

DOES AN EVASION OF CRIMINAL PROCEDURE EXIST IN THE TRADITIONAL LEGAL CULTURE OF VIETNAM?

Lan Chi LE (Ph.D)

VNU-School of Law, Hanoi, Vietnam; Email: lelanchi@vnu.edu.vn

Abstract: Criminal procedure refers to the state's performance of activities to handle criminal cases and bring criminal proceedings against offenders. However, in the Vietnam's history of law, many provisions were set out minimizing crime denouncement in order to reduce the number of criminal cases that the state apparatus must solve. On the part of the people, their fear of proceedings and the criminal justice system's coercive power is manifested in the notions of "Vô phúc đáo phụng đình" (*being involved in lawsuits is a bad luck and those who are involved in lawsuit are idiots*), "Con kiến mà kiện củ khoai" (unofficial translation: the ants that sue the potato, referring to futile lawsuits in which the plaintiff are ordinary people and the defendants are the upper class who are superior on account of their wealth and power), and "Được vạ thì má đã sung" (equivalent in English: while the grass grows, the horse starves, referring to all the sufferings and losses inflicted on the participants in legal proceedings until they win the lawsuit) (Vietnamese proverbs). Both the state and the people seem to share one thing in common, which is their tendency to avoid criminal proceedings. In the light of this issue, the paper aims to answer the questions: is there really a so-called mindset of evading criminal procedure in the traditional legal culture of Vietnamese people? If so, what are the causes? Do such mindset and causes still exist in contemporary society? Seeking the answers to those questions nowadays has an important relationship with and significance in the process of realizing the rule of law and due process of law in Vietnam.

Key words:

Criminal procedure, evasion, laws, traditional culture, Vietnam.

Introduction:

Trê Cóc (equivalent in English: "The chronicle of the catfish and the frog") is a popular poem in Vietnamese folklore describing the frog's involvement in a lawsuit to reclaim its offspring and reclaim justice from the catfish, caused by the similarity between the tadpoles and the catfish couple, which results in them taking the tadpoles home and bring them up. The chronicle of the catfish and the frog specifically and vividly reflects Vietnamese people's views on proceedings. Accordingly, it is unfortunate to be involved in lawsuits for the state has absolute power in proceedings while the people can be crushed, broken and may spend a fortune just like the situation of the accused catfish in this case:

"The mandarin orders and the underling commands
Tied during the day, shackled during the night.
The imprisoned got crushed flesh and bones,
Hit for several times with a double whip.
The catfish husband and wife pity,
No matter how much it costs."

So do people avoid legal proceedings? Or vice versa, as remarked by a renowned scholar in Vietnam in the early twentieth century, historian and cultural researcher Dao Duy Anh once

said: "people in the countryside are very fond of proceedings" (Dao, 2002 , p 171). For such cause, there were various state regulations enacted to limit litigation of the people in the medieval and early modern Vietnamese criminal procedure law¹. Is the restriction on proceedings of the state a reflection of Confucian's disregard for proceedings, stemming from the upholding of the idea of neutrality, harmony, tolerance, amiability and from the state's responsibility for putting an end to proceedings based on Confucius' conception? The afore-mentioned avoidance of proceedings has not been identified, thus it is crucial for studies to continue the clarification and especially the determination of a possible consequence in the modern legal life.

This article answers the above questions by starting from the generalization of the transformation and development process of Vietnam's criminal procedure law to clarify the nature of the criminal procedure law, thereby explaining the people's perceptions on criminal proceedings as well as clarifying the authorities' legislative views on the role of the criminal procedure law and the necessity of criminal proceedings. In order to explicate the people's feelings for criminal proceedings as well as the authorities' legislative views regarding this issue, the article will take a deep approach from the Confucian political – legal ideology applied by feudal authorities and from the legal psychology of the majority of people in traditional society. Accordingly, the article will present a comparison with the contemporary context to determine if the mindset of evading criminal proceedings still exists in the current Vietnamese legal life.

Criminal procedure law in the medieval and early-modern history of Vietnam

Contemporary criminal procedure law in Vietnam is the product of a multi-layered sedimentary process: Eastern medieval imperial criminal procedure, Western early- modern capitalist criminal procedure, modern socialist criminal procedure in the second half of the twentieth century, and later on, the legal acculturation of certain aspects of adversarial procedures with the trend of expanding adversarial litigation from the early 2000s to date. (Le, 2021, p 482).

The first sedimentary layer of Vietnam's criminal procedure is the Eastern medieval imperial criminal procedure, including Quoc trieu hinh luat (National Penal Code,15th century), Tu tung dieu le (Statutory and Customary Stipulations on Procedure, 15th century), Quoc trieu Hong Duc chu cung the thuc (Hong Duc National Regulations on Forms of Testimony and other Procedure Activities, 15th century), Quoc trieu chieu lenh thien chinh (National Ordinance, 17th century), Quoc trieu kham tung dieu le² (National Regulations on Investigation and Litigation,18th century), Hoang Viet luat le (National Penal Code,19th century). Vietnam had a considerably developed legal system for criminal procedure. The imperial states held the responsibility for conducting criminal proceedings against the offender with the system of competent authorities. The burden of proof belonging to the public institutions, was allocated, from cases under the authority of a village to competent state agencies with specific authority. The criminal procedure of imperial dynasties demonstrated myriads of characteristics of the proceedings with the state's role of hearing actions on the basis of Eastern medieval interrogation. The criminal procedure law required the accuser to gather and adduce evidence, which was shown under multiple provisions

¹ We will refer to and analyze the regulations restricting litigation of the people in the legal history of Vietnam in the following section of the article.

² This Code was evaluated (Vu, 1967, p 143; Nguyen, 2015; Le, 2020) with its endorsement of the humanitarian spirit, procedural thinking and legislative techniques. Particularly, Nguyen (2015) argued that generally while there were sets of General Laws in the medieval period in the East which were comprehensive laws containing provisions of different legal fields, the existence of the National Regulations on Investigation and Litigation with the nature of a separate and independent law in the field of proceedings revealed its own uniqueness and rarity.

and sanctions applied to unproven accuser and denunciation without the observation of the hierarchy of competent agencies and procedural order. The criminal procedure law also set out a lot of rules that require impartial and cautious attitudes towards officials in charge of conducting procedure during the course of “hearing a case” as well as compliance with the law in the process of evidence collection and trial (Le, 2021, p 483). However, in essence, medieval Vietnamese criminal procedure law demonstrated the role of a legal framework (in terms of procedures) in order to realize criminal laws (in terms of content) in the performance of the general duty of the laws which is to protect the feudal social order and Confucian moral standards in the family and society (Nguyen, in Nguyen, Pham, Mai (eds.), 2017 p 168). The feudal dynasties of Vietnam also made full use of criminal procedure law to protect their interests (Hoang & Phan, in Hoang (eds), 2005, p 20).

After the French arrival in Vietnam in 1858, legal transitions gradually appeared in all three regions of the country (Cochinchina, Annam, Tonkin) where the French applied the principle of “divide and rule”, with the *Bo hình luật canh cai* (Code Pénal modifié) in Cochinchina in 1912, *Bo luật hình sự Trung Viet* in Annam in 1933, *Bo luật hình sự Bắc Viet* in 1921 and *Bo luật hình sự to tung Bắc Viet* in 1917 in Tonkin. The new criminal statutes were introduced by the French on the basis of the 1810 Napoléon Criminal Code and revised to obtain the proper application in Vietnam (Le, 2021). The criminal procedure law of the French was the inquisitorial procedure model with a strong emphasis on the stage of investigation and the role of the Court in determining the truth of the case. Although existed only for a short time (from 1917 to the middle of the twentieth century), the presence of French criminal procedure law is considered the second sedimentary layer and an important transition for the application of Soviet criminal procedure law – the third sedimentary layer of the criminal procedure law of Vietnam. The criminal justice system imposed by the French served as an efficient tool for the repression carried out by the colonial regime in Vietnam. Nonetheless, by looking at it from another angle, it can be seen that Vietnam adopted the legal institutions which embody a progressive law, contributing to the endorsement of equality and transparency in society, promoting the elimination of outdated customs of the feudal society, at the same time such institutions had already gone hand in hand with traditional customs, practices and culture. (Dao, in Rualin, Pastorel, Trinh and Nguyen (eds), 2016, p 18).

Thus, both medieval and early-modern laws set out an institutional system to handle criminal cases. More specifically, the political regimes in Vietnam in the medieval and early-modern history demonstrated awareness by regulating criminal procedure in order to establish a procedural legal framework for combating crime, assertion of responsibility and also the power and interests of the state in the course of conducting legal proceedings against offenders. However, does this contradict a traditional legal culture characterized by the combination of two Confucian ideologies - characterized by elements of power regards as law, law regards as penalty, disregard proceedings, respect reconciliation, disregard rights and respect prevention (Du, 2020, p 15-26)?

Confucian rulers' views on the restriction of proceedings

As an East Asian country deeply influenced by Chinese Confucian ideology for more than two millennia, medieval Vietnamese laws upheld and defended Confucian moral values as the value of Confucian moral values such as Ren, De, Li had great significance in relation to populism in maintaining a social order in favor of the authorities. Confucius was the one who introduced the policy of leading the people with "De" (morality, virtue), bringing the people into order by "Li" (rites). From the perspective of “Ren”, Confucianism especially attached great importance to the

Rule of Virtue and the Rule of Rite. Confucius affirms, “Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves” (Analects II, 3). Given the context of Qi state where the number of people having their legs cut off as a form of penalty got so high that in markets of the capital city, shoes were too cheap and crutches were too expensive (the Book “Zuo zhuan”), Confucius did criticize the so-called “道政齊行” or “道之以政，齊之以刑” (the use of orders to govern and the use of penalty to rule). This ruling approach only makes people refrain from wrongdoings due to temporary fear. The radical solution is to make people feel humiliated if they do something wrong and breach the law, thus they will not do it. As the result, it is necessary to uphold “道德齊禮” (to make use of morality to lead and use rite to rule the people). Accordingly, Confucius stated: “听讼，吾犹人也，必也使无讼乎” (In hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations) (Analects, Yan Yuan). Therefore, “no litigations” being the best solution was the original expression of the so-called disregard for proceedings and respect for precautions of Confucianism (Le, 2021).

No litigations or disregard for litigations with Confucius' starting point refer to the fact that the government must create a prosperous and equal society which honors De and Li so that people refrain from committing crimes, thereby they will not be punished. Accordingly, there will be no more proceedings, which means no litigations and the state are not subject to accepting and resolving criminal cases. The Confucian bureaucratic feudal regime considered the number of cases as the main indicator for examination of the mandarins' performance. Therefore, as the local mandarins wanted to show that they knew how to use ethics to teach the people, they restricted litigations and used devious means to oppress the right to prosecution of the people (Du, 2020, p 19). This is considered to be one of the important reasons for the control over the number of criminal cases resolved by official means which is criminal proceedings. The restriction on the right to denounce and to sue is evident in the medieval criminal procedure law of Vietnam.

In Vietnam, concerns about the right to denunciation being abused to become "indiscriminate lawsuits" existed broadly in the regulations and legal documents of the feudal dynasties³. The rules for magistrates requested: “When the magistrate in the judiciary office finds that someone has filed a lawsuit, they must examine carefully to see if the lawsuit can be processed, if it cannot be handled then the magistrate shall explain and return to prevent litigation... False claims shall not be handled to maintain the country's rules and prevent indiscriminate lawsuits” (Nguyen (eds), Le and Tran, 2006, p 478)⁴. The prevention of indiscriminate lawsuits, according to Dao 2002, p 171, is that a lawmaker (in the monarchy) shall contemplate to help the people refrain from litigation, so the state even punished those who appealed with no basis and forbade lawyers. As disputes and lawsuits were mostly seen as a possible cause of chaos and a threat to social stability, they were limited to the fullest extent to maintain the "stability" of villages and the state. Such restriction could be realized through the provisions on the right holder of denunciation. A number of documents such as Regulations for proceedings in the case of bodily injury in the National Regulations on Investigation and Litigation specifically stipulated the right to litigation of the representatives of the victim's family with the principle of determining the litigation status

³ These ancient legal sources were gathered, translated and published by scholars named Nguyen Ngoc Nhuan, Le Tuan Anh and Tran Thi Kim Anh of the Institute of Han-Nom Studies, Vietnam Academy of Social Sciences in the series of books called “Some Vietnam legal instruments from the 15th to 18th century”, published by the Khoa hoc xa hoi Publishing House in 2006

of the victim's family as follows: “if there is a murder case because of vengeance, adultery, brawl or robbery in the locality, only the spouse, children, parents or the siblings of the victim can file a lawsuit. The relatives of the victim can file a lawsuit only if the victim has no spouse, children, parents or siblings”⁵ (Nguyen (eds), Le and Tran, 2006, p 740). This is considered a necessary provision in order to properly and uniformly determine the status of the plaintiff. However, it also limits the number of denunciations by limiting the status of the denunciators. In addition, there are provisions restricting the scope of denunciation. For example, there are provisions limiting the number of criminals included in the file report of the case: “The submissions were only allowed to be filled with no more than one or two names of the mastermind of the crime and no more than three to four names of the assailants. It is not allowed to record the perpetrators randomly, fabricate the content of the report or submit a blank application and fabricate the names later on. If the victim's report states more than two masterminds and more than four assailants, the head of the commune will omit the names before examination. If the person refuses to cut down the names, the head of commune shall guide such person to the place where the corpse is reported in accordance with law, once the district authority finishes examination and filling of the report, the person shall submit their report in conformity with the rules. The district authorities shall not make excuses and intentionally delay the completion of the report” (Nguyen (eds), Le and Tran, 2006, p 740, 741). The restriction of litigation in these regulations stem from the fear of "fabricating information", slandering or exacerbating the criminal situation, causing social instability.

However, restrictions on litigation do not mean that the state will give up its role in resolving criminal cases. In the history of the laws of Vietnam, there have been a variety of laws stipulating the responsibility of the state apparatus in the thorough acceptance of denunciations, the responsibility to handle criminal cases to proceed with legal proceedings with the allocation and decentralization for determination of authority. For example, Quoc trieu hinh luat (National Penal Code,15th century) discerned: "for a very small issue, one shall sue in the commune; for a small issue, one shall sue in the district; for an average issue, one shall sue at the court officials' place; the mandarins shall judge fairly and in accordance with the law; for a great issue, one shall come to the capital... Those who denounce treason shall not be subject to this law” (Article 672). The law also presented regulations on sanctions against competent persons who intentionally fail to receive and handle victims' denunciation of crime: “If anyone outside of town makes a denunciation, the local authorities shall carefully consider the situation and request on behalf of the officials. The underlings shall not delay or ignore the indictment, instigate (the person who submits the indictment) or return the indictment (fail to submit to the superior mandarin), and decide for themselves; if someone acts against this law, then the local authorities shall report to the superior to convict the person inciting the plaintiff. If the local authorities fail to acknowledge, they shall be demoted or disqualified from their position or received other common punishment for their crime”(Article 673). Bo Hoang Viet luat le of the Nguyen dynasty continued to provide regulations on the responsibility for handling denunciation - an issue posed by the Quoc trieu hinh luat (National Penal Code,15th century). Hoang Viet luat le (National Penal Code,19th century) clarified the relationship between the nature of denunciation and the responsibility of the person handling it: "If a bureaucrat fails to handle a case, he shall be sentenced to 3 years of penal labor in prison for a case of treason or rebellion; beaten with a heavy stick for 100 times if committing other crimes and beaten with a heavy stick for 80 times for murder" (Article 303).

⁵ Vietnam Academy of Social Sciences, Institute of Han-Nom Studies, Some Vietnamese legal instruments, Volume 1, from the fifteenth century to the eighteenth century, the Khoa hoc xa hoi Publishing House, Hanoi, p. 740

In addition, in order to prevent disturbances against the stability and order of the society, imperial laws of Vietnam focused on regulations on reconciliation and encouraged peace and harmony. This legislative view also stems from the respect for reconciliation and the core ideology promoting Humanitarianism, “仁者二人者” (respect for the relationship between people and people, human beings have to care for, love and tolerate each other) and Rule of virtue of Confucianism: “古者修教訓之官，務以德善化民，民已大化之後，天下常亡一人之獄矣” (in ancient times, the mandarins shall look after and use virtue to educate the people, once educated, there shall be no litigations in the society” (Hanshu, Biography of Dong Zhongshu. Regulations for proceedings in the case of bodily injury stipulated: “If the report of the victim is still under suspicion, not truly witnessed and the incident happened in the same commune due to an unintentional brawl and both sides compromise, they shall be allowed to discuss to with each other to end the lawsuit” (Sdd, p 749). Another provision related to crime and illegal acts between the parties: "For common lawsuits related to micellaneous actions of disptutes relating to gift-given property, social position and tussles, debt, if the plaintiff agrees to compromise, the judges shall also follow the rules of reconciliation and agree with each other to prevent litigation, reduce the costs for the people and refrain from extortion” (Nguyen (eds), Le and Tran, 2006, p 770). From the above philosophies and regulations, it can be seen that the laws promoted reconciliation, morality, unity and social harmony, and reduced procedural costs in handling crimes by creating other methods to handle the case: instead of dealing with crime by criminal proceedings, it shall be handled by reconciliation.

However, because of the fact that the promotion of reconciliation may lead to omission of crime, lawmakers set out strict regulations for cases in which "people who make a separate agreement with the criminal mentioned above are those who are acquisitive, who only care about money in the short term and forget about the grudge of a lifetime. Such separate agreement not only causes injustice for the deceased, but also the fact that criminals are not punished, thus it is necessary to report to the mandarins. If anyone dares to negotiate privately with the criminals as stated, once discovered, such person shall be punished by law and not forgiven. This notice is made available to everyone” (Nguyen (eds), Le and Tran, 2006, p 478). Reconciliation being restricted in order to protect social order and social morality is a uniform requirement between "private" and "public" crimes. For public crimes, Quoc trieu hinh luat (National Penal Code, 15th century stated: “Those who report on public crimes shall not reconcile with the defendant. If the judicial official and the prison official obey, they shall be whipped 50 times, degrade one level downward a lower rank of position. One shall be accused of breaching the law if he acts because of personal relationship or a bribe” (Article 718).

The essential cause of the stipulation of the above provisions is that: the perceived crime is an act not only violating an individual but also harming the position and power of the state. Therefore, the state does not give up the right to punish offenders and the right to prosecute criminal liability against the offenders. On the one hand, imperial laws set out provisions for criminal proceedings to form “天網恢恢，疏而不失” (The heavenly net is vast, loose, and yet does not let anything slip through) (Lao Tzu, Tao Te Ching) for criminals in order to protect the public interests, to prevent the state apparatus from accidentally or intentionally neglecting criminals and to prevent the overuse of reconciliation; on the other hand, they set out regulations to restrict criminal proceedings or more precisely, restrict allegations and claims that could cause disturbances to social order and stability. Considering the issue from a general standpoint, the application of criminal procedure law to deal with crimes is a question which can be answered in many different ways, but one thing in common is the interests of the authorities – Confucian moral

relations. Therefore, it is not extreme to say that “according to traditional conception, the laws are merely a tool of suppression, one of the devious means to dominate which can be manipulated and combined by the ruler at his discretion. (Luong Tri Binh, 1996 ("Phap bien", Tap chi Khoa học xa hoi Trung Quoc so. 4 in Du, p 850).

The legal culture in feudal dynasties in China and Vietnam was Confucian legal culture because the moral values according to Confucian standards were highly upheld and defended. Nonetheless, the rulers upheld and defended such standards by Legalist approach on severe penalty-based legal system, which was well disguised by the formal and populism formula of “德主刑辅” (morality is first, punishment is secondary). Given the fact that criminal law and punishment was applied to govern almost all social relations and the various harsh penalties were common punishment and enforced in many harsh forms, in practice, the formula demonstrating the nature of Confucian legal culture, at least, in the criminal justice field was “刑主德辅” (the supremacy of “刑”(punishment or penalty” and the subservience of “德” (morality). Law or criminal laws showed the authoritarian power of the rulers, so “刑” (regarding punishments, incapacitation, deterrence, and prevention with the severity of penalty) shows the main role, expressed in a major, common and permanent manner; “德” (virtues, rites) as a supplementary role, expressed in a minor, uncommon, non-permanent manner in stipulations on punishments and their practice of execution (Le, 2020, p 407, 408). The intrinsic relationship between Morality and Penalty in Confucian legal culture shows that with a criminal justice system upholding the protection of the state’s interests with the above punishment, although there are restrictions on proceedings on the part of the Confucian authorities, restrictions on proceedings should be construed as restrictions on the rights of the people in litigation and it should not be understood as restrictions on the role, rights and responsibilities of the state in their participation in criminal cases.

The people’s mindset of evasion of legal proceedings in traditional legal culture

The relationship between the state and the people in traditional laws is an unequal relationship between the king (the king is the father) and the people (the people are the children), the father is honored and the children are disregarded, the people – the children obeying the king – the father is the characteristic of Confucian morality. This relationship is protected by law. The king/father has the right to enact laws, and the people/children are obliged to observe the laws, otherwise they will be punished by the legal sanctions. This is the "power regards as law, law regards as penalty" of the traditional legal culture. This creates the people’s fear of the laws as the laws belong to the state, of the state and for the state and the implementation of the laws is guaranteed by repression of the state. From a general fear of the law, when disputes occur, instead of participating in legal proceedings to be protected, the people avoid litigation and the laws. When being oppressed by public agencies and authorities, it is burdensome for people to sue public institutions due to the inequality between the two parties. Therefore, litigation is unrealistic - "the ant that sues the potato" (Vietnamese proverbs) and if litigation is to be done, "being involved in lawsuits is a bad luck and those who are involved in lawsuit are idiots". People are aware that state agencies and the court are the places where "the mandarins’ words are iron and steel", where people have to deal with the fact that "the proof of wisdom is in the court". Therefore, it is very challenging to access justice through criminal proceedings, litigation takes a long time and there are too many losses and consequences in the pursuit of the case, because “Được vạ thì má đã sung” (Vietnamese proverb, equivalent in English: while the grass grows, the horse starves”).

More specifically, the avoidance of proceedings stems from the fear of repressive power, coercive measures as well as other possible disadvantages in the process of resolving criminal cases. Criminal procedure law vests too much power to the bureaucracy and imposes too many obligations to those participating in litigation. The burden of proof - the obligation to provide testimony and evidence remains subject to the accused person. If this obligation is not fulfilled, the right to apply corporal punishments of the State will be activated. This means the accused person can be legally tortured and such person is not exempt from the obligation to present evidence against himself. In addition, the criteria for assessing the level of fulfillment of the burden of proof by the criminal prosecution agency are extremely vague. They are not as clear as the standard which requires that when it is impossible to convict or when there is insufficient evidence for conviction, it shall be concluded that the accused person is not guilty. In the process of resolving of a criminal case, the principle of presumption of guilt is applied instead of presumption of innocence. The accused person is biased guilty in the mindset of the judicial official (expressed through the application of corporal punishment so that the accused shall confess, through the way the accused is referred to as a sinner and through the way the accused is educated and lectured in an inferior manner (Le, 2021, p 483, 484).

Dao (2002, p 171) believed that "people in the countryside are very fond of proceedings" with the cause indicated as "the influence of agriculture". It is probably due to the fact that a majority of Vietnamese people were farmers living in highly self-governing villages and communes. The tradition of rural settlements existed in "autonomous" villages and small-scale production methods formed a peasant mentality, partly leading to narrow-mindedness and envy. "The autonomy of the village is the cause of the diseases of narrow-mindedness, selfishness and faction" in the way that "my house is my castle", "one shall take care of his own business", "the buffalo takes care of itself and so does the cow" (Vietnamese proverbs). "The diseases of narrow-mindedness, selfishness and faction" might be real, however, this mentality is different from the preference for litigation.

On the other hand, "the diseases of narrow-mindedness, selfishness and faction" is only a small part of the national mentality. It is also because of the organization of the population in the villages and communes that the highly appreciated collective character, collective value and value of the community were formed. "Vietnamese collectivism is distinct from communitarian attitudes in the West. A human being is born to be a member not only of a family, but a village and, in a broader sense, a member of a country. He or she lives in natural connection with other members of the society, as an integrated part of one organic body. Under such a system, the collective interest of society is supreme over individual interests; people who fight for their own interests are often viewed as selfish and egotistical (Marr, 2000 in Nghia, p 80).

With respect to the traditional agricultural society of Vietnam, the organization of residents by village units formed a community of villages associated with a stable geographical area to reside and cultivate agricultural crops which were mainly wet rice cultivation. Such communities are highly stable and autonomous. There is an internal system of regulations of villages and communes called village internal regulations and customs. These norms are not the law, but for each village, depending on the time and circumstances, they can act as a substitute, have equal or even higher value than the law of the country in the mentality of the residents. The feudal dynasties always wanted to build a centralized state in which the central government takes control over the grassroots authority efficiently (with the restrictive regulations for the villages: approving the list of the village's council, regulating the status and conditions for drafting the village internal regulations...), the regulations inside villages internal are the supplement to the law, the "extended

arm" of the state. On the other hand, there is a separation of powers between the state and the village in handling the village's order and security in general and dealing with criminal cases. In certain cases, "the will of the king yields to the people's customs". Article 74 of the internal regulations of Quynh Doi village, Quynh Luu, Nghe An requested: "If the situation cannot be considered, it shall be handled by the district officials and the court officials. They shall handle the case the same as the village and the criminal shall pay with a pig. For those who fail to submit to the village and go to district authorities and court officials to sue, the village also fine them with the same amount"(Le, 1998, p 288). The barrier set up for the case to be handled only in the village and for the village to handle itself not only existed in the internal regulations of Quynh Doi village above but also in many other ones which were published. The 70th clause of the village regulations of Phu Xa Doai commune, Phu Xa locality, Kim Anh district, Phuc Yen province stipulated: "If anyone has any dissatisfaction, they shall report to the head of the court, they shall not be involved in a brawl. If one fails to obey the resolution, on the day the council brings the case to trial, the person at fault shall be punished heavily, the innocent person shall punish the person who is at fault. Both shall be punished to encourage tolerance for harmony with other people" (Le, 1998, p 348). On the one hand, the appreciation of tolerance for harmony with other people shows the respect for affections and relationships in the village or the respect for community values, especially the village community of the Vietnamese people in one's behavior. On the other hand, it shows that the access to criminal proceedings as a formal means of handling crimes is also limited. We hereby believe that the limited access to criminal proceedings of the State comes from the "sovereignty" of the "village" with the significant position of the village in relation to the state in the history of Vietnam and the fact that the people want to avoid non-democratic relations between the people and the state, especially when the state has the right to use corporal punishment and promote presumption of guilt in criminal proceedings.

Is there any residue of the mentality of avoiding criminal proceedings nowadays?

In the medieval law, Confucianism became a tool of ruling the spiritual life of the people applied by the authorities successfully. Specifically, the feudal states turned moral obligations into legal obligations that people had to comply with, and Vietnamese laws set out the rules that punish criminal acts that violate Confucian moral values and social relations according to the three moral bonds and five constant virtues. The process of accepting and complying with the laws of the people gradually became the process of accepting the obligations of the citizens, in other words, the laws strengthened morality and at the same time, they turned legal values into moral ones.

When the French came to Vietnam, the criminal procedure law they brought to Vietnam in the whole legal system acted as an efficient tool for the policy of barbaric exploitation, colonial exploitation and brutal repression that the French carried out in Vietnam. However, the philosophy of Western criminal procedure was at least introduced for the first time in the early twentieth century on the right of individuals in harmony with the state's powers: "The noble principle of the stipulation of criminal procedure law is to reconcile these two things: 1. On the one hand, to maintain social order so that the offenders are all condemned and not neglected. 2. On the other hand, equality must be maintained for each individual so that there is no bias and one shall not be oppressed. Then the criminal procedure law is regulated to harmonize the interests of society and individuals..." (Nguyen, 1923, p 96, 97). In the second half of the twentieth century in Vietnam, after the August revolution in 1945 and especially after the end of the war against the French, Marxism–Leninism replaced the Confucian worldview—the puppet son of heaven abdicated its

power and was replaced by the people's republic, which again was replaced by the 'dictatorship of the proletariat'. Socialist collectivism replaced the Confucian three yokes and five relationships (tam-cuong, ngu-thuong) (Nghia, 2005). The modern political values namely "Socialist collectivism" and the traditional political values of Confucianism are similar in terms of emphasizing collectivism. Confucianism has shaped the relationship between the people and the state as one between the individual and the collective, between the private and the common for more than 2000 years. In this relationship, "the primacy of public or common interests over individual interests, the broad and active role of the ruler or state to serve the common interests of the people, and the conception that law is just one of the tools used by the state to maintain social order. This also explains why the Confucian authoritarian style of government may also have contributed its characteristics to Asian Communism (Peerenboom, 2002 in Nghia, 2005). Collectivism place individuals, especially the accused, the victim in a lower position in criminal proceedings, in a position where their individual rights are easily overlooked or even ignored. The same applies to China, a country with Confucian and Marxist ideology, the criminal justice agencies pay more attention to crime control than to human rights in criminal cases. In order to efficiently solve case and control crime, the authorities usually cooperate with each other to convict more accused, or follow public opinion to relieve the indignation of the public. Strengthening so called collective interests against law abuses individual rights, particularly the rights of the accused (Jiang, 2016, p 119). However, unlike China, criminal law and criminal procedure law maintained the characteristic of the authoritarian instrument in the second half of the twentieth century (from 1945 to 1988 when the criminal procedure law was enacted in 1988), caused by the fact that this was the period when Vietnam was still suffering wars and solving post-war issues (Anti-French Resistance War in Vietnam, Anti-US Resistance War in Vietnam and unification, Sino-Vietnamese War and the Cambodian–Vietnamese War). As a result, a criminal procedure law was not enacted in Vietnam. On the other hand, the legal documents of criminal proceedings in this period partly showed the consistency in the direction of the development of the criminal procedure law, under which the police, the prosecutors and the courts were perceived as the three agencies that share the same task of settling criminal cases in order to: (1) suppress anti-revolutionaries who are the enemies of the people and the socialist regime; (2) protect public and private property; (3) protect social order, security and safety (Nguyen, p 45 in Nguyen & Le, 2019). The criminal justice of the new regime has protected the interests of the majority of people in society, one thing that the old regime failed to accomplish. However, due to the country's objective conditions which were inadequate for the balance of interests between the group and the individual of the criminal justice of the new regime, the human rights of the accused were not emphasized. As a result, the accused person were afraid of the proceedings not only because in the end they would be punished but also because individual procedural rights were not specified and fully implemented, they were still presumed guilty and considered anti-revolutionary, anti-social, condemned and boycotted by the society. As for victims of crime, when the criminal proceedings were caught up in the protection of the common interests, they were not in the right position to recognize, fully ensure private prosecution and privacy rights, the right to friendly treatment in criminal proceedings of the victims. If these factors are believed to be the cause of the evasion of proceedings by accused persons and victims of the crime, it is somewhat forced but it is also possible to say that they did not have access to criminal proceedings as a mechanism assuring an adequate position compared to the giant procedural apparatus that represented the state, the whole of society when they were accused of a crime, or they did not have access to criminal proceedings as a mechanism to be heard and understood with respect to their individual needs when they were harmed by crimes.

Modern criminal procedure has a completely new approach compared to the past in its mission: “The Criminal Procedure Code has the duty to ensure accurate detection and fair and timely handling of all criminal acts, to prevent crimes and the omission of crimes, prevent innocent people from being slandered; contribute to the protection of justice, human rights, citizenship, socialist regime, interests of the state, legitimate rights and interests of organizations and individuals; educate all people to observe the law, fight and prevent crimes.” (2015 Criminal Procedure Code, Article 2). Accordingly, the protection of human rights and citizenship is a priority task which is put above the task of protecting the socialist regime and the interests of the state. However, the above characteristics of the legal culture in wartime and partly also the traditional legal culture are still more or less existing at present. Modern criminal proceedings still follow a clear distinction between criminal justice agencies of the state as the subjects conducting the proceedings. Criminal justice agencies such as investigation agencies, custody and temporary detention enforcement agencies, and criminal judgment enforcement agencies are mostly located in the armed forces (people's police). Meanwhile, the Law on People's Public Security 2018 provides for the people's public security forces, with the tasks and powers to "apply measures to mobilize the masses, laws, diplomacy, economics, science – technology, profession and armed forces to protect national security, ensure social order and safety, combat and prevent crime and violations against the law on national security, social order and safety” (Article 16, Clause 14), the law is only one of the measures to handle crimes applied solely or simultaneously with one or many of the above measures. This shows that the law (criminal procedure law) is not the only option for dealing with crimes and that the criminal justice agencies have a lot of measures and powers to apply in the detection, investigation and prevention of crime.

The above factors create the proactivity, flexibility and high repressive ability against crimes of state agencies, at the same time, they increase the inequality between individuals participating in the proceedings and the criminal justice agencies. The criminal procedure law and criminal justice agencies are still prioritizing the protection of the people as a group over the protection of an individual – one who is directly involved in crime in the settlement of a criminal case. Therefore, in modern times, while criminal proceedings cannot be evaded due to the criminal procedure law, criminal justice agencies must “be responsible for ensuring accurate detection and fair handling, in a timely manner all criminal acts and preventing crimes” (Criminal Procedure Code 2015, Article 2), these individuals have low self-esteem, feel small and accept the procedural decisions and acts from criminal justice agencies. The overwhelming number of pre-trial detention cases, the extremely low number of cases with lawyers are in fact proof of this mentality of the people. It is both a residue of the past and a consequence of the current model of criminal control, the barriers to the progress to the so-called due process of law and criminal justice is also an area where the requirements of the rule of law are hard to meet.

Conclusion

Thus, in the traditional legal culture, when the Confucian rulers applied the formula "Morality is primary and Penalty is secondary" in form and "Penalty is primary and morality is secondary" in essence, the state apparatus restricted criminal proceedings to limit litigation in the society to ensure social stability and at the same time had a cautious attitude to start criminal proceedings in order to refrain from neglecting criminals who infringed upon the interests of the state, to prevent the abuse of bureaucrats' power, the overuse of village institutions and reconciliation.

For the common people, the unequal social order with the repressing power of the procedural apparatus and the mentality of submission, low self-esteem, the king is considered the father and the people is regarded as children more or less made the people have the mentality of avoiding proceedings. Criminal proceedings, although placed on a relatively complete legal system, gave too much power to state agencies and vice versa for the people. Confucianism also lulled the people to accept the respect to the state, not to mention that the Confucian rulers also knew how to apply Buddhism, Taoism and the village self-governing institutions so that the people accepted being tolerant to achieve harmony.

In modern society, when the Criminal Procedure Code 2015 set out the goals for criminal proceedings (ranked in order of priority) as "contributing contribute to the protection of justice, human rights, citizenship, socialist regime, interests of the state, legitimate rights and interests of organizations and individuals; educate all people to observe the law, fight and prevent crimes."(Article 2), the avoidance of proceedings in terms of theory will no longer exist when the first goal is to protect justice, followed by human rights, citizenship and lastly, to protect the socialist regime and the interests of the state. However, the appreciation of the collective value of socialist laws and the recognition of the laws as an authoritarian tool of state power are similar to Confucian and Legalism in traditional legal culture and also strengthened by the ideological legacies of Confucianism and Legalism in modern legal culture. Therefore, the individual, the personal interests of the participants in the modern criminal proceedings, though recognized, are not easily respected and guaranteed to be fully implemented in the practice of criminal case resolution. This is an obstacle to the process of democratization and transparency of criminal proceedings and such obstacle needs to be acknowledged for further adjustments by lawmakers and law applicators in order to realize the above objectives of criminal proceedings.

REFERENCE

Satutes and Statutory instruments

Bo luat to tung hinh su Viet Nam 2015 (Vietnam Criminal Procedure Code 2015)

Books

Dao Duy Anh, *Viet Nam van hoa su cuong (Overview of the history of Vietnamese Culture)* (first published Quan Hai Tung Thu 1938) (Van Hoa Thong Tin 2002)

Du Vinh Can, *Nho gia phap Tu tuong thong luan (Overview on Confucianism on Philosophy of Law)*, translated from Chinese into Vietnamese by Nguyen Duc Sam, Le Van Toan (first published Renmin Guangxi 1991)

Jiang Na, *Wrongful Convictions in China* (Springer 2016)

Le Duc Tiet, *Ve huong uoc, le lang (On village Internal Rules and Customs)* (Chinh tri Quoc gia, 1998)

Nguyen Van Dien, *Luoc khao ve bo luat moi o Bac Ky (Overview on the new code in Tonkin (north Vietnam))*, (Kim Duc Giang 1923)

Nguyen Ngoc Nhuan (eds), Le Tuan Anh, Tran Thi Kim Anh, *Mot so van ban dien che va phap luat Viet Nam (Some Vietnam legal instruments from 15th to 18th century)*, Vol 1 (Khoa hoc xa hoi 2006)

Nguyen Minh Tuan, Pham Thi Duyen Thao, Mai Van Thang (eds), *Lich su Nha nuoc va phap luat Viet Nam (History of the State and Law of Vietnam)* (Dai hoc quoc gia Ha Noi 2017)

Randall Peerenboom, *China's long march toward rule of law* (Cambridge University Press 2002)

Vu Van Mau, *Dan luat luoc giang (Overview of Civil Law)* (Vol.1) (Sai gon 1967)

Contributions to edited books

Dao Tri Uc, 'Laison entre droit Vietnamien et droit français: regard sur la réception et l'adaptation du droit', in Arnaud De Raulin, Jean Paul Pastorel, Trinh Quoc Toan, Nguyen Hoang Anh (eds), *Anh huong cua truyen thong phap luat Phap toi phap luat Viet Nam (Influence of French law tradition on Vietnam Law)* (Dai hoc Quoc gia Ha Noi 2016)

Hoang Thi Minh Son, Phan Thanh Mai, 'Khai niem, nhiem vu va cac nguyen tac co ban cua Luat to tung hinh su' (Concept, Task and Fundamental Principles of Criminal Procedure Law), in Hoang Van Hanh (eds), *Luat to tung hinh su Viet Nam (Vietnam Criminal Procedure Law)* (Cong an nhan dan 2005)

Le Lan Chi, 'The Principle of Presumption of Innocence in the History of Criminal Procedure in Vietnam', in *Presumption of Innocence (international workshop proceedings)* (Hong Duc 2021)

Le Lan Chi, 'Policy on Enforcement of Imprisonment Sentences in Vietnam and China - from the Perspectives of Tradition, Constitution and Statutory Law', in *Asian Constitutional Law Recent Developments And Trends (8th Asian Constitutional Law Forum conference proceedings)* Vol. 1 (Dai hoc Quoc gia Ha Noi 2020)

Nguyen Ngoc Chi, 'Nhap mon Luat to tung hinh su' (Introduction of the Subject Criminal Procedure Law), in Nguyen Ngoc Chi, Le Lan Chi (eds), *Luat to tung hinh su Viet Nam (Vietnam Criminal Procedure Law)* (Dai hoc Quoc Gia Ha Noi 2019)

Journal Articles

Nguyen Minh Tuan, 'Quoc trieu kham tung dieu le voi viec bao ve quyen loi chinh dang cua con nguoi' (Quoc trieu kham tung dieu le and the due protection of human rights) [2015] *Nghien cuu lap phap*, 1(281)

Luong Tri Binh, 'Phap bien' [1996] *Khoa hoc xa hoi Trung Quoc* (4) in Du Vinh Can, *Nho gia phap Tu tuong thong luan* (Overview on Confucianism on Philosophy of Law), translated from Chinese into Vietnamese by Nguyen Duc Sam, Le Van Toan (first published Renmin Guangxi 1991) (HongDuc 2020), p 850

Pham Duy Nghia, 'Confucianism and the conception of the law in Vietnam' [2005] *Asian socialism and legal change: The dynamics of Vietnamese and Chinese reform*, 76-90.

Websites

Le Lan Chi, 'Death penalty in confucian legal culture in China and Vietnam' (Melbourne Law School, 18-19 February 2021) <<https://law.unimelb.edu.au/centres/alc/news-and-events/death-penalty-in-asia-law-and-practice-online-conference/> recache#papers> accessed 30 April 2021