyers mainly engaged actively in the investigation and adjudication stage.

Similar to the survey result on the level of facilitation of investigation bodies (see Figure 17), lawyers evaluated the cooperation level of district procuracies as slightly higher than that of provincial bodies (see Figure 19). Provincial procuracies rated the second highest in this area.

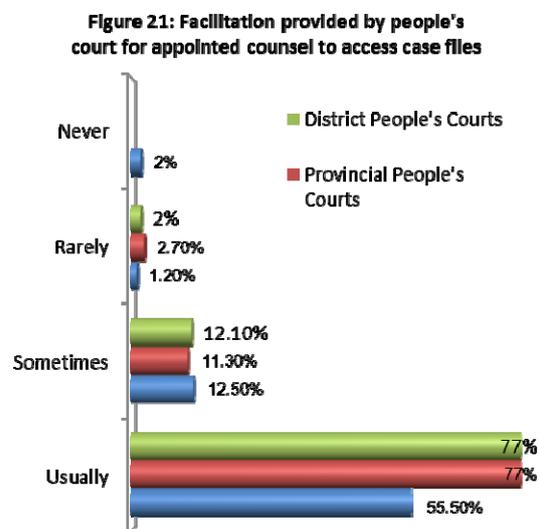
### 3. Adjudication stage

In the adjudication stage, the proportion of lawyers involved 'after the issuance of the decision to bring the case to the trial' is not much higher than the rate of counsel taking part 'after receiving the case file from the procuracy' (see Figure 20). This situation needs to be improved, since counsels' participation just 'after the issuance of decision to bring the case to the trial' may inhibit their ability to perform their defence work.



As mentioned above, there are many causes leading to the inactivity of lawyers in defence work in mandatory cases that result in many lawyers only becoming involved at the adjudication stage, when the cases are brought to the hearing.

According to judges in in-depth interviews, many lawyers appeared on the adjudication date, but did not actively participate in studying case files or meet the accused before adjudication. Some lawyers were so unfamiliar with their case that they incorrectly stated the name or the crime of the accused at the hearing. In some courts, court leaders often asked judges or court clerks to request lawyers to meet the accused before the hearing or allowed the delay of the hearing so that the relevant counsel could exchange a few words with the accused, avoiding the situation just mentioned.

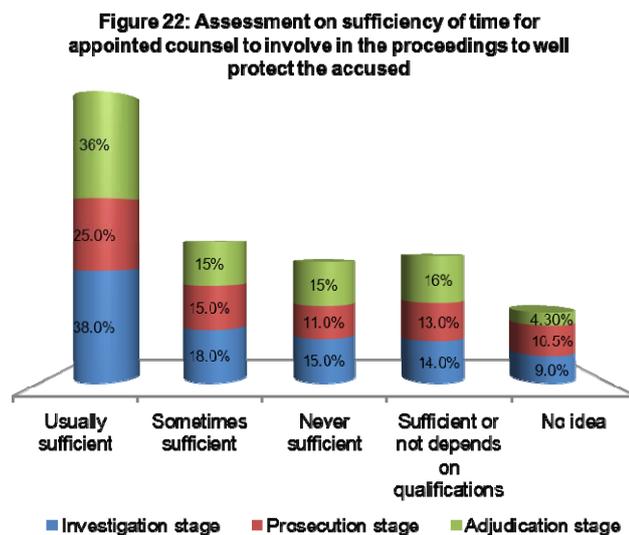


Lawyer satisfaction of the facilitation provided by courts at both the provincial and district courts is similar (see Figure 21).

#### 4. Duration of participation in the defence work

The number of lawyers who considered they had sufficient time for their defence work in mandatory cases as satisfactory ('Usually sufficient') was relatively higher than those who said they did not have enough time, "Some sufficient", "Never sufficient" and "Depending on lawyer's capacity" (see Figure 22).

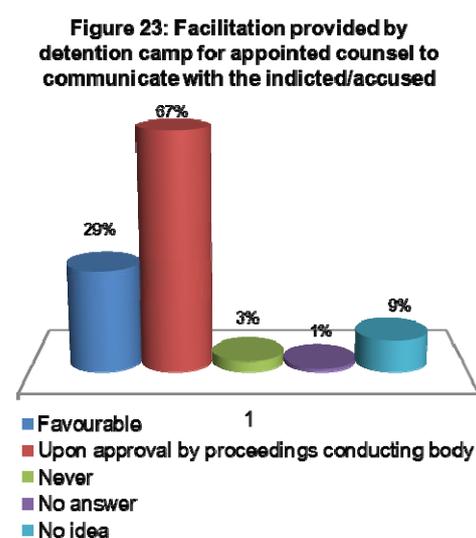
Interviewed lawyers assumed that mandatory cases are usually serious ones; consequently, bodies conducting proceedings often create favourable time conditions to enable the legal counsel to make better study of the case files.



#### 5. Support provided by prisons and temporary detention camps

Lawyers assessed the support of prisons as rather positive (see Figure 23), even though several prisons only allowed lawyers to communicate with the defendant/accused upon expiry of the investigation stage and upon presentation of a COD granted by the procuracy or court. Some prisons also requested notes or approval of bodies conducting legal proceedings permitting lawyers to see the defendant/accused.

Only 3 in-depth interviewed lawyers indicated that they work constructively with



the prisons in their province. Such lawyers in fact had personal relationships with the managing board of such the prison.

Other lawyers were often required to provide several kinds of papers to meet the defendant during the investigation stage even though they were already granted a COD.

However, all in-depth interviewed lawyers also requested a change to the procedure for meeting the defendant/accused in temporary detention camps or prisons. They recommended that legal counsel should only need to present their COD to see the defendant or the accused, and that no introduction letter or any approval should be requested. The difficulties that lawyers face in interacting with the management board of prisons are time consuming and cost ramifications since detention camps or prisons are often located away from centre areas. Lawyers had to spend a lot of time travelling to temporary detention camps or prisons, but usually obtained no payment for their work if they were not facilitated by the managing board of such camps.

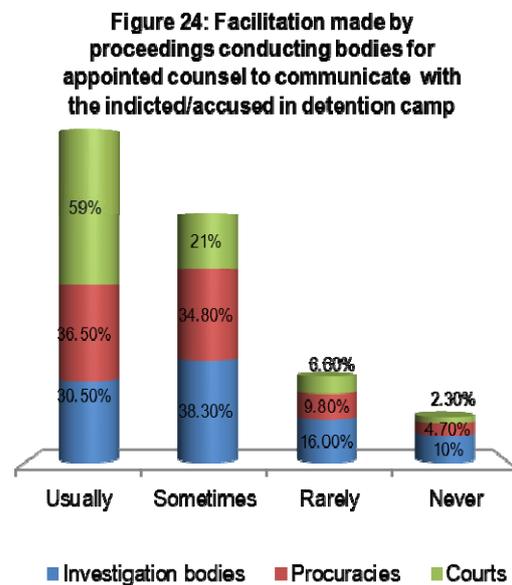
**Table 7: Reasons for temporary detention camps not creating conditions for appointed counsel to meet and communicate with the defendant/accused**

*(% from respondents)*

<i>Reasons</i>	<i>Usually</i>	<i>Some times</i>	<i>Rarely</i>	<i>Never</i>
Work overload	5	6	2	4
Complicated procedures to request a meeting with the defendant/accused	14	6	1	3
Inability to attend due to sudden work of the camp	4	6	2	4
Expiry of the time permitted by the detention camp even though it is still within office hours	16	8	1	4
No permission to meet the defendant/accused by the bodies conducting legal proceedings	5	10	3	2
Refusal of the defendant/accused to meet counsel	0	5	4	6

There are many reasons that managing bodies of temporary detention camps or prisons do not create conditions for counsel, even in mandatory cases (see Table 7). The most notable reason is that the procedure for meeting the defendant/accused is complicated.

In some temporary of the detention camps that the Research Team visited, there were separate rooms for the accused/defendant to communicate with outsiders. However, only investigators or prosecutors are provided with the facilities to have separate meetings. The counsel or their family meet detainees under the supervision of the guardians, which remarkably restricts counsel's ability to collect information and negatively affects the accused/defendant. Guardians of prisons revealed that they had to ensure legal counsels' safety in their contact with the accused/defendant, especially those involved in 'mandatory cases' since those persons are usually believed to be dangerous criminals.

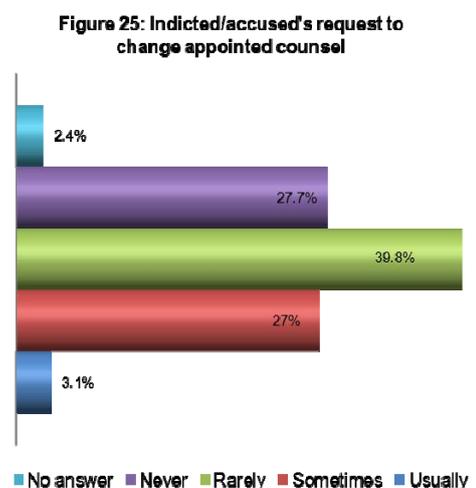


Our observations at some temporary detention camps, and also according to the interviewed lawyers, there is no sign indicating 'the rights of the accused/defendant under the CPC'. Some camps have such a sign, but it is located outside the gate, so that only persons not kept in temporary detention are able to read it. We do not know whether the persons kept in detention can attain information about their right to counsel.

### 6. Attitude of the defendant/accused to counsel in mandatory cases

According to the evaluation of lawyers, the defendant or the accused rarely change their appointed counsel (see Figure 25).

According to the interviewed lawyers, none of them faced the situation of a change to the appointed counsel at the request of the accused. Only one lawyer received a notice from the



investigation body of a defendant’s request to change counsel. But when he asked to meet the defendant in person and his relatives, the defendant withdrew the request.

Two lawyers stated that in mandatory cases, the defendant/accused rarely changed counsel for several reasons. One of which was that some lawyers engaging in mandatory cases had relationships with investigation bodies, and the defendant was ‘advised’ to use such lawyers.

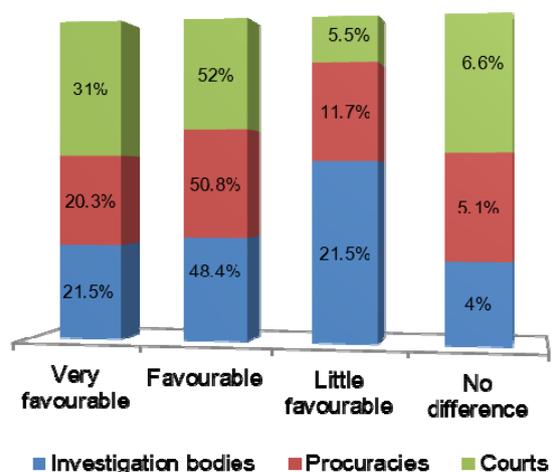
One of our respondents who had been through a period of imprisonment stated that he had requested to ‘change lawyers’ but this request was not accepted. In the hearing, the court allowed him to use both a normal lawyer and the appointed counsel to defend his case. However, ‘the normal lawyer argued toward the direction that the accused did not commit the crime while the appointed counsel argued that the accused committed the crime for the first time, and asked for clemency to reduce the penalty’. Subsequently, he submitted a petition for appeal and employed only the normal lawyer in appellate stage.

Most prosecutors and judges assumed that criminals are often those who ‘have weak awareness’ or ‘have no money’, so when they are defended free of charge, they are likely to accept their counsel immediately and not wish to change. Very few defendant/accused fearing having to pay for counsel, would refuse appointed lawyers. Such officials also emphasised that some lawyers did not put all their effort into mandatory cases, consequently, the defendant/accused was disappointed and refused lawyers. In some cases, the accused refused lawyers at the hearing, claiming that they had not known about the counsel’s participation; in addition, they were afraid that the lawyers did not fully understand the case and would not be able to provide an adequate defence.

### 7. Advantages of lawyers participating in mandatory cases

The survey results indicate that lawyers taking part in mandatory cases are often more assisted by bodies conducting legal proceedings than those involved in normal cases (see Figure 26). Less than 10% of lawyers reflected that there was no difference between lawyers in normal cases and those in mandatory cases.

**Figure 26: Comments on advantages for appointed counsel compared to normal counsel**



Interviewed lawyers said that mandatory cases were the cases in which the bodies conducting legal proceedings needed lawyers to ensure the legal proceedings were conducted in accordance with the law. Hence, the bodies conducting legal proceedings should create conditions for lawyers. This opinion was the same as that of several prosecutors and judges in the in-depth interviews.

Leaders of a provincial court even said that in mandatory cases, the court often had to nominate a court clerk to maintain frequent contact with the assigned counsel to ensure that s/he would attend the hearing, thereby avoiding adjournment of the hearing. In several cases, the court clerk even had to pick up the legal counsel to bring them to the hearing.

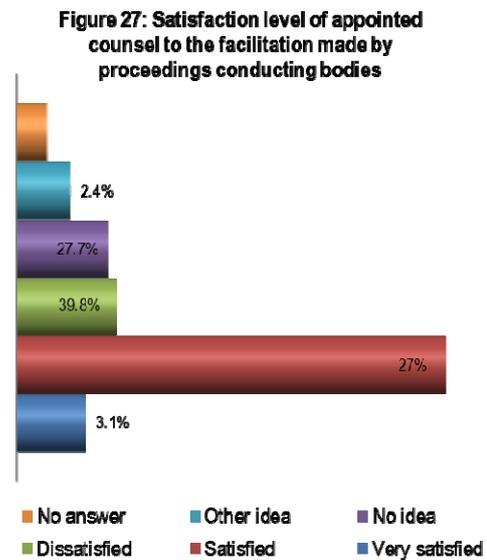
**Table 8: Reasons for appointed counsel to be more facilitated by bodies conducting legal proceedings than normal ones**

*(% from surveyed persons)*

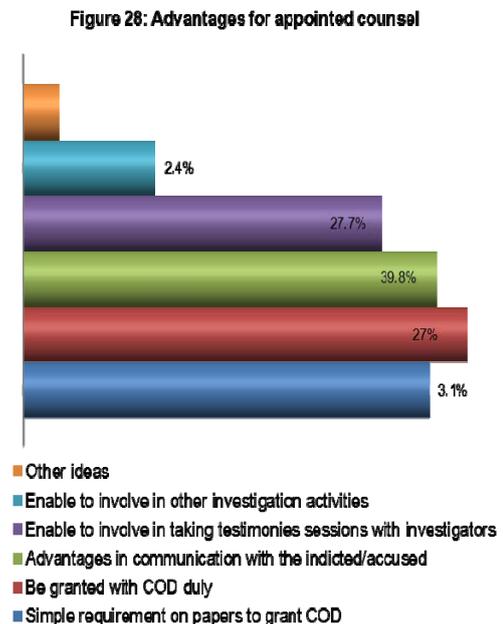
<b>Reasons</b>	30
Mandatory cases are normally cases of a serious nature	22
Mandatory cases are normally cases which attract public attention	80
Bodies conducting legal proceedings need appointed counsel to ensure the correct legal proceedings	9
Personal relations between handling official and the counsel	3
Other opinions	30

Two investigators revealed that they usually used their pocket money to pay compensation to lawyers on the days of taking testimonies with the aim of making it easier for lawyers to receive compensation. After that, they carried out administrative procedures for the payment of compensation. These two officials said that if they did not adopt this practice, it would be difficult to find lawyers of the province to be involved in their cases. There was a very limited number of lawyers in their province while the province had a significant number of cases. If there was no presence of lawyers in 'the final interrogation', it was easy for their case file to be cancelled or returned for additional investigation.

Lawyers also highlighted their satisfaction with their experience of facilitation made by the bodies conducting legal proceedings in mandatory cases (see Figure 27). The rate of ‘disatisfaction’ was not high. But among other opinions, a lawyer suggested that the evaluation of satisfaction level varied across localities and bodies conducting legal proceedings. There was an opinion indicating that it was ‘difficult to evaluate’ because in fact bodies conducting legal proceedings and lawyers were in a mutually dependent relationship regarding this activity.

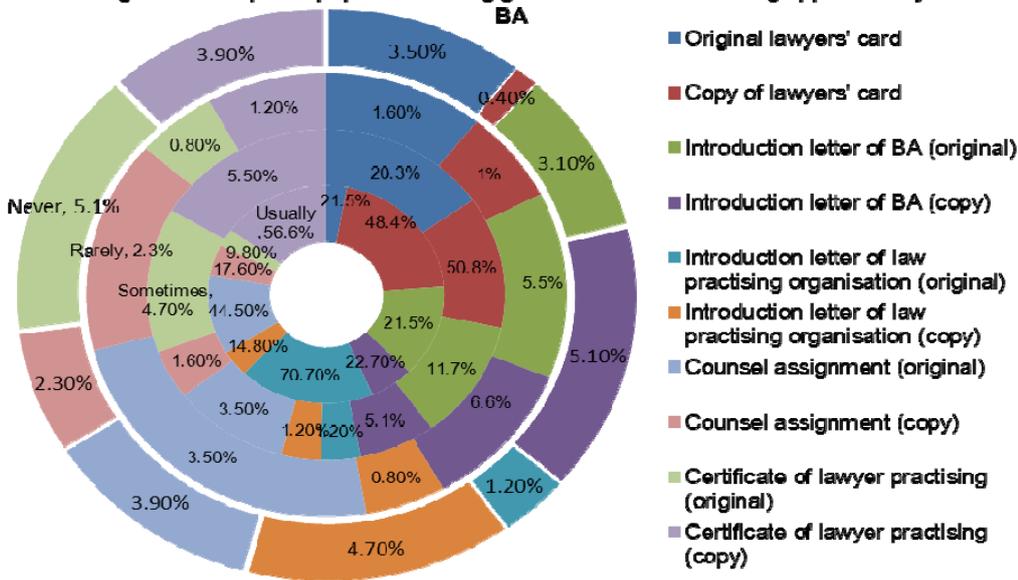


Advantages for lawyers in mandatory cases are varied. There may be advantages ‘in the grant of the COD’, ‘in communication with the defendant’, or ‘in participation in the interrogation sessions’, etc. (see Figure 28). Some lawyers added that when they just commenced their professional career, they really wanted to participate in mandatory cases to gain experience; especially as they believed they may be more supported by bodies conducting legal proceedings to take part in various procedural activities than they would be in normal cases.

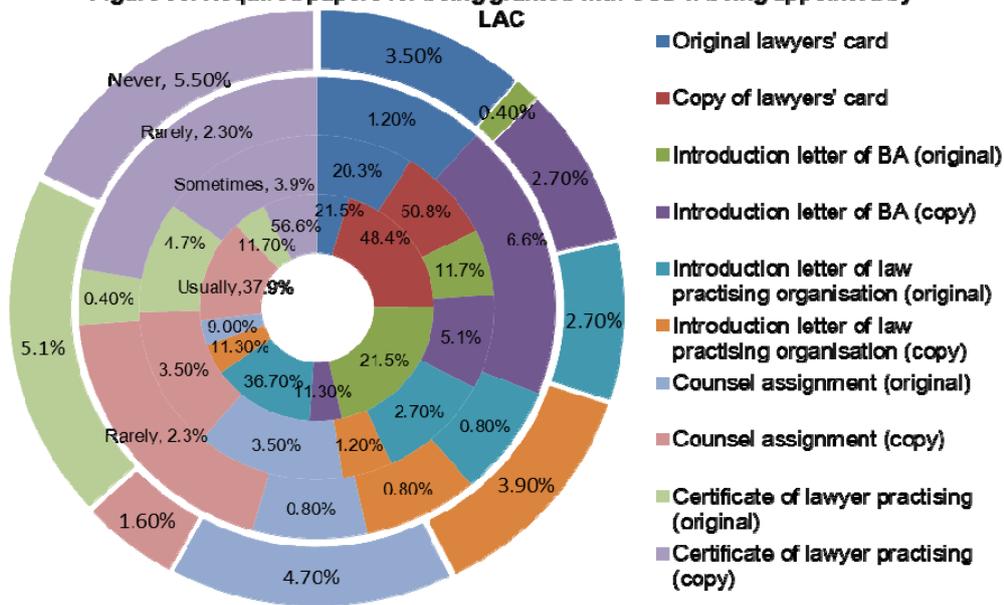


There is a burning issue raised by several lawyers with respect to Certificate of Counsel (COD) since the promulgation of the CPC 2003. In mandatory cases or cases assigned by LACs, it is believed that the counsel is usually more facilitated in obtaining the COD than those in normal cases (See Figure 27 and 28).

**Figure 29: Required papers for being granted with COD if being appointed by BA**

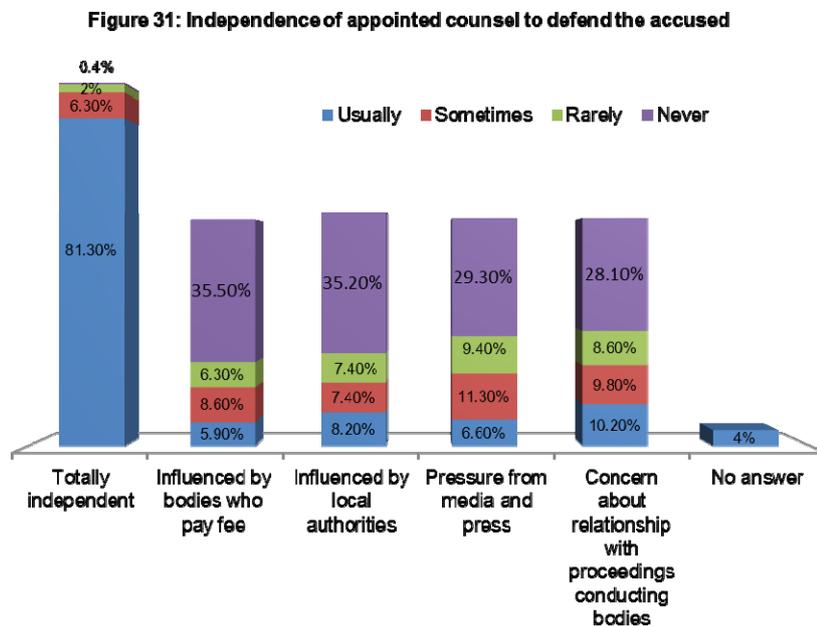


**Figure 30: Required papers for being granted with COD if being appointed by LAC**



In spite of such advantages, counsel in mandatory cases still face significant challenges in their practice, for example, their independence and the pressure of bodies conducting legal proceedings, in abiding by the provisions on mandatory counsel as stipulated in Article 57 of the CPC.

**Challenges on the independence:** as mentioned, a lot of lawyers participate in mandatory cases due to a personal relationship between them or their law practising organisations and the officials handling the case. However, most lawyers thought that they were ‘totally independent’ in mandatory cases (see Figure 31).



Interviewed lawyers stated further that several mandatory cases were ‘key’ or ‘serious’ cases; therefore, public opinion and pressure from the local authorities on the settlement of cases seriously impacted the independence of their professional judgment of the counsel. In several cases, three bodies conducting legal proceedings reached an agreement on settlement of the case, so it was difficult for counsel to defend. It was reflected by a lawyer that the presiding judge of a hearing informed counsel about ‘*the way to settle the case of the competent bodies*’ and asked them to cooperate. All of these factors have significantly influenced ‘the independence’ of lawyers in mandatory cases. To improve their independence, lawyers are currently required to be exceptionally ‘brave’ and ‘clever’. The case of ‘Sam Duc Xuong – a principal paying sexual intercourse with his pupils’ highlights the difficulties faced by lawyers in maintaining their independence under such circumstances. (see the Box below).

**The case of ‘Sam Duc Xuong – the principal making prostitution with his pupils’**

*The accused Sam Duc Xuong, ex principal of Viet Lam high school (Vi Xuyen District, Ha Giang Province) was prosecuted with the ‘crime of sexual intercourse with juveniles’. Being prosecuted together with Sam Duc Xuong were the accused including Nguyen Thi Hang (born in 1991) and Nguyen Thi Thanh Thuy (born in 1992) – former pupils of Viet Lam high school,*

where the accused Xuong had been a principal. Those two girls were prosecuted with the crime of 'procuring prostitutes'. The victims were secondary and high school pupils who studied in Viet Lam high school.

After two months of investigation, the investigation body of Vi Xuyen Police completed the case file and transferred it to the procuracy to issue the indictment and decision to prosecute the case.

The acts of the principal Sam Duc Xuong lasted for a long time. The victims were all pupils. Those facts caused public indignation.

The case was brought to hearing in November 2009 in a closed trial, involving the accused, victims, and persons with related rights and obligations. According to the press, hundreds of people came to the hearing, but they were not allowed to attend<sup>127</sup>.

The counsel for the two accused Nguyen Thi Hang and Nguyen Thi Thanh Thuy was a teacher, not a lawyer. This teacher was convened by the court as the protector for rights and interests of the pupils who were juvenile<sup>128</sup>.

The first instance judgment declared, the defendant Sam Duc Xuong was subject to the sentence of 10 years 6 months of imprisonment for the crime of 'having paid sexual intercourse with juveniles more than once' and had to compensate the victims for his breach of civil responsibilities. The accused Nguyen Thi Hang received the sentence of 6 years of imprisonment and Nguyen Thi Thanh Thuy received 5 years of imprisonment with the crime of 'procuring prostitutes'. All parties appealed the decision.

In the appellate stage, the accused Nguyen Thanh Thuy had a petition to request lawyer Tran Dinh Trien and the accused Nguyen Thi Hang sent a petition to lawyer Nguyen Van Tu to ask for help together with the detailed list of individuals who they and their friends had to 'make love with'. They were all Mr. Xuong's friends. According to Thuy and Hang, they were also 'victims' and 'forced to do so'<sup>129</sup>.

Lawyer Tran Dinh Trien sent a petition to competent authorities to request their thorough consideration of the case. He claimed that the body conducting legal proceedings at first instance level had seriously violated proceeding procedures as follows:

- At the first instance level, the investigation body took testimonies of the two accused who were still juvenile but without an accompanying guardian.

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<sup>127</sup> <http://vietnamnet.vn/xahoi/200911/Xu-kin-vu-an-hieu-truong-mua-dam-tre-vi-thanh-nien-877357/> not a direct link to the article- date of publication?

<sup>128</sup> <http://dantri.com.vn/c20/s20-360441/hieu-truong-mua-dam-nu-sinh-nhan-126-thang-tu.htm>

<sup>129</sup> <http://www.vietnamnet.vn/xahoi/doi-song/201001/Vu-Hieu-truong-mua-dam-hoc-tro-them-tinh-tiet-moi-891643/>

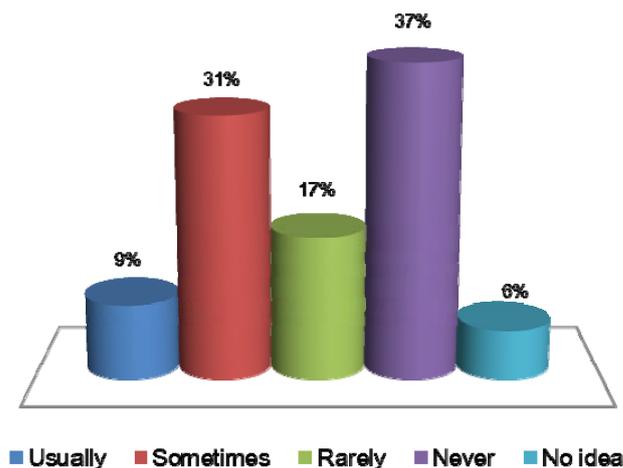
- The two accused were forced to write a note to refuse any counsel to protect their rights and interests.
- The investigation body seriously infringed the rules of detainment with juvenile as specified in Article 308 –CPC<sup>130</sup>.

In the appellate hearing, the counsel of the two accused Thuy and Hang successfully argued that the body conducting legal proceedings at first instance seriously erred in following procedure. They requested the adjudication panel to declare their clients innocent. At the same time, they requested to initiate a lawsuit on falsifying the case file, and to initiate a lawsuit in relation to the new denunciations made by the two accused.

Consequently, the appellate adjudication panel (Ha Giang Province People’s Court) overturned the first instance judgment of the case due to the serious infringements upon procedures of the investigation body and the first instance adjudication panel (the People’s Court of Vi Xuyen District)<sup>131</sup>.

**Pressure from bodies conducting legal proceedings:** in addition to the pressures influencing the independence of lawyers, some lawyers said that they were also put under the pressure by bodies conducting legal proceedings to sign declarations or other documents of the case in order to make the case file plausible. In the course of

**Figure 32: Frequency that appointed counsel is requested to sign in to testimonies or other case documents to make case file proper**



formulating questionnaires, 5 lawyers who participated in the pilot interview by the Research Team all mentioned this phenomenon. The result of the final survey by questionnaire indicates that this phenomenon exists in practice with 57% of respondents indicating that it has occurred at some point (if the criteria of ‘usually’, ‘sometimes’ and ‘rarely’ are all taken into account) (see Figure 32).

Most of the interviewed lawyers

<sup>130</sup> <http://dantri.com.vn/c20/s20-375598/luat-su-vu-hieu-truong-mua-dam-gui-don-kien-nghi-khan-cap.htm>

<sup>131</sup> <http://vietnamnet.vn/xahoi/201002/Huy-an-so-tham-vu-hieu-truong-mua-dam-892525/>

refused to answer the similar answer.

On the other hand, all of the interviewed investigators, prosecutors and judges attested that this phenomenon never happens. They all consider it an illegal act. As mentioned above, two investigators who usually spent their own money paying counsel to participate in mandatory cases confirmed that they only asked the counsel 'to sign some papers to make it convenient for the payment'. Such papers temporarily contained 'no content' because the counsel did not have time to declare or fill the information, thus, the investigators did such work for them.

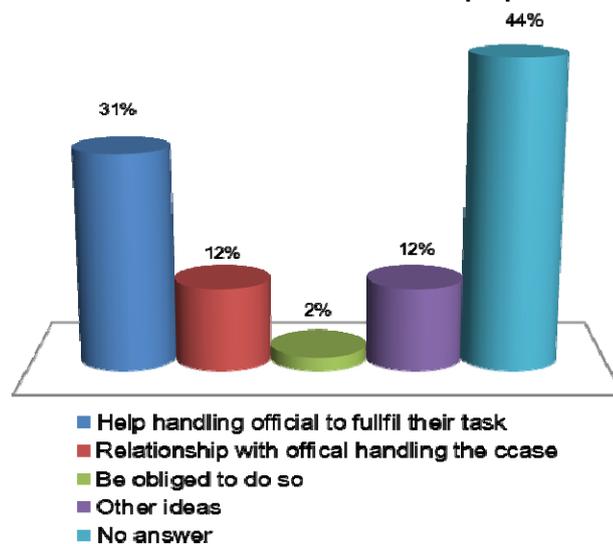
When giving explanations for having counsel sign 'declarations or case documents to make the case file convincing', 31% of lawyers said that they wanted to help 'the handling official to fulfil their tasks' (see Figure 33). Some interviewed lawyers believed that 'circumstances of the case were normally clear', so it did not matter if they signed some papers.

Some lawyers reflected that sometimes handling officials gave them some blank papers for their signatures, explaining that they would rewrite 'the declaration to make it clean so as to avoid the overturn of the case' and so forth. Moreover, appointed counsel in first instance proceedings are often lawyers being subject to the

administration of the provincial BAs who practise within the province and have relationships with the first instance proceedings bodies in the province. As a result, relying on the available personal relationship, handling officials usually ask lawyers to sign some papers. Some lawyers in in-depth interviews said that they were very reluctant to leave their signature on 'blank papers' since they have to bear responsibility, but they still performed the requirement due to complaisance.

In addition, there were 4 lawyers who reflected that they themselves had been directly requested by investigation bodies 'to help in their investigation work' by pressuring a witness or the suspect psychologically or reporting information to the investigation

**Figure 33: Reasons that appointed counsel is requested to sign into testimonies or other case documents to make case file proper**



bodies; or they had heard of that situation. Such lawyers usually had to cleverly 'reject' these requests from investigation bodies.

Such acts are serious infringements to procedural rights; therefore, it is time for competent state authorities to lay down necessary prevention measures.

**Sub-conclusions:**

- Lawyers in mandatory cases often receive more favourable conditions created by bodies conducting legal proceedings than those in normal cases. This may affect the '*right to a fair trial*'; thus, it should be addressed comprehensively.
- The investigation stage is the most difficult stage for lawyers to conduct their defence; meanwhile, the adjudication stage is the most favourable in mandatory cases. It should be remembered that mandatory counsel cases are often characterised by a high penalty (life-sentence or death penalty). This has limited the exercise of the '*right to counsel in proceeding stages with respect to the death penalty*' which has been recognised in international treaties. The failure to facilitate lawyers to participate in investigation stage has also restricted the '*right to sufficient time to prepare for the hearing, including the communication with counsel*'.
- According to the survey results, the bodies conducting legal proceedings at district level normally create more favourable conditions for lawyers than those at higher levels. This is a rather remarkable finding since the jurisdiction of the bodies conducting legal proceedings at district level has just been increased so that they are competent to settle cases of more serious nature compared to their previous jurisdiction, as required by the CPC.
- The defendant/accused in mandatory cases normally accepts counsel and they rarely change the appointed counsel. However, this is not due to their satisfaction with the quality or qualification of the lawyers, but generally a result of 'the poor awareness of the defendant/accused', the advice 'not to change counsel' that the defendant/accused usually receives from judicial staff, or the lack of information about legal counsel and their quality, etc. Regarding this matter, it is necessary to introduce measures to prevent the accused/defendant '*from selecting unqualified or inappropriate legal counsel if they themselves have had suitable lawyers*'. The right to choose their own legal counsel is *jus cogen* (constituent right) of the 'right to counsel', already recognised by international treaties.

- Lawyers involved in mandatory cases normally face challenges with respect to their '*independence*'. Thus, state bodies should adopt particular measures to limit such challenges, for instance, promulgating sanctions on bodies conducting legal proceedings, officials participating in procedural activities, lawyers, and other relevant persons once they commit any act which violate 'lawyers' independence'. The '*independence*' of lawyers in defence activities is required to guarantee that '*the right to counsel is the act protecting the accused's rights*', not '*the act for the assistance of those bodies conducting proceedings*'.
- Possible changes to simplify the procedures by which a COD is granted, and the papers required to be granted with COD, need to be explored. This is not only aimed at saving compliance costs for lawyers and bodies conducting proceedings, but also to ensure the '*right to a fair trial*'. It requires that the SPC, SPP, Ministry of Police, MOJ, VLA and VLF issue common guidelines for administrative procedures in relation to defence activities, including guidelines for types of papers that lawyers have to submit to be promptly granted a COD.
- The Ministry of Police needs to promulgate a regulation to request temporary detention camps to facilitate counsels' communication with the accused/defendant to ensure their '*right to counsel*'. Counsel should be given the same opportunity to communicate with their clients as investigators and prosecutors have to communicate with the defendant/accused. In addition, it is necessary to post materials and locate information boards and signs to provide education on the rights of the defendant/accused in criminal proceedings so as to enhance their awareness and limit power abuse.

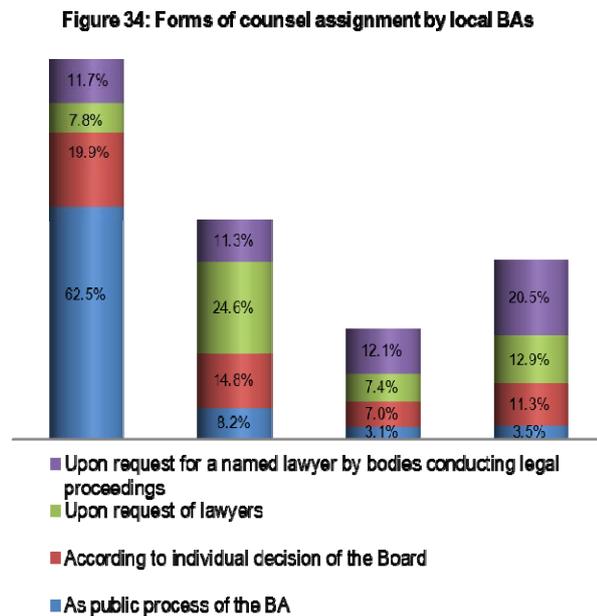
#### **IV. THE ROLE OF BAR ASSOCIATIONS, LEGAL ASSISTANCE CENTRES AND OTHER SOCIAL ORGANISATIONS IN SUPPORTING COUNSEL APPOINTMENT**

##### **1. Bar Associations**

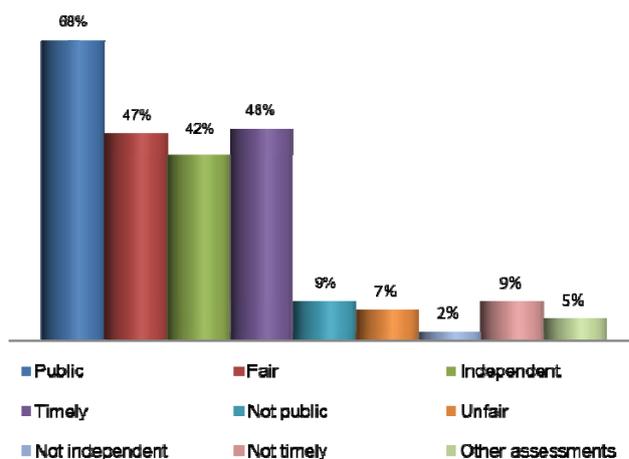
Pursuant to Article 57 of the CPC, in mandatory cases, BAs play the legalised role of appointing lawyers for defence work. As we have analysed above, such role of BAs aim to ensure the independence of lawyers in attending procedural activities.

The vast majority of lawyers believe that case assignment was ‘usually done in accordance with the BA’s public process’ (see Figure 34).

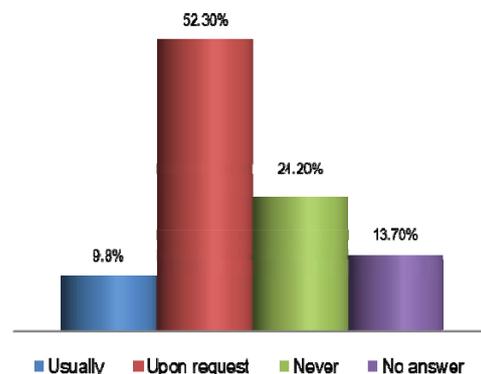
According to the interviewed lawyers, many lawyers do not want to take part in mandatory cases, therefore, BAs must mandatorily appoint lawyers ‘to be responsible for’ such cases. As a result, the appointment process is often publicity to lawyers. This matches the survey result (Figure 35).



**Figure 35: Assessment on counsel appointment by BAs**



**Figure 36: Assessment on support to appointed counsels by Bas**



Via in-depth interviews and the field survey in the 9 localities, it was found that BAs have not promoted their role of appointing lawyers in compliance with the CPC for various reasons. However, counsel appointment is considered public and transparent at some BAs (See Figure 36).

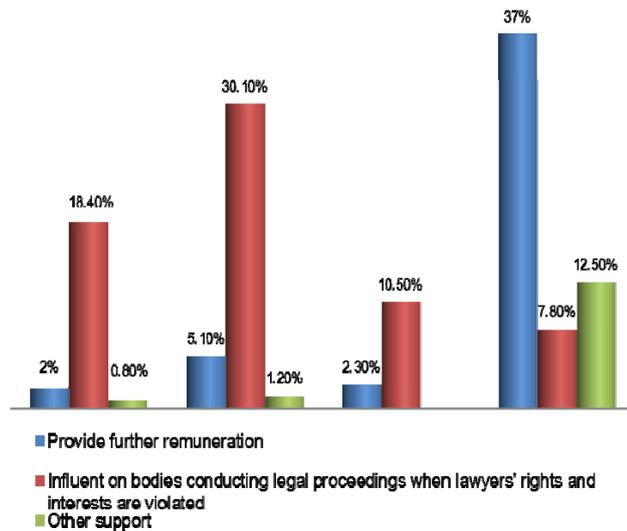
During our survey, the Research Team found that some BAs had brought in measures to provide financial support for activities of appointed counsel, namely compensation. For instance, a BA divides the mandatory cases between all lawyers participating in that BA. Any lawyer who does not participate in defence work for mandatory cases must

contribute money to the BA so that the managing board can seek/invite other lawyers to be involved. The lawyers participating in mandatory defence then receive the amount contributed by those who do not participate to compensate for at least part of their expenses. According to the managing board of this BA, this solution is fully supported by all lawyers in the BA.

Other BAs that were interviewed did not have this kind of financial support system, but they ‘supported or intervened once the rights and interests of lawyers were violated’, for example they may send a complaint to the body conducting proceedings. None of the 9 interviewed BAs have any title or program to honour the lawyers who actively and effectively participated in appointed counsel work. The title ‘The Lawyer for Justice’ of Ha Noi Bar Association is commonly

granted to lawyers who make achievements in their practice, contribute the full member fee and receive no complaints on their practice. The award of ‘The law firm of the year’ and ‘The lawyer of the year’ held by Vietnam Law Newspapers (Phap luat Viet Nam) focus only on financial criteria and amount of work assumed by the law firm or the lawyer honoured. These awards are only considered once the lawyer or the law practicing organisation has financially contributed to the organising committee of the award<sup>132</sup>. This issue should be considered by state bodies (such as the MOJ and DOJ) and VLF, as well as local BAs to institute appropriate mechanisms of encouragement. The issue of awarding lawyers participating in free-of-charge defence or consulting work (pro-bono work) has been popularly applied in several nations in the world, including the USA<sup>133</sup>, Canada<sup>134</sup>, Australia<sup>135</sup> and the United Kingdom<sup>136</sup>.

Figure 37: Forms of support to lawyers from BAs



<sup>132</sup> Vietnam Law Newspaper, *Voting program for: the Law firm and the Lawyer of the year*,

<http://www.phapluatvn.vn/hangluat/201004/Chuong-trinh-binh-chon-1940623/>, Invitation to the Voting program for the Law firm and the Lawyer of the year

<sup>133</sup> American Bar Association,

[http://www.americanbar.org/groups/probono\\_public\\_service/projects\\_awards/pro\\_bono\\_publico\\_award.html](http://www.americanbar.org/groups/probono_public_service/projects_awards/pro_bono_publico_award.html)

<sup>134</sup> Website of Canadian Bar Association, <http://www.cba.org/CBA/awards/main/>.

## 2. Legal Aid Centres

Under the provisions of the CPC 2003, legal aid centres ('LACs') are not entitled to appoint lawyers to participate in mandatory defence work. The function of such centres is to assign counsel for those subject to legal assistance as stipulated in the Law on Legal Aid<sup>137</sup>. As mentioned above, the role of LACs in criminal defence is considered positive.

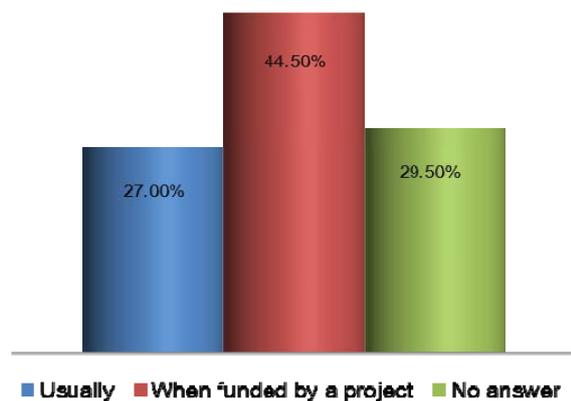
In a locality with few lawyers, prosecutors, investigators and/or judges may have to request the local LAC to appoint a counsel who is a legal aid officer, or a collaborator of the centre to support in mandatory counsel. Because, LAC is cooperating with lawyers belonging to other local BAs.

Interviewed lawyers showed different opinions in judging the legal assistant operations of LACs. The eleven questioned lawyers said that LACs should be the coordinating body for all activities of legal assistance and lawyer appointment in cases with compulsorily counsel; yet five lawyers suggested that legal assistant activities of LACs in defence work had not been effective and there were concerns about the quality of their work. LACs do mainly work through collaborators. The selection of lawyers who participate in proceedings is usually conducted by the LACs officials.

According to legal assistant officials, it is not easy to build up the network of collaborating lawyers. Those who have prestige or experience rarely register to be collaborators of LACs. Some do, but they generally do not accept legal assistant cases, or they do not fulfil their professional responsibility at a high level. LACs usually try to maintain a number of lawyers who are dedicated and have high levels of demonstrated professional responsibility to be their main collaborators.

Recently, the LAC system has received the support of some foreign governments and international organisations. Part of the budget to pay for counsel is funded by these support projects. Several lawyers thought that the rate of

**Figure 38: Assessment on legal aid in appointed cases**



<sup>135</sup> Law and Justice Foundation, [http://www.lawfoundation.net.au/justice\\_awards](http://www.lawfoundation.net.au/justice_awards); Pro - bono conference, <http://www.probonoconference.ca/awards.php>

<sup>136</sup> ProbonoUKnet, <http://www.probonouk.net/>

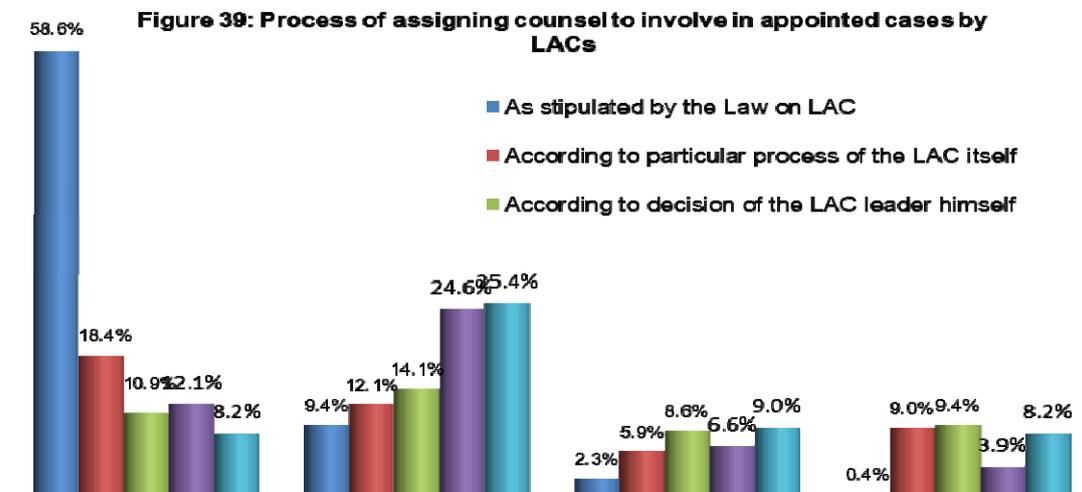
<sup>137</sup> *The Law on Legal Aid*, Article 10

payment from this budget was good (about 1.5 million VND to 2.5 million VND per case); consequently, they actively took part in defence work appointed by LACs (see Figure 38).

In addition, the procedure for compensation payment by LACs is seen by lawyers to be simpler than that of bodies conducting legal proceedings. As affirmed by LAC officials, they always create the most favourable conditions for paying lawyers after they complete the work, which aims to attract lawyers to become involved in legal assistance activities.

LACs usually closely supervise the defence work of the legal assistants and lawyer-collaborators of such centres. Thus, the lawyers/appointed counsel have to provide proof of their work.

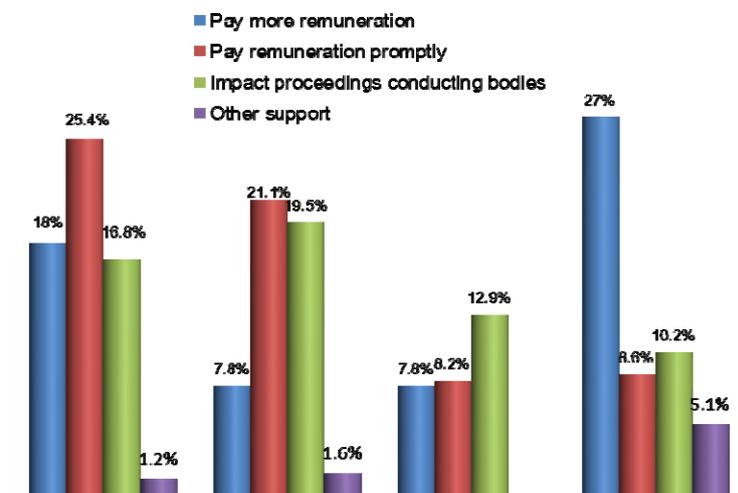
In relation to the procedure for appointing legal assistants or collaborators of LACs, approximately 60% of lawyers said that LACs' appointment of lawyers to participate in mandatory cases was 'in accordance with the law on LA' and their participation frequency was 'Usually' (see Figure 39).



However, some lawyers reflected that several LACs allow lawyers to make their own inquiries about information about LAC for clients who may be entitled to legal assistance in cases since often people are qualified for legal assistance but they are unaware of the programs. Those lawyers may advise and introduce them to LACs to be supported in employing counsel.

Activities of LACs also vary across localities. In each locality, LAC has its own way of carrying out legal dissemination and legal aid activities, which differ from others. One centre may provide support through its budget for lawyers to participate in cases subject to LA (see Figure 40); where, another centre may

Figure 40: Form of support to lawyers by LACs



popularise the lawyers' role in criminal cases by producing a guide on how to invite and contract with lawyers for subjects who need legal aid. Such guiding boards are hung at the head office of bodies conducting legal proceedings and in detention camps.

Some lawyers still revealed that some individuals wished to use the service of LACs with the hope that such service may affect the results of the trial since it is 'by the state'.

### 3. Other social organisations

Pursuant to regulations of the CPC on the appointment of counsel in mandatory cases, only the appointment made through FFC or member organisations of the FFC (assigning counsel for their members) is accepted. However, bodies conducting proceedings rarely request the FFC to appoint counsel. Leaders of local lawyer associations confirmed that they have a huge staff of legally qualified members who may participate in defence work, such as retired but legally qualified judges, prosecutors, and legal experts.

FFC is an organisation stipulated in the Constitution with presence in all 63 provinces of Vietnam and its system spread from central to communal level<sup>138</sup>. There are up to 44 political, socio-political and social organisations who are members of the Vietnamese Fatherland Front, including the Communist Party of Vietnam, General Labour Federation of Vietnam, Farmers' Association and the Lawyers Association<sup>139</sup>.

<sup>138</sup> Website of the Fatherland Front of Vietnam, <http://www.mattran.org.vn/>

<sup>139</sup> Website of the Fatherland Front of Vietnam, <http://www.mattran.org.vn/Home/GioithieuMT/gtc4.htm>

The Lawyer Association is the most long-standing socio-politic organisation working in the field of law. By the end of 2010, the association was present in 62/63 provinces of Vietnam (except for Son La Province) with 62 provincial lawyer associations, 366 district association, approximately 2,000 associations at communal level, and 55 committees at central ministries and agencies<sup>140</sup>. Currently, the Vietnam Lawyer Association has over 40,500 members, including judges, prosecutors, investigators (who account for 46%), lawyers, consultants, and notaries (who account for 8%), members working at institutes and universities (who account for 3.5%), those working in state agencies (who account for 37.4%) and retired members (who account for 5.1%)<sup>141</sup>. For legal consultancy and legal assistance work, the lawyer association system has set up 8 legal consulting centres under the Central association, and 40 legal consulting centres in local associations<sup>142</sup>. According to the Research team's observation of 9 provincial lawyer associations in nine provinces, they all have a legal consulting centre at their office. During our days of survey, we noticed that all of those centres had people coming in for legal education and resources.

In some localities where the BA has few lawyers or the BA has not been established, the body conducting legal proceedings is obliged to request that the local Fatherland Front Committee or Lawyers Association of the province appoint persons to participate in the defence work. Leaders of the Lawyers Association in the provinces who participated in in-depth interviews said that sometimes their LCC receives proposals from individuals for defence assistance in criminal and civil cases.

Through our in-depth interview, leaders of local lawyer associations revealed that the jurists or legal executives participating in LACs of the association are professionals with enthusiasm, dedication, experience and morality. They join the work of law consultancy and legal services due to their desire to assist the poor in particular, and the society in general. They themselves often have income from their pension, thus, they are not particularly concerned with compensation or expense.

In order to improve further the quality of legal consultancy and assistance, the Central Committee of the VLA usually organizes training and fostering activities for experts and

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<sup>140</sup> Website of Vietnam Lawyer Association, Work report of northern area, 19/11/2010, <http://www.hoiluatgiavn.org.vn/content/view/428/1/lang.vietnamese/>; Thang Van Phuc & Nguyen Minh Phuong, *The roles of social organizations in social development and management*, National Political – Truth Publishing House, 2010, 277-287.

<sup>141</sup> Thang Van Phuc & Nguyen Minh Phuong, *The roles of social organizations in social development and management*, National Political – Truth Publishing House, 2010, 277-287.

<sup>142</sup> Thang Văn Phúc & Nguyễn Minh Phương, *Vai trò của các tổ chức xã hội đối với phát triển and quản lý xã hội*, NXB Chính trị Quốc gia – Sự thật, 2010, 277-287.

consultants, which combine to broaden and increase knowledge in the field of law. Training programs have included training about laws on WTO integration, training on legal consulting skills and training on issues relating to HIV/AIDS<sup>143</sup>.

With respect to other associations or unions being members of the FFC, most of them do not specialise in 'proceedings participation' but they have implemented legal consulting activities in accordance with Decree No. 77/2008/ND-CP dated 16/07/2008 on legal consultancy (in replacement of Decree No. 65/2003/ND-CP dated 11/06/2003 of the Government on organisation of legal consulting activities). Vietnam General Confederation of Labour, Vietnam Women Union, Ho Chi Minh Communist Youth Union, Vietnam Farmers Association, and Vietnam Veterans Association are units that implement activities around legal consultancy and law dissemination of associations under the FFC<sup>144</sup>. According to the interviewed lawyers, prosecutors, and judges, the bodies conducting legal proceedings at their provinces have never proposed social organisations under the FFC should assign counsel, except for cases where a direct request has been made to the FFC or the provincial Lawyers Association as discussed above.

The in-depth opinions also highlighted that it has not been clearly explained in Article 57 (clause 2) of the CPC whether the counsel assigned by the FFC or its member is necessarily required to be a lawyer. According to Article 56 of the CPC, 'counsel' may be a 'people's advocates' or 'the legitimate representative of the detainees, the accused/defendant; however, in fact, the bodies conducting legal proceedings have only granted CODs to lawyers and only lawyers receive their support as the conditions and papers for a counsel to be granted with a COD are specific to Lawyers<sup>145</sup>. The SPC has issued a document requesting courts to provide a definition of 'counsel', in which, 'they should mention the necessary conditions and procedures to be recognized as a people

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<sup>143</sup> Thang Van Phuc & Nguyen Minh Phuong, *The roles of social organizations in social development and management, National Political* – Truth Publishing House, 2010, 277-287; Website của Hội Luật Gia Việt Nam, <http://www.hoiluatgiavn.org.vn>.

<sup>144</sup> Project VIE 02/015: *Supporting the Implementation of the Development Strategy for Vietnam Legal System to 2010*, Legal Assistance in Vietnam: Status quo and orientation for perfection, Judicial Publishing House, 2005; Central Committee of Vietnam Farmers Association, *Mechanism for cooperation between the state and socio-politic organizations in law dissemination and education*, Democracy and Law Magazine, Special Volume on 'Construction of the Law on Dissemination, propagandisation and education of law', 2010; Tran Thi Thanh Ha, *About the role of trade unions at all levels in legal consultancy provided to employees in Vietnamese enterprises currently*, State and Law Magazine, Volume 5, 2009

<sup>145</sup> *Law on Lawyers*, Article 27

counsel'<sup>146</sup>. However, at present, there has been no specific regulation on the documents for granting CODs to people's advocates; thus, the Research Team has not found any people's advocates granted a COD.

**Sub-conclusions:**

- It is necessary to continue maintaining the role of BAs in the appointment of lawyers where appointment of counsel is mandatory due to the requirements of publicity, fairness, independence, and timeliness. However, several conditions are recommended to ensure the effectiveness of this work, including:
  - o The procedure to appoint lawyers in mandatory cases should be public, transparent, and relevant to the specialty and capacity of lawyers. BAs should have their own regulations regarding such procedures to enable them to cooperate with bodies conducting proceedings and lawyers.
  - o BA's should be directly responsible for the payment of compensation to lawyers appointed by BAs. This issue needs to be addressed through a legal normative document.
  - o It is recommended that measures are introduced to limit intervention by bodies conducting proceedings or handling officials into lawyer appointment by BAs.
- It is recommended that the CPC be amended to allow LACs and some socio-political organisations under the FFC, such as VLA, to become involved in appointing counsel for mandatory cases. This will increase the number of professionals able to be drawn upon for mandatory counsel. The participation of socio-political organisations under the FFC in mandatory defence should not be confined to '*members of such organisations*', and should be available to qualifying persons generally.
- The CPC, or its guiding documents, should contain specific regulations on the necessary criteria, conditions, and procedures to recognise a 'people's advocate' as counsel and to grant CODs to 'people's advocate'. The important role of lawyers to the policy of professionalizing the defence task in general, and counsel mandatory cases in particular, should be further considered. The system of 'people's advocates' should be continually maintained in localities with few lawyers. This is an issue not

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<sup>146</sup> Official letter of the SPC No. 117/2004/KHXX dated 22/07/2004 on implementing the execution of the CPC 2003.

only for Vietnam but also other countries such as Russia Federation, Republic of Korea, China, and Japan<sup>147</sup>.

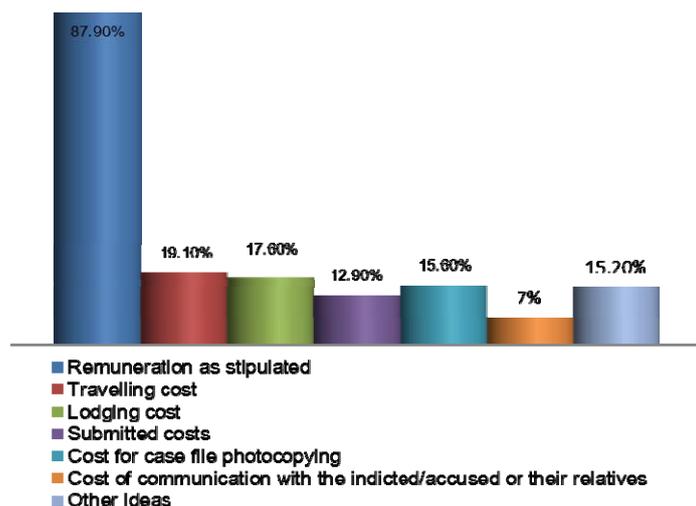
- The regulations of the CPC need to ensure the independence of lawyers, LACs, and socio-political organisations in appointing lawyers and/or assigning lawyers, legal assistants, or jurists to participate in defence work for cases requiring mandatory counsel. The CPC or internal regulations, rules, or charter of BAs should also limit lawyers' agreements with the bodies conducting proceedings in mandatory cases.
- State management over the participation of lawyers, legal assistants, or jurists must clearly and specifically determine the obligations and responsibilities of participants. When such persons conduct mandatory defence or legal assistance to the poor and subjects entitled to priority policies, it is their responsibility to the community, not merely an act originating from voluntariness or charity. Approaching mandatory counsel in this way may better bind and control the responsibilities of the participants, thus improving the qualities of such activities.
- Compensation and the mechanism to pay compensation to counsel or counsel in mandatory cases need to be perfected. This issue shall be more carefully analysed and discussed below.

## V. COMPENSATION MECHANISM FOR APPOINTED COUNSEL

### 1. Budget and compensation value of bodies conducting legal proceedings

In accordance with Inter-Circular No. 66/2007/TTLT-BTC-BTP of the Ministry of Finance and Ministry of Justice which provides guidelines for the level of compensation and payment of lawyers participating in proceedings upon request of

Figure 41: Allowances that counsel receives when involving in appointed cases



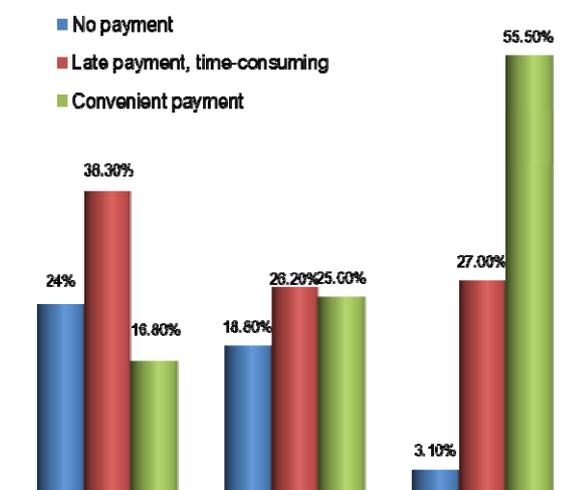
<sup>147</sup> Sydney University, *Research Studies on the organization and functions of the justice system in five typical countries including China, Indonesia, Japan, Republic of Korea, and Russian Federation*, 2010

bodies conducting legal proceedings ('Circular 66'), lawyers are paid 120,000VND for one working day or 60,000VND for a working session. Circular 66 stipulates a wide range of activities for lawyers which must be paid by the state budget<sup>148</sup>. However, according to the questioned lawyers, the amount of compensation is too low (57% of respondents) (see Table 9). Usually, appointed counsel could receive maximum VND500,000 for all their work from the investigation stage to first instance trial.

Compared with the market compensation for lawyers in 2010, a mandatory case in which the penalty for the accused may be life-sentence or death penalty shall result in the fee of 10 to 30 million dong for lawyers in Ha Noi and Ho Chi Minh City, or 4 to 15 million dong for lawyers in Dien Bien, Lang Son, An Giang, Da Nang, Lam Dong, or Khanh Hoa. The fee varies depending on evidence, materials of the case file as well as the point from which lawyers commence their participation in the case. The clients are usually requested to provide a down payment of compensation to counsel (from 30% to 50% of the total compensation), and the remaining fee is usually required to be paid in full before the presence of counsel at the hearing. If the counsel needs to undertake significant travel to defend in other provinces, for verification purposes, or to interview the defendant, accused, or witnesses, the travelling and accommodation expenses for lawyers will be paid in full based on agreement with the clients<sup>149</sup>.

However, lawyers who have participated in mandatory cases revealed that they were not paid for all circumstances stipulated in Circular 66, such as travelling and accommodation expenses. They were only paid for days working at the office of the bodies conducting legal proceedings, and they had never been paid for time spent travelling or travelling costs (train fare,

Figure 42: Payment of remuneration by proceedings conducting bodies



<sup>148</sup> Inter-Circular of the Ministries of Finance and Justice No. 66/2007/TTLT-BTC-BTP providing guidelines on compensation level and payment for lawyers in the event where lawyers participate in the proceedings upon request of bodies conducting legal proceedings, Section II, Point 2.

<sup>149</sup> 31 lawyers responded to this question, among which, 19 practise in Ha Noi and Ho Chi Minh City, and the other 12 practise in other areas.

coach fare). Eleven of the 31 lawyers reflected that many bodies conducting legal proceedings usually owed monies to counsel in mandatory cases.

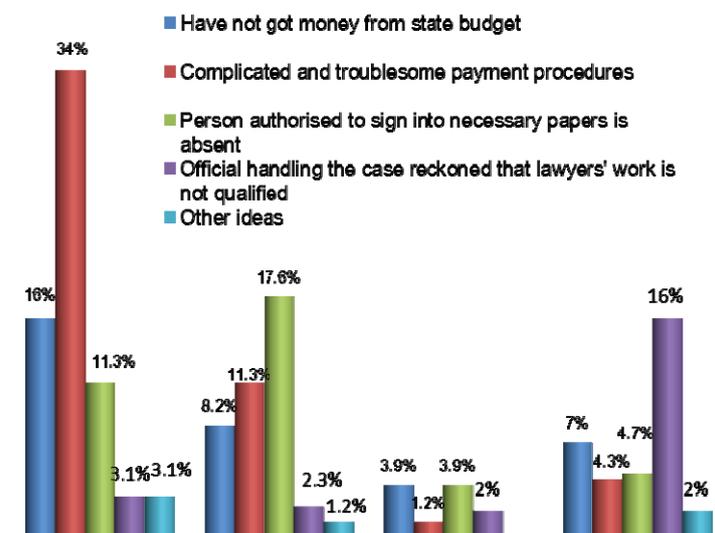
**Table 9: Lawyers’ assessment on the current compensation amount and method of compensation calculation**

Compensation amount		%	Method of compensation calculation		%
Too low		57	Inappropriate		78
Low		33	Acceptable		12
Acceptable		4	Other opinions		7
Other opinions		6	No answer		3
Total		100%	Total		100%

The interviewed investigators, prosecutors, and judges all recognised that they only paid lawyers for their working days and sometimes paid them for the travelling and accommodation expenses for mandatory defence. They admitted the possibility that bodies conducting legal proceedings debited compensation of lawyers..

According to Circular 66, each body conducting legal proceedings must prepare the estimated budget for paying counsels compensation and directly pay this amount to counsel<sup>150</sup>. In practice, some bodies conducting proceedings have made an estimate of the budget for paying lawyers

**Figure 43: Reasons for not paying remuneration of proceedings conducting bodies**



<sup>150</sup> Inter-Circular of the Ministry of Finance and Ministry of Justice No. 66/2007/TTLT-BTC-BTP providing guidelines for compensation level and payment for lawyers when they participate in proceedings upon request of bodies conducting legal proceedings, Section II, Points 4 and 5.

in mandatory cases through judicial assistance or support activities (as described in the box below).

***The Budget for judicial assistance activities of an investigation body***

*The leader of an investigation body at the provincial level revealed that the budget for paying compensation to lawyers who take part in the procedural activities with the investigation body in mandatory cases is taken from the budget for judicial assistance.*

*Annually, the investigation body of the province prepares the estimate cost for judicial assistance activities from 1 to 3 billion VND. However, the actual amount granted is only around 700 million VND.*

*The amount spent on judicial support includes payment for forensic examination, appointed counsel and so on. Consequently, the 700 million VND is not sufficient to pay for even one judicial activity, for instance, forensic examination. For each human body requiring forensic examination, the investigation body must spend about 7 million VND. With the current number of traffic accidents, each year the province has more than 100 fatal traffic accidents and this alone costs more than 700 million VND. The entire budget for all judicial assistance activities.*

*With the abovementioned budget distribution, the investigators have to save the budget allocated for case investigation as much as possible. Therefore, they cannot invite lawyers to participate in various investigation activities especially over several working days.*

The story of 'budget for judicial assistance activities of an investigation body' summarised above has partly explained 'the reasons for the bodies conducting legal proceedings' failing to make payment for compensation' to counsel involving in mandatory cases.

The lawyers answering the questionnaire survey asserted that 'the complicated and prolix procedure for payment' was the main reason behind lawyers not being compensated. A further reason was identified where 'the money from the state budget has not been disbursed' (see Figure 43).

However, the matter of low compensation and late payment to appointed counsel in mandatory cases is not the solely a Vietnamese problem, but also a problem in other countries such as the Russian Federation<sup>151</sup>.

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<sup>151</sup> Sydney University, *Report about Russian Federation: Research studies on the organization and functions of the justice system in five selected countries including China, Indonesia, Japan, Republic of Korea, and Russian Federation*, 2010.

As we have mentioned, several lawyers stated that they engaged in mandatory cases due to reasons other than compensation. According to some lawyers responding in person, they have never received the compensation from investigation bodies or procuracies (see Figure 42). But all in-depth interviewed lawyers admitted that the courts usually paid compensation to lawyers who participated in mandatory cases more easily and conveniently when compared to other bodies conducting proceedings. A leader of a provincial court said that the payment of compensation to appointed counsel was made immediately after the conclusion of hearings, and this was done by the court clerk. This leader also revealed that without this mechanism for compensation payment, it would be not easy to invite lawyers to attend hearings. If this were the case, the hearing may be adjourned to wait for the participation of lawyers in accordance with procedural provisions.

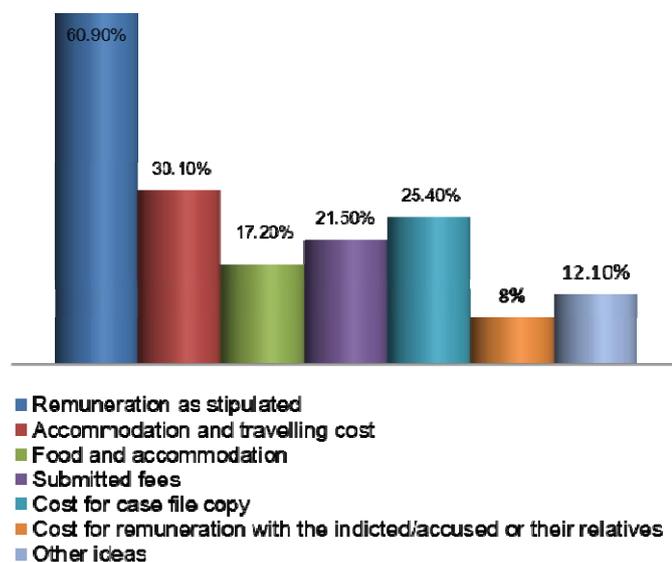
The mechanism for direct compensation by bodies conducting legal proceedings to lawyers raises the matter of ‘the independence’ of lawyers. Supposing that the bodies conducting legal proceedings have sufficient budget to pay lawyers, there is still a question about the relationship between ‘the service provider’ and ‘service requester’ for lawyers. Therefore, the mechanism of compensation payment must further be thoroughly studied.

## 2. Compensation amount from LACs

The lawyers interviewed in-depth and surveyed confirmed that LACs often accept a higher number of working days compared to that accepted by bodies conducting legal proceedings; LACs also make payment to legal counsel on the basis of 120,000VND per working day of lawyers or legal assistants (Comparing Figure 44 and 41).

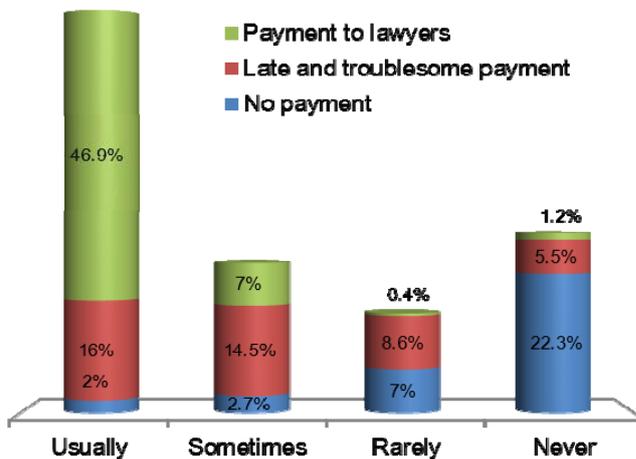
As mentioned above, the rate of payment for each case subject to legal aid is roughly 1.5 million VND to 2.5 million VND, depending on its nature and extent. Twenty-three per cent of lawyers believe this rate is ‘too low’ and 41% believe it is ‘low’ (see Table 10).

**Figure 44: Allowances for lawyers when involving in cases with legal aid**



These are still positive rates compared to those offered by the same participants in their evaluation of the compensation amount paid by bodies conducting legal proceedings.

**Figure 45: Payment of remuneration by LACs**



Through the survey and in-depth interviews, LACs received a better report compared to bodies conducting legal proceedings of making ‘usual’ payment to lawyers (making comparison between Figure 45 and Figure 42). However, 16% of lawyers ‘usually’ have to go back and forth to receive the payment made by LACs.

All interviewed officials of LACs reported to the Research Team that they always make full payment to lawyers who seriously conduct their defence work in cases with LA. Those counsel who ‘only send their written pleadings, and avoid attending the hearing’, ‘neither study the case before hearing, nor meet with the defendant before the hearing’, ‘claim for more money from the family of the subject of LA’, and ‘commit other acts that are strictly forbidden in the Law on Legal Aid or the Law on Lawyers’ will not get paid. LACs usually assign a LA official to keep track of counsel’s defending activities. According to the interviewed officials of LACs, they have never received complaints nor been sued by the lawyers whose payment have been refused due to the acts mentioned above.

LACs of local provincial lawyer associations only pay fees to lawyers who are collaborators participating in consulting activities. The compensation varies between the various centres and is usually stipulated by the Provincial Lawyers Association. All questioned leaders of Provincial Lawyers Association asserted that the fee collected from the people and paid to collaborators were entirely based on the actual income of the local people, payment by LACs under the DOJ or the payment by the bodies conducting legal proceedings. However, as we have mentioned, lawyers who collaborate with LC under the local Lawyers Association usually coordinate with the Association without much attention to the compensation from legal assistance activities at the centre.

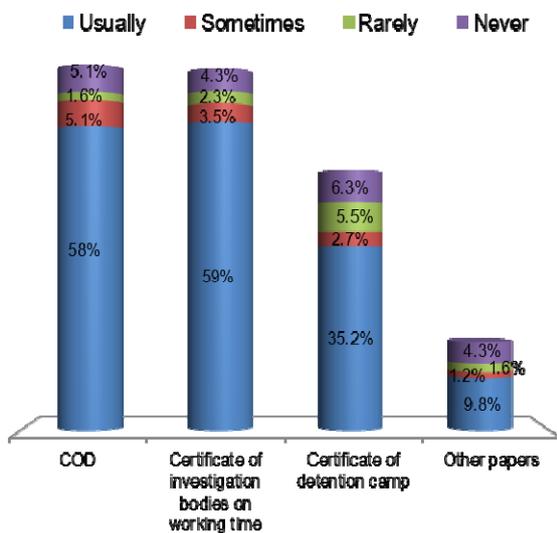
The independence of lawyers or legal assistants would be more protected with the compensation paid by LACs than that paid by bodies conducting legal proceedings.

**Table 10: Assessment on compensation amount and method for compensation calculation of LACs**

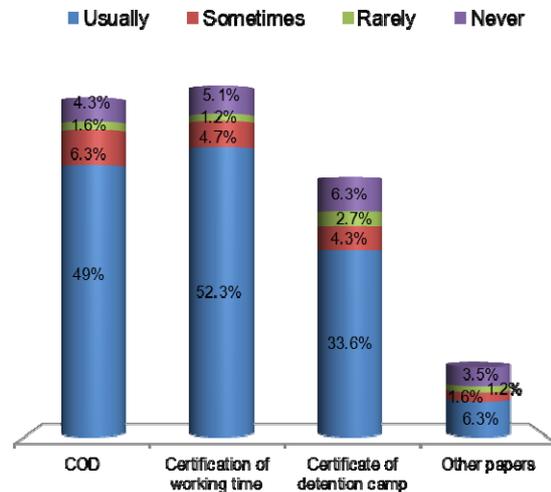
Compensation amount	%	Method of compensation calculation	%
Too low	23	Inappropriate	52
Low	41	Acceptable	16
Acceptable	12	Other opinions	6
Other opinions	4	No answer	26
No answer	20		
Total		Total	
100%		100%	

**3. Procedures for compensation payment from bodies conducting legal proceedings**

**Figure 46: Required papers for receiving remuneration of appointed cases from investigation bodies**

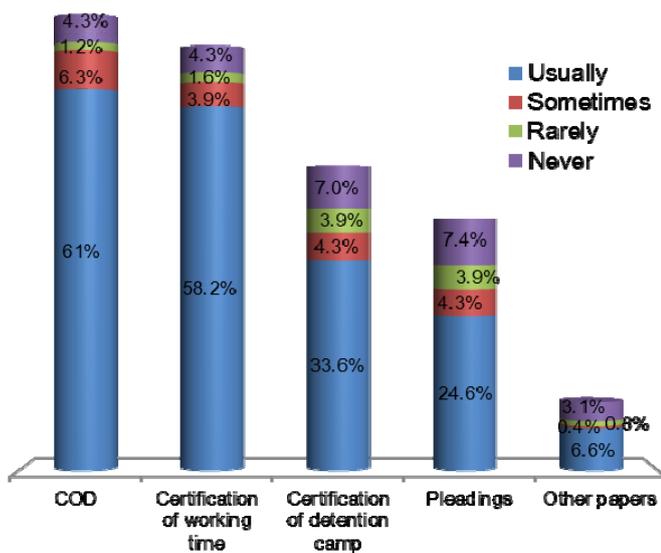


**Figure 47: Required papers for receiving remuneration of appointed cases from procuracies**



The procedures to pay for compensation of bodies conducting legal proceedings were evaluated as ‘complicated and troublesome’ by various lawyers (see Table 6, Figure 42, and Figure 43). The interviewed lawyers complained that there were too many different papers required to be completed by lawyers before payment (Figure 46, Figure 47 and Figure 48).

**Figure 48: Required papers for receiving remuneration of appointed cases from courts**



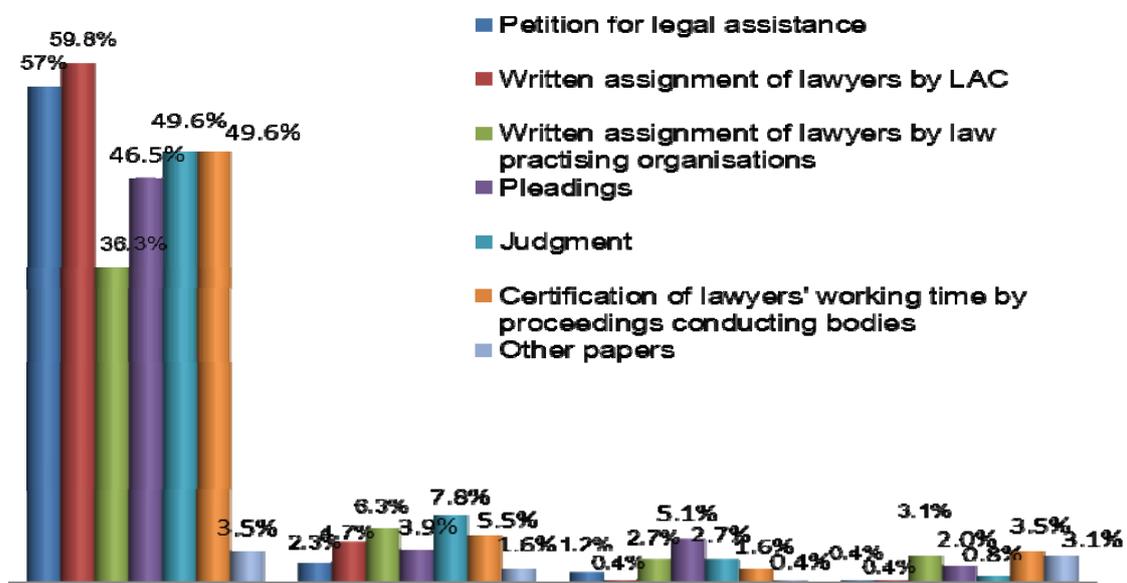
In order to receive the relevant payment, lawyers have to obtain confirmation of the handling official of the case regarding the duration of their work with the body conducting legal proceedings. In the event that lawyers meet the defendant/accused in prisons or temporary detention camps, they must obtain the confirmation of the prisons or temporary detention camps with respect to the date and time of the meeting.

Additional administrative formalities are also required for such confirmation, such as: Step 1 – ‘taking certification by the handling official on the days of working’; Step 2 – ‘taking approval from the manager of the body conducting proceedings’; Step 3 – ‘submitting all certifications and payment requests to the finance division of the body conducting proceedings to receive compensation’. If lawyers could meet all the requirements mentioned above, the payment could be completed within some hours only. However, 26 of 31 interviewed lawyers explained that they could not get all the certifications in one day, thus, they reluctantly to not pursue such compensation since they did not want to waste time travelling back and forward when the final amount may be rather modest (only 60,000 to 120,000 Vietnam dong).

#### 4. Procedures for compensation payment from LACs

Procedures for payment of compensation by LACs, require lawyers or legal assistants to submit 6 kinds of papers under the LAC system to receive the payment (see Figure 49). Interviewed lawyers showed that procedures of LACs require the sufficiency of papers which are not difficult for lawyers to obtain such as Application, written judgment and pleadings of lawyers. Such procedures are still cumbersome, but according to two of the responding lawyers, when compared to other methods they are better at ensuring payment.

**Figure 49: Required papers for receiving remuneration of cases with legal aid**



### 5. Additional compensation for lawyers

One troublesome practice identified by lawyers is that the appointed counsel in mandatory cases can collect additional fees or compensation from the relatives of the defendant/accused. One per cent of lawyers involved in the survey confirmed that this practice ‘Usually’ occurs, while 16% of lawyers indicated that it ‘sometimes’ occurs (see Figure 50). It must be acknowledged that this is an illegal act, therefore, a lot of lawyers cannot publicly admit the occurrence of this act. However, the survey results confirm that the practice exists.

As we have mentioned repeatedly in this paper, the participating lawyers have indicated that compensation amount paid for representation in mandatory cases is too low, therefore, they observed that they could not ‘pay all their attention and interest’ into the defence work. Two lawyers revealed that some defendant/accused or their family who clearly understood this matter would find a way to give further compensation to the appointed counsel.

According to 6 lawyers, in many circumstances, the appointed counsel are those who have personal relationship with the handling official of the body conducting legal proceedings. Acknowledging this fact, the defendant/accused recommended the lawyer to become the bridge between them and the handling official with an expectation of a reduction of their penalty (‘corruption’). Such phenomenon was confirmed to ‘exist’ by the interviewed lawyers.

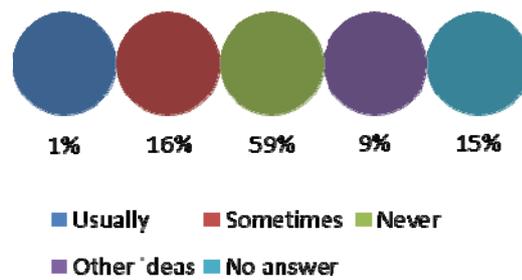
As discussed above, a BA will give higher compensation to appointed counsel. In addition to the amount paid by the bodies conducting legal proceedings, the appointed counsel receives a further VND120,000 per working day by BA, and half-day of work is rounded to one day. This payment is public to all members of the BA. This is not a high amount, but it has helped to further support lawyers who are involved in the work. According to the management board of this BA, such expenditure also aims to improve the lawyers’ awareness of their social responsibilities.

At a BA with limited budget and few member lawyers, the BA has proposed that the provincial People’s Committee or DOJ spend a part of its budget supporting appointed counsel. Although this amount is not much, it works as an effective encouragement to lawyers and has partially compensated lawyers who participate in mandatory defence but face difficulties in taking compensation from the bodies conducting proceedings.

**Sub-conclusions:**

- The procedure for payment by bodies conducting legal proceedings needs to be changed due to the incongruence between the procedure and the policy of

**Figure 50: Possibility of charging more by lawyers against the accused/indicted's relatives**



administrative reform and judicial reform. Changes should be enacted to create favourable conditions for participating lawyers and also to ensure the right to counsel of the people.

- It is recommended that the budget pay for appointed counsel is separated from the budget for judicial assistance of investigation bodies to ensure the payment of lawyers.
- In the short term, the bodies conducting legal proceedings need to reform their procedures to pay lawyers. In the future, it is necessary to set up a new model for compensation payment to lawyers participating in mandatory cases. It is better not to let bodies conducting legal proceedings make the payment for lawyers since this cannot assure the independence of those lawyers. The bodies newly proposed to do this task are BAs and/or LACs.
- It is necessary to stipulate a clear and concrete sanction for circumstances where lawyers receive money from both the state budget and the people. If this amendment is not adopted, the practice will distort the nature of 'counsel appointment' in criminal cases.

## PART 4

### CONCLUSIONS AND RECOMMENDATIONS

As we mentioned at the outset of this report, the 'right to counsel' is a *jus cogens* in the 'right to a fair trial' which has long been recognised in international treaties and the laws of Vietnam. The Vietnamese people have full 'right to positive counsel' – which originates from their own desires and need, and also the 'right to mandatory counsel', or 'right to appointed counsel' – which originates not only from their own desire, but also as a result of the responsibility of the bodies conducting legal proceedings. The Study on '*Appointed Counsel in Vietnamese criminal laws and practice*' has attempted to present both the theoretical and practical issues in Vietnam with regard to the responsibility to exercise the 'right to mandatory counsel'.

Several significant policies and guidelines have been promulgated by the Communist Party and the State of Vietnam targeting the 'right to a fair trial', including Resolution No. 48/NQ-TW of the Politburo on the Strategy for construction and perfection of Vietnamese legal system to 2010 with vision to 2020, Resolution No. 49/NQ-TW of the Politburo on Judicial Reform Strategy to 2020, Resolution No. 17/NQ-TW dated 1

August 2007 of the fifth Conference of the 10<sup>th</sup> Central Party Committee, the Criminal Procedure Code, the Law on Lawyers and the Law on Legal Aid. This has demonstrated the humanity of Vietnam's Government as well as its respect for the internal commitments of Vietnam.

To realize these policies of the Party and the State, procedures need to be changed and perfected in strict compliance with the policies with the aim of *'improving the quality in activities of judicial bodies and the quality in litigation at all adjudication trials, which is seen as the turning key of judicial activities; and gradually socializing some judicial activities'*<sup>152</sup>

At present, the number of lawyers in Vietnam is still modest, and the allocation of lawyers in different areas is not sufficient to satisfy the people's need in judicial activities. To attract lawyers to participate in mandatory defence work, the State needs to not only call on the social responsibility of lawyers, lawyer organisations, or other private organisations, but also to create concrete financial conditions, policies and mechanisms and extend the pool of professionals able to participate in mandatory defence until there are enough legal professionals to meet the needs of the community.

Through this study, the Research Team has found that the execution of Party policies and legal regulations around the 'right to a fair trial' and the 'right to mandatory counsel' needs further improvement in some areas. For instance, counsel, counsel appointment mechanism, subjects allowed to appoint counsel, mechanism for compensation to appointed counsel, and incentive regimes and measures to encourage qualified persons to become involve in the appointed defence work should all be enhanced. Therefore, the Research Team would like to recommend the following:

### **1. Subjects acting as counsel**

- Those able to act as counsel in mandatory cases should be extended to include, for example, lawyers who are the collaborators of LACs and socio-political organisations under the FFC.
- MOJ, Departments of Justice, VBF, local BAs and LACs should allow law practicing organisations and individual lawyers to register and recommend other voluntary methods to involve counsel in appointed defence work or legal aid work.
- The content of state governance over the involvement of lawyers, legal assistants, and jurists/legal executives in appointed defence work must specify

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<sup>152</sup> Resolution No. 49/NQ-TW, Point 2, Section III

clearly the obligations and responsibilities of those involved. When these professionals are involved mandatory defence work, or legal aid for the poor or subjects entitled to receive special policies, they should be awarded wither by honours or rewarded with a reduction of their financial obligations to the state. This approach may work better to bind and control the responsibilities of those involved to enhance the quality of their work.

## **2. Counsel appointment mechanism**

- The current mechanism to appoint counsel through BAs and FFC under the provisions of the CPC, and assignment of counsel to take part in cases subject to legal aid through LACs under applicable laws, are considered appropriate and could guarantee the '*independence*' in counsel appointment mechanism. However, attention should also be paid to guarantee the strict execution of this appointment mechanism.
- In order to enable the timely involvement of counsel in proceedings (including legal counsel, legal assistants), it is necessary to simplify administrative judicial procedures. BAs need to set up a process for the assignment of counsel making the criteria for selecting counsel for mandatory cases simplified, public, and transparent.
- The CPC, or documents guiding its implementation, need to specify the required criteria, conditions, and procedures for recognizing a 'public counsel' and granting the COD to 'public counsel' in localities with few lawyers. Criteria, conditions, and procedures to be recognised as a public counsel require consideration. However, it is advisable to consider the important role of lawyers in line with the policy to professionalise defence work in general and appointed defence in particular.
- The CPC, or documents guiding its implementation, should be amended to allow bodies conducting legal proceedings or BAs to appoint lawyers in other provinces to become involved in mandatory cases in provinces with limited legal professionals.

## **3. Organisations to appoint counsel**

- The CPC should extend the organisations which are empowered to appoint counsel for mandatory cases further than BAs, FFC or its member organisations (in case of protecting members of such organisations). LCC and FFC members should be allowed to appoint collaborating lawyers, legal assistants or

jurists/legal executives to take part in defence work in mandatory cases. Such involvement of socio-political organisations under FFC should not be confined to appointment to *'their members'* but extended so that lawyers of such organisations are able to act in the defence of non-members. Once this recommendation is adopted, the CPC and Law on Legal Aid must also be amended accordingly.

#### **4. Method for compensation payment**

- The current method to calculate compensation for counsel by bodies conducting legal proceedings must also be amended to guarantee counsels' legitimate rights and interests. A new model for compensation payment to counsel in mandatory cases should be formulated. The bodies conducting proceedings should no longer be responsible for paying counsel since this practice cannot ensure counsels' independence. The bodies newly recommended to assume this task are BAs, FFC, VLA, and LACs.
- The fund for paying appointed counsel must be separated from the budget for judicial support of investigation bodies to guarantee full payment to the counsel.
- BAs should set out criteria to select counsel to participate in mandatory cases and appropriate mechanisms for compensation. In the future, if the budget for mandatory defence work is high, BAs may give competitive offers to lawyers and law practising organisations wishing to participate in this work. Alternatively, in cases where the budget is limited, the Government, MOJ, VBF and BAs should offer awards and honourable titles for lawyers who do this work well so that they can advertise or promote their expertise.
- The MOJ and Departments of Justice need to develop the system of legal aid funding. The model of legal aid funding may encourage a lot of subjects to advocate the legal aid activities and mandatory defence. However, the legal aid fund should not be restricted only to those who fall into exceptional situations of economic difficulty or those who are entitled to receive incentive policy from the State for their merits. Its scope should be widened to subjects who are entitled to appointed defence. Organisations participating in legal aid work or mandatory defence work may compete to assume the work paid for by the fund.

#### **5. Incentive mechanism for appointed counsel**

- The compensation for counsel involved in mandatory cases is too low for them to feel secure in performing the defence work. A new level of compensation should

- be considered by the State to encourage qualified counsel to participate in mandatory cases.
- The MOJ and relevant State agencies should lay down methods and mechanisms to encourage lawyers to act in rural and mountainous regions to further guarantee the mandatory defence in such areas. This could be achieved for instance, by developing the local lawyer contingent or by facilitating lawyers from other localities to gain recognition in the region.
  - It is necessary to have financial support or provide other financial incentives (such as incentives on corporate income tax, personal income tax) for social organisations, law practising organisations, LACs, and lawyers that take part in mandatory defence and legal aid work.

#### **6. Sanctioning mechanism**

- State agencies should introduce specific measures to prevent acts violating the 'independence' of counsel in proceedings activities. The 'independence' of counsel in defence work acts to guarantee *'the right to counsel which is the act protecting the accused's rights and interests'* rather than *'the act for the sake of the bodies conducting legal proceedings'*.
- BAs should also adopt sanctioning measures applied to counsel and law organisations that fail to guarantee their 'independence' in their practice.
- It is also required that sanctions are introduced to regulate cases where the counsel receives compensation from the state budget for mandatory defence but still takes more money from concerned parties.

#### **7. Administrative procedures in relation to defence work**

- Procedures for granting the COD and the papers required should be simplified. This will not only save the compliance cost for counsel and bodies conducting legal proceedings but also guarantee *'the right to a fair trial'*. This matter requires the SPC, SPP, Ministry of Public Security, MOJ, VLA, and VBF to introduce common guidelines on administrative judicial procedures in relation to defence work, including guidelines on papers to be submitted by counsel for the fastest grant of the COD.
- Comfortable administrative judicial procedures would also guarantee the time involving in defence work of counsel is adequate and ensure the strict

implementation of *'the right to have adequate time to prepare for the hearing, including communication with counsel'*.

- Procedures to meet the defendant/accused in temporary detention camps should be studied for improvement so that the effort and cost to counsel of communicate with the defendant/accused is reduced.

## **8. Legal proceedings**

- Legal proceedings need to be amended toward creating favourable conditions for counsel and guaranteeing the fairness between counsel appointed by bodies conducting legal proceedings and counsel invited by the defendant/accused (normal counsel). Counsel should be facilitated from the investigation stage, throughout the proceedings.
- The investigation stage is still the most difficult stage for counsel to conduct their defence work while they are more facilitated in adjudication stage of mandatory cases. Specifically in mandatory cases with a high penalty such as imprisonment, this restricts the execution of *'the right to counsel at all stages of proceedings in death-penalty cases'* recognised in international conventions. The failure to facilitate counsels' involvement in the investigation stage also limits the constituent right of the right to counsel, which is *'the right to have adequate time to prepare for the hearing, including communication with counsel'*.
- Legal proceedings need to be reformed in conformity with the spirit of Resolution No. 49/NQ-TW of the Politburo on Judicial Reform Strategy to 2020, with the objective of *'improving adversarial quality in hearings'*. Procedural activities must guarantee equal rights of all parties involved in the proceedings, including the *'prosecuting party'* and the *'defending party'*. Or in another approach, proceedings must ensure that parties involved in the proceedings (investigation bodies, procuracies, counsel, accused) have equal opportunity to present and prove the objective truth and the courts (as the embodiment of justice) shall judge.

## ANNEX 1: FIGURES ON CASES WITH LEGAL AID

### Total number of persons enjoying legal aid services

(From 01 October 2008 to 30 September 2009)

In accordance with Form 17-TP-TGPL promulgated in attachment with Circular No. 05/2008/TT-BTP

No	Agency	The poor	Persons dedicated to the National revolution	The elderly	Children	Disabled people	Ethnic minorities	Others	Total
1	An Giang DOJ	2,257	144	41	117	25	475	727	3,786
2	Binh Dinh DOJ	693	692	269	356	71	590	1,253	3,924
3	Binh Duong DOJ	140	136	0	9	0	7	3,328	3,620
4	Binh Phuoc DOJ	287	132	1	10	3	246	819	1,498
5	Binh Thuan DOJ	755	533	499	338	79	461	1,718	4,383
6	Bac Giang DOJ	544	320	31	29	20	131	622	1,697
7	Bac Kan DOJ	360	42	0	4	3	262	0	671
8	Bac Ninh DOJ	71	118	0	48	0	0	165	402
9	Bac Lieu DOJ	684	107	0	11	0	37	0	839
10	Ba Ria – Vung Tau DOJ	461	369	112	180	50	121	111	1,410
11	Ben Tre DOJ	140	95	5	6	0	0	75	321
12	Ca Mau DOJ	444	611	2	12	2	189	422	1,682
13	Cao Bang DOJ								
14	Can Tho DOJ	1,013	181	5	1	2	47	205	1,454
15	Dak Lak DOJ	219	55	5	40	1	1,253	162	1,735
16	Dak Nong DOJ	1,162	324	3	0	0	1,390	488	3,367
17	Da Nang DOJ	635	439	9	235	17	46	1,238	2,625
18	Dong Nai DOJ								
19	Dong Thap DOJ	1,160	535	47	2	97	0	697	2,538
20	Dien Bien DOJ	88	279	0	1	0	3,986	0	4,354

21	Gia Lai DOJ	96	26	0	85	0	952	81	1,240
22	Ha Giang DOJ	110	101	53	20	33	582	0	899
23	Ha Nam DOJ	311	112	75	10	42	0	56	606
24	Ha Noi DOJ	300	170	6	689	16	14	751	1,946
25	Ha Tinh DOJ	343	277	7	53	154	0	26	860
26	Hai Duong DOJ	383	341	8	191	12	0	1,004	1,939
27	Hai Phong DOJ	362	450	13	110	13	0	663	1,677
28	Ho Chi Minh DOJ	2,822	540	614	685	30	230	4,290	9,211
29	Hau Giang DOJ	266	163	1	47	2	170	998	1,647
30	Hung Yen DOJ								
31	Hoa Binh DOJ	1,751	737	0	43	1	4,312	2,000	8,844
32	Khanh Hoa DOJ	250	57	1	149	1	608	1,479	2,545
33	Kien Giang DOJ	604	217	5	267	1	1,954	1,408	446
34	Kon Tum DOJ	74	2	0	3	0	1,191	0	1,270
35	Lam Dong DOJ	766	134	0	164	0	1,469	40	2,573
36	Lao Cai DOJ								
37	Lang Son DOJ	25	88	13	14	3	633	5	781
38	Lai Chau DOJ	12	0	0	4	0	505	0	521
39	Long An DOJ	178	77	2	20	0	0	29	306
40	Nam Dinh DOJ	520	353	83	79	53	0	50	1,138
41	Nghe An DOJ	1,204	1,356	174	313	226	1,623	76	5,028
42	Ninh Binh DOJ	158	271	8	29	2	49	494	1,011
43	Ninh Thuan DOJ	577	19	45	81	3	550	393	1,668
44	Phu Tho DOJ	1,394	940	125	176	54	450	0	3,142
45	Phu Yen DOJ								
46	Quang Binh DOJ	551	416	2	105	1	232	119	1,506
47	Quang Nam DOJ	687	891	5	34	13	477	374	2,481
48	Quang Ngai DOJ	115	70	0	70	0	215	0	470
49	Quang Ninh DOJ	347	203	14	38	7	356	129	1,119
50	Quang Tri DOJ	1,502	666	82	69	57	503	850	3,729

51	Son La DOJ								
52	Soc Trang DOJ	1,496	806	0	0	0	1,718	0	4,020
53	Tay Ninh DOJ	208	30	3	171	0	1	255	668
54	Thai Binh DOJ	358	688	1	23	2	0	132	1,204
55	Thai Nguyen DOJ	806	468	0	92	0	987	190	2,543
56	Thanh Hoa DOJ	966	380	15	22	19	479	123	2,004
57	T.T. Hue DOJ	576	275	100	65	43	315	239	1,613
58	Tien Giang DOJ	510	174	9	110	0	0	1,104	1,907
59	Tra Vinh DOJ	425	198	36	5	6	457	140	1,267
60	Tuyen Quang DOJ	201	3	1	83	0	1,151	415	1,854
61	Vinh Long DOJ								
62	Vinh Phuc DOJ	820	523	0	105	0	150	427	2,025
63	Yen Bai DOJ	369	112	12	3	7	232	47	782
<b>Total:</b>		<b>33,556</b>	<b>17,446</b>	<b>2,542</b>	<b>5,626</b>	<b>1,171</b>	<b>31,806</b>	<b>30,417</b>	<b>118,796</b>

\* Note: - The statistics are summarised from the Appendix of Department of Justice (DOJ).

Blank cells belong to provinces that did not send any appendix or sent appendix not satisfying the requirements.

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