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# Significance of Judicial Independence in the Law Governed by the Rule of Law in Vietnam

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## Abstract

*Judicial independence refers to judgements made on the basis of facts and in the light of the law. Judicial independence lies in making sure that judges are not influenced by any outside party or the judge's own personal interests, nor by any fear of defamation or threats. The purpose of this study was to examine whether the Vietnamese judiciary understands its responsibility to protect citizens against unlawful acts of government, and the extent to which is independent of the legislative and executive pillars of the government. The study used a historical and analytical approach to investigate the data collected from Procurators, legal archives and libraries. During the data collection, the focus was on the Vietnamese constitution and other related Acts. The study came across a lot of limitations in the implementation of the judicial independence as judicial reforms. The findings of this study suggest that Judicial independence and legislative and executive wings of the government should always go together. The study also suggested that Judicial independence should be seen as the demand of society and the access to justice should be integrated with human rights.*

**Keywords:** Judicial, Judicial Independence, Communist Party of Vietnam, the law governed by the rule of law

## Introduction

The meaning of Judicial independence requires that judges have the freedom to exercise their judicial powers without any interference from state, media, political entities, or even litigants. When judges are making a judgment, it is often a choice between the interest of the citizens on one hand and the state or powerful individuals on the other hand. No judge attending on a criminal case against any individual or entity should be influenced by the state nor should come under pressure to admit or not admit certain evidence and pass the sentence accordingly. Judicial independence also means that judgement ought to be made on the basis of the facts of the case and in the light of the law. Judicial independence lies in making sure that judges cannot be influenced by any outside party or by the judge's own personal interests, or by any

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fear of defamation or threat or coercion by litigants. Only Judicial independence can assist judges to discharge their constitutional responsibility in a fair and impartial manner. Last, but not the least, Judicial Independence is the foundation for the prosperity of any economy because only when there is Judicial Independence, citizens can expect the court rulings to be based on truth, without any bias or prejudice, nor causing any harm to any litigants.

In the Republic of Vietnam, judicial independence has been selectively absorbed in its foundation of democratic ideas. For instance, Article 100 of the Constitution states: "In trial, the Court has the right to be independent and obey only the law". Article 69, Decree No. 13 signed by President Ho Chi Minh on January 24, 1946, one of the first documents laying the foundations for forming the judicial background of the People's Revolutionary State, noted that: "During the trial, judges only obey the law, other agencies must not interfere.... judges cannot make excuses, except for the case of changing the procedure-conducting person and requests for replacement of participants in legal proceedings, to refuse to judge any cases". In April 1958, the Congress set up the Supreme People's Court and the Central People's Procuracy, separating the Court and Prosecutor system from the Ministry of Justice. This decision was later recorded in the 1959 Constitution of the Socialist Republic of Vietnam, marking a new development step in the policy of independent adjudication in the Court system.

This study aimed at making an assessment of the efforts made by the international community to reform the judicial independence of Vietnam. The need for such a study had long been felt as there is a dearth of studies on Judicial independence and judicial reforms with reference to Vietnam. It was also essential to examine the extent to which judiciary independently protected citizens against unlawful acts of government as well as private organizations. The study also contributes in showing how judiciary in Vietnam is independent of the legislative and executive machinery of the government.

## **Literature Review**

- *Judicial reform process in Vietnam*

Vietnam introduced the process of judicial reform under the Politburo's Resolution No. 49-NQ/TW of June 2, 2005, stated as "Strategy Judicial reform to 2020". This initiative was much earlier than most nations that made any accurate assessments or conclusions about the impact of the current series of reforms. In order to assess Vietnam's judicial independence, Bryan Fornari, Deputy Head of EU Delegation Cooperation in Vietnam remarked that Vietnam is going through an ambitious judicial reform process. Integrity and judicial capacity are given much importance to accelerate judicial reform, addressing the challenges of the justice system through the Justice Partnership Program ([Mendelski, 2012](#)) Montesquieu had once said "There is no liberty, if the Judiciary power be not separated from the Legislative and Executive. Were it joined with the Legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the Executive power, the judge might behave with violence and oppression" [quoted in "Law on Organization of People's Courts of 2014".] ([Nicholson, 2001](#)).

The international community assess the accuracy of judicial reform process in

Vietnam on the basis of research and assessment of the reform initiatives (Khanh, 2019). Prior to the enactment of the Constitution of the Socialist Republic of Vietnam in 2013, a lot of initiatives had been taken in Vietnam to introduce the judicial reform process. There are several records available for the perusal of the international community for their assessment. For instance, Brian J.M. Quinn, the coordinator of Vietnam for the Harvard International Development Institute from 1994 to 2000, based in Ho Chi Minh City, Vietnam, outlined the judicial reform prepress in his book *Vietnam Continue legal reform: Gain control over the courts*. Quinn (2003) assessed the 2002 reforms of the Vietnamese court system, the supervision of Congress, the Procuracy and the potential impact of reforms. These reforms were reflected in competitions, conflict of power between the power blocs in Vietnam, the independence of judicial and the relationship between the judicial system and the role of the Communist Party of Vietnam.

Besides, the statistics of an organization named Coffey, that managed the Justice Initiatives Facilitation Fund from 2010 to 2015, show how it helped the Vietnamese non-governmental organizations to participate and increase their contributions in judicial reforms. The funded projects achieved results that exceeded expectations such as: 83,700 Vietnamese who were in difficult circumstances and lived in remote and rural areas were provided with legal awareness; 15,940 Vietnamese received direct advice and support about juridical process; 78 research and information publications were developed (with more than 158,000 copies distributed); and 220 dialogue events were held at the national and local level (Waage et al., 2010). Hence, the assessments at national and international levels help to understand the process of judicial independence reform in Vietnam prior to 2013, after which the Constitution of the Socialist Republic of Vietnam took the charge and planned judicial independence reforms for Vietnam. The Constitution paved the way how Vietnam should address the issue of judicial independence and balance the roles of the legislative and executive machinery of the government, a challenge faced by the Communist Party and State of Vietnam (T. M. H. Nguyen & Ha, 2019).

- *The process of forming and developing Vietnam's judicial independence reform policy*

The 1980 Constitution of the Socialist Republic of Vietnam had also recognized the judicial independence in Vietnam. Article 131 states: "In trial, Judges and People's Assessors are independent and only obey the law"; Article 6, Law on Organization of the Court in 1981 also stipulated: "During trial, Judges and Assessors are independent and only obey the law". Accordingly, Q. V. Nguyen (2006) in his PhD thesis claimed that the independent court must be a central pillar of judicial reforms in Vietnam. However, as this study showed, still much work has to be done to strengthen judicial independence in Vietnam. The author further states, "It [judicial independence in Vietnam] is limited to analyzing the independence of domestic courts ... There has been still so much work to be done, but we [need to] be judicially confirmed that Vietnam is transferring to the law governed by the rule of law, with the aim of bringing the country to prosperity, democracy, justice and civilization (Q. V. Nguyen, 2006)

In another study, Andersson (2012) of Lund University, Sweden pointed out that, in practical terms, the Vietnamese society was undergoing judicial reform and that

law would play a bigger role in the lives of the Vietnamese. The Vietnamese society is changing in many ways, with an open economy and greater international influence in the region (Mohammadf, 2021). However, it would be difficult for Vietnam to compete on the level of fairness and transparency with other countries if the justice system does not develop in line with economic reforms. He further adds that history shows that in an open society the needs of the industry as well as of the people will increase and greater freedom and transparency will be demanded. The only solution to that is democracy and transparency (Andersson, 2012). Regarding judicial independence, Karl Marx once said “As for the judge, there are no superiors other than the law ... The judge considers actions on the basis of a certain law” (Nussbaum, 2003). If a law is governed in accordance with the rules of the Socialist Republic of Vietnam, the position and role of the Court gets stronger. A court is an entity that enforces the judicial rights of the State Agencies and ensures the implementation of the law. This directly affects the goals and values of the construction of the law governed by the rule of law in Vietnam. This is where the nature of State and justice of the regime are most deeply shown. This is the evidence of the quality of operation and reputation of the whole judicial system in the law governed by the rule of law of Socialist of Vietnam (Curley et al., 2018).

### **Problem Statement**

The great challenge before Vietnam is that judicial independence must be guaranteed and officially recognized by the State in accordance with the constitution or national laws. The state must also ensure that all of its authorities have the duty to respect and comply with judicial independence. It is also important to see that the state power is unified, assigned and coordinated among state agencies in exercising the rights: legislative, executive and judicial, having the strict inspection and supervision of the exercise of state power. Before the task of developing, protecting and building the country of the law governed by the rule of law of Socialist of Vietnam in the new phase, along with administrative reform, Communist Party and State of Vietnam have advocated promulgation and implementation to mitigate any threat to the judicial independence and judicial reforms (McCormack, 2021). The Strategy of judicial reform to 2020, which takes the Court as the center, the trial as the focus and the focus of the judicial way is to ensure that the independent principle of justice is effective.

This study would attempt to answer some of these issues and recommend feasible solutions to this issue.

### **Results and Findings**

- *Judicial independence and the Vietnamese Constitution*

The 1992 Constitution of the Socialist Republic of Vietnam included the principle of independent trial in Article 130: “During trial, the Judge and Assessors are independent and only obey the law”. When this Constitution was amended and supplemented in 2001, its Article 2 affirmed: “State power is unified, there is a division and coordination between state agencies in exercising legislative, executive and judicial powers”. Hence the Constitution of the Socialist Republic of Vietnam also affirmed that state power in Vietnam should be unified and admitted the fact that

there exist legislative, executive, judicial powers. Similarly, Article 127 of the Constitution stated: "The Court is the judicial organ of the Socialist Republic of Vietnam". This showed that the Constitution recognized the Court as the agency exercising judicial rights, but did not stipulate that the Court was the only agency exercising judicial rights, so there was no official recognition in practice of the independence of judicial rights.

Vietnam's undertakings on judicial reform, in general, and judicial independence, in particular, are clearly stated in many resolutions and directives of the Central Committee of the Communist Party of Vietnam, Political Bureau of the Party Central Committee and the Secretariat. For instance, in the 7th Party Congress, the Politburo's Resolution No. 08-NQ/TW of January 2, 2002, stated "key tasks of the judicial work in the near future" and Resolution No. 49-NQ/TW, June 2, 2005, of the Politburo adopted "Strategy for judicial reform to 2020". The resolution No. 49-NQ/TW, June 2, 2005, of the Politburo on "Strategy for judicial reform to 2020" on judicial reform strategy to 2020 has clear goals: Building a clean, strong, democratic and strict judicial system, protecting justice, gradually modernizing, serving the people and serving the Socialist Republic of Vietnam; and Judicial activity with a focus on judicial activities is conducted with high efficiency and effectiveness.

Additionally, the strategy of judicial reform identified eight tasks, in which there were some missions mentioned about the judicial independence in the light of the law governed by the Socialist Republic of Vietnam, namely: clearly define the functions, tasks, powers and accomplishing the organization and apparatus of judicial agencies; build a contingent of judicial officers and supporting judiciaries in a clean and strong manner; improve the supervision mechanism of elected bodies and promoting the people's ownership of the judiciary; guarantee facilities for judicial activity; accomplish the Party Committee's leadership mechanism to the judicial work.

So far, many Party Committee's guidelines on judicial independence have been recognized by the Constitution and institutionalized into the provisions. At the same time, to ensure the Court's independence, Resolution No. 49-NQ/TW outlined to: "organize the Court system according to the jurisdiction, not dependent on administrative units". It can be affirmed that making a request to organize the Court under its jurisdiction, regardless of the administrative units is a proper policy, which can ensure the principle of independence in the judicial activities of the Court. Independent trial is the highest judicial requirement in the law governed by the rule of law. When deciding to resolve a case, the competent judge shall only rely on the objective circumstances of the case, based on its legal and his own thinking, not influenced by any other external factors (Huong, 2019).

More recently, the 2013 Constitution of the Socialist Republic of Vietnam institutionalized the Party's standpoints about judicial independence in Article 2: Acknowledging legislative, executive, judicial power and the principle of ensuring the division, coordination and strict control among agencies in the exercise of the legislative, executive and judicial powers. These provisions on the division of labor power gave the People's Court a new position and appearance. According to that, for the first time in Vietnam's constitutional history, the court was recognized as an agency exercising judicial rights, protecting justice, protecting human rights and protecting civil rights. This was the only agency on behalf of the State to exercise the national



judicial rights, conduct judicial activities to protect justice, human rights, lawful rights and interests of organizations and individuals base on the law and objectivity.

Clause 2, Article 102 of the 2013 Constitution of the Socialist Republic of Vietnam further stated: “The People's Court is the judicial body of the Socialist Republic of Vietnam, exercising judicial rights”. Because of this regulation, for the first time in the Constitution, the agency exercising judicial rights in Vietnam was affirmed as the People's Court. The judicial power was also interpreted as a right to trial. Compared to the period before the 2013 Constitution of the Socialist Republic of Vietnam, the judicial rights and judiciary had been shaped and narrowed to a wide range, leading to innovations in the awareness of judicial rights in Vietnam. This 2013 Constitution of the Socialist Republic of Vietnam was more specific than previous Constitutions. For instance, it stated: “Judges and jurors conduct trials independently and obey only the law; Agencies, organizations and individuals are strictly forbidden to interfere in the trials of judges and jurors”. This shows judges and jurors are independent in all procedural activities since registering a case till the end of the trial, and not just limited to “in trial”, as was in previous constitutions. The prohibition of agencies, organizations and individuals from interfering in the trials of judges and jurors also ensured that this principle was enforced in practice, independent of external factors.

The independent of internal factors also means that all members of the trial panels are independent in researching records, reviewing and evaluating evidence and drawing conclusions on crimes, and form opinions about offenders, and sentence penalties during the trial. This also stated that only members of the trial panels can participate in the deliberation. People's assessors are the first to vote and Judges are the last to vote. The issues of the case must be resolved by voting and deciding by majority. Those with minority opinions are entitled to present their opinions in writing and put on record in the case files. In conclusion, the 2013 Constitution of the Socialist Republic of Vietnam, which is similar to the Constitution of many advanced countries in the world on judicial independence, is an achievement in renewing the political-legal thinking of the Communist Party. It is also an achievement of constitutional Vietnam. Although there are still some limitations, this strong step has brought many positive results to Vietnam's judicial system, approaching the common criteria of international justice on judicial independence.

- *Policies regarding Independent judicial reforms in Vietnam*

There are multiple factors to define and understand the policies regarding independent judicial reforms in Vietnam.

- i. *Firstly, The Party and the State of Vietnam have well resolved the relationship between the principle of Party leaderships and the principle of independent judiciary.*

One of the prerequisites of judicial reforms is that though the Party manages the judiciary but does not exercise any state power on it. The Party can use the State apparatus only to implement its political platform, undertakings and policy. It can set out major principles and views that serve the basis for building the organization and operation of the judicial agencies. It can outline the directions and orientations in the field of activities of the judicial agencies. However, the Party cannot act on behalf of the judicial authorities, nor directly intervene in the adjudication or settlement of a specific case of the judiciary. The Party should always respect and uphold the

organization and operation principles of the judiciary, including the independent judiciary principle.

As its efforts to implement judicial reforms, the Party also guarantees to adopt the principle of independent judicial rights on the basis of respect and recognition to the principle of independent judiciary. The Party committees at all levels have the task of thoroughly grasping and building political awareness in order to strictly implement the principles on all party members. As a result, the independent judiciary principle can be strictly and effectively implemented. Moreover, to select leadership and other personnel in the organization, the Party determines that all functions, tasks, organizational structure and apparatuses of judicial agencies must ensure the principle of independence. The Party sets major goals and solutions to build a contingent of judiciary officials who are clean and strong; who are strong in politics; who have professional expertise; who are brave in protecting justice; who can ensure that they operate in accordance with law; and who can be independent in carrying out the adjudicating duty. For professional tasks, it is said that “the Party give the directions or comments on general principles, based on provisions of law in handling criminals related to officials and party members, serious and complicated cases about politics, economy and society, corruption cases involving officials under the management of party committees, cases involving foreign affairs (Q. V. Nguyen, 2006) and do not decide on specific matters under the jurisdiction of the judiciary.

In short, the Party leading the judiciary is an important and necessary pillar to ensure the compliance to the principle of judicial reforms. The Party leading State is an important principle in the organization and operation of the state apparatus and the Court system. The practice has proven that the Party leadership has not violated the principle of independent judiciary, but ensured a fair implementation of its contents.

**ii. Secondly, the Court system has changed the mechanism, criteria for budget allocation of trial activities and accomplished the solution on the human side.**

The judicial reforms much depend on budget and availability of funds. If Courts wish to independently exercise their judicial function, they must have sufficient budget. The budget for the Court system in general and for judges in particular is one of the indirect factors that can affect judicial independence and judicial reforms. The Clause 3, Article 96, Law on Organization of the People's Court of 2014 states that after reaching an agreement with the Supreme People's Court, the Government submits the budget of the People's Court to the Congress for approval. In the case that the Government and the Supreme People's Court cannot reach agreement, the Chief Justice of the Supreme People's Court will request the Congress to consider and decide. The management, allocation and use of funds comply with the State Budget Law (Law on Organization of People's Courts, 2014). The Court has autonomy and is responsible for the budgeting of its activities in particular and the Supreme Court has autonomy and is responsible for the budget estimates of the whole Court in general. The budget is also allocated based on requests from local courts and it is always transparent.

On the human side, Article 70, Law of Organization of People's Courts of 2014 stated that judges should be considered a separate category of judicial officials in the

Vietnamese court system. This provision will create a unique and noble position for the judge. The selection and appointment of judges gradually move from judicial selection regime at each Court level to the national entrance examination to supervise National Judges. There is a selection committee whose members are selected by the Congress Standing Committee according to proposal of the Chief Justice of the Supreme People's Court Law (Law on Organization of People's Courts, 2014).

iii. **Thirdly**, *strengthening the supervisory relationship between supervising the power of the people and independent judicial principles.*

In Vietnam, the Congress is the only body with constitutional and legislative rights. It is the highest representative body of the people and the highest state authority. The Congress has an important role in creating a basic legal foundation for the operation of judicial agencies. The supervision of the people through elected bodies with regard to judicial activities which is concretized into tasks, powers and responsibilities is the exercise of state power recognized by the Constitution and laws. Therefore, the Congress, the Judicial Committee, the Congress Deputies and the Congress Delegation are the entities that directly exercise their supervisory authority and are responsible for exercising this authority. This is a peculiarity of the law governed by the rule of law of Socialist of Vietnam. Over the years, this representative body has shown its roles and responsibilities in monitoring the judicial activities on many aspects, namely: supervising the settlement of a number of specific cases; proceeding to question the Chief Justice of the Supreme People's Court, the Head of the Supreme People's Procuracy, and so on. The supervision of elected bodies representing the people's power has also been conducted regularly, publicly, transparently, democratically and objectively; without affecting the normal operation of the judiciary. It ensures the principle of independence, obeying the law; supervising but not interfering and not replacing. The principle of independence must also be placed in the assignment and coordination between the Congress and the Congress Standing Committee, the Judicial Committee, the Congress deputies and the Congress Delegation.

Although the nature of supervisory activity is almost the same as control, it is also intended to ensure that judicial power is properly functioning; that is, it is judicially independent. The supervisory power has a narrower scope, not involving inspection and examination activities but it shows independence in influencing judicial power. Therefore, supervision will have less "potential" negative effects on the independence of the judiciary. The people's direct supervision of judicial independence in Vietnam does not have state power and direct legal effect. Through the supervision, people have the rights to reflect, petition, appeal, denounce to competent agencies and organizations if they think judicial power is not exercised independently or there are acts violating the Constitution and laws. Through the criticism of the people, courts must also be more cautious, more independent when dealing with cases.

The criticism mechanism of the people is also sufficient to prevent and deter the violation of the principle of independence in judicial activities. In order to make the people's supervision become more practical and stronger, Vietnam has built the system of mechanisms that ensure the principle of monitoring the power of the people over the principle of judicial independence: through transparency in judicial



activities. It also makes public the proceeding process, applying the principle of presumption of innocence in judicial activities, public judgment; enhance people's ability to access to information, access to justice; promulgating regulations and statutes according to the Law on Organization of People's Courts in 2014 to process the responsibility of the person conducting the proceedings (Chief justice, Judge, Assessor, Procurator, Investigator), and when there is a violation in the activities of trial and procedure.

iv. **Fourthly**, *strengthening the function of controlling judicial activities of People's Procuracy from central to local.*

Judicial field is such a range of power that ought to be highly independent, but it is always put under abstinence and tight control. In Vietnam, control mechanisms among state agencies in the exercise of legislative, executive and judicial rights is specified in Clause 3, Article 2 of the 2013 Constitution of the Socialist Republic of Vietnam, which states: "The state power is unified and delegated to state agencies which coordinate with and control one another in the exercise of the legislative, executive and judicial powers". Vietnam has also built many mechanisms to control the state power in general and to control judicial power in particular. This is the political and juridical basis to control the judicial power and maintain the principle of independent judicial rights.

In Vietnam, Procurement is a specific activity of the procuracy - a constitutional body. Procuracy is a powerful body established by Congress to control power. This body, depending upon who designed it, can substitute for a lot of independent power control agencies. When the Vietnam People's Procuracy was established on the model of the Procuracy of the socialist countries, the central task of this independent body was to focus on controlling and comply with the law of the system of state administrative agencies as well as law enforcement authorities. However, until 2001, with the Resolution amending and supplementing a number of articles of the 1992 Constitution of the Socialist Republic of Vietnam of the X Congress, the People's Procuracy in Vietnam now only represents judicial control.

The Article 4 of Law on Organization of 2014 of the People's Procuracy stipulated the function of controlling the judicial activities of the People's Procuracy. It stated the need to control the legality of acts and decisions of agencies, organizations and individuals in judicial activities. Although there has not been any official explanation about the content of controlling judicial activities, legislative practice and law enforcement has shown that judicial activity control is recognized as procuring judicial proceedings. It means that the Procuracy not only monitors the trial process, but also strengthens the control of the investigation and enforcement process. Therefore, it can be seen that there is a strong development in the thinking of the Party and State of Vietnam on controlling judicial power over the principle of independent judicial.

v. **Lastly**, *Implementation of the principle of presumption of innocence in criminal procedure right in independent and a fair trial - according to international standards.*

There are different types of procedural models in the world, including two main procedural models: interrogation proceedings model and adversarial proceedings model, known as crime control proceedings and fair proceedings (Goldstein, 1973).

Each procedural model has certain advantages and disadvantages. These models help in the Criminal Procedure Code of Vietnam when it faces difficult circumstances such as whether to continue the interrogation proceedings or change into the adversarial proceedings. The 2013 Constitution of the Socialist Republic of Vietnam marked a new step in the principle of presumption of innocence regulation in particular and the principle of independence in trial in general. The previous Constitution and laws in Vietnam stipulated the principle of presumption of innocence only to cover one indication: “No one shall be regarded as guilty without the effective sentence of the conviction”. In other words, a sentence is legally valid only when a person is found guilty.

The principle of presumption of innocence also synchronizes with the regulations on the rights of defendants. As reported by the 2013 Constitution of the Socialist Republic of Vietnam, the arrest and detention of a person must be in accordance with the law, no one shall be arrested without a decision of the People's Court, except in the case of being caught red-handed. This proved the independence of the Court in deciding to arrest and detain people in Vietnam, independent of external power factors. This point of view is shown more clearly in Article 13 of Criminal Procedure Code of Vietnam in 2015: “An accused person is deemed innocent until his guilt is evidenced according to the procedures and formalities as defined in this Law and a Court passes a valid conviction. If grounds for conviction, as per the procedures and formalities in this Law, do not suffice, competent procedural authorities and persons shall adjudge the accused person to be not guilty”.

This result shows that the principle of presumption of innocence in Criminal Procedure is suitable with the model of Criminal Procedure in Vietnam and the reform of the Vietnamese judicial system. For instance, on August 24, 2015, the People's Court of Binh Phuoc province had a first-instance trial which declared Mr. Nguyen Van Dong not guilty of murder. He was released by the court although the representative of the Procuracy had proposed life imprisonment. Judge Nguyen Van Nhan (Presiding judge of court hearing) said: “Because of lack of conviction grounds, after three days of judgment deliberation, the Trial panel declared that Dong did not commit murder. The Trial panel had thoroughly applied the principle of presumption of innocence to trial. If there is not enough evidence of conviction, the Trial panel has to strongly declare that the defendant is not guilty.

In conclusion, ensuring the judicial independence of the Court is a condition to assess the effectiveness of an independent judicial reform policy. The process of implementing this policy in Vietnam in recent years has shown many positive results. The Party and the State of Vietnam have well resolved the relationship between the principle of Party leaderships and principle of supervising the power of the people to the principle of independent judiciary. At the same time, the state has also strengthened the improvement of human solutions, implemented the judicial control function of the People's Procuracy, as well as separated budget allocations for judicial activities. These actions have contributed to bring the Vietnamese judiciary closer to the advanced judiciary in the world - the judiciary must be independent and should not interfere with the Court's trial process. However, besides the positive results that have been mentioned, the issue of independent judicial reform in Vietnam is still a controversial topic that makes Vietnam reform the judiciary in a comprehensive

manner towards modernity, independence and equity.

## Discussion

Currently, Vietnam is in the process of implementing reform policies about judicial independence in particular, judicial reform policies in general. There are several domestic debate on independent judicial reform, which are categorized into 5 issues:

- i. The first issue deals with the Party method of leadership. There is an opinion that the Party's leadership over the current judicial activities has not been clearly and specifically defined. Vietnam has no specific criteria to make out what are serious and complicated cases about politics, economy, society, corruption cases involving officials under the management of party committees, cases involving foreign affairs. There are no specific mechanisms and guidelines for seeking opinions of the party organization on handling a number of specific cases and no clear regulations about scope and content of party committees' examination of judicial activities. It could lead to abuse of seeking advice or in contrast, abuse reporting requirements and steering. Therefore, the State has to have clear and specific regulations on the leading role of the Party in judicial activities of the Court in general as well as for each specific case in particular to guarantee a principle: "During trial, Judges and Assessors are independent and only obey the law".
- ii. The second issue deals with the management of court budgets and manpower. In Vietnam, local courts as well as the Supreme People's Court themselves draft budgets for their courts. The process of drafting a budget is the internal affair of the Supreme People's Court. The draft budget is first sent to the Government to meet the budget. Next, the government submits it to the Congress. According to the Law on Organization of the People's Courts in 2014, the Supreme People's Court cannot directly submit the draft budget to the Congress for approval without the approval of the government. This mechanism gives administrative agencies certain influence on the Court system. This has led to the fact that the budget for judicial activities is not guaranteed at the level that the Court can be completely assured and exercise the independent judiciary. The selection of manpower or the appointment of judges according to Vietnamese law is quite strict. Besides, its term is too short (the first term is 5 years, the next term is 10 years). For this reason, judges are subjected to psychological pressure during their term of office, which may not be really reassuring factor. The judges may not be proactive or independent at trial due to such pressures. It is therefore necessary to consider extending the term of judges compared to the present, and extend it to whole life. The judge's relatively low salary also put pressure on them and could be a possibly reason to promote corruption. Last, but not the least, it is a general opinion that there is also a slow process involved in several important functions of the judicial machinery namely, identification of tasks, organizational structure, budget allocation mechanism, renewal of training, fostering, appointment, commendation, discipline and remuneration policies for officials of judicial agencies and judicial supplements. There are also a number of judicial officers with political affiliations, lacking professional ethics and qualifications not meeting the requirements.
- iii. The third issue relates to the supervision mechanism of the Congress, the elected

body for the work of adjudication. The Congress is the highest authority to supervise the adjudication work with respect to the functions and duties of the Court. However, the fact that the current supervision of the elected body for the trial is still limited: Some important contents such as supervising the promulgation of guiding documents for law and ordinance implementation have not been done much and regularly. The interrogation of the Chief Justice of the Supreme People's Court is also unclear and ineffective when delegates often focus on specific cases which the judge is hard to remember and answer immediately. In judicial activities, the independence of the procedure is highly appreciated. However, it is a controversial issue to define the scope of supervisory activities of the Congress, the Congress Standing Committee, the Judiciary Committee, Congress Deputies and Congress Delegation. Some people think that monitoring is the only function of the Congress, so it can only supervise the activities of the judiciary at the central level. Others think that since Congress must supervise all activities of the state, its scope of supervision includes the local judicial authorities. This example accurately reflects the scope and supervision competence of the Congress which is stipulated in Article 69 of the Constitution which ensures the principle of independent judiciary.

- iv. The fourth issue relates to supervisory and procedural functions of Supreme People's Procuracy. In Vietnam, the control of trial activities is the exercise of control of judicial power from the outside, carried out by a competent agency established by the Congress. There are some arguments to highlight this element: that the Procuracy must be independent of trial activities in order to administer the trial activities; that it is an independent body of justice, not the judiciary as it has often been confused; that it has been established by the Congress as a tool to control the state power in general, including judicial power, and so on. The point of view which supposes that People's Procuratorate is not a judicial body like the People's Court, leads to the issues whether or not to control the judicial activities of People's Procuracy. Many people think that only the Congress and its agencies have the authority to supervise and control the trial activities. There are many other opinions that stem from the principle of independent judiciary supposing that judicial power is not necessarily from outside, but only an internal control mechanism. It takes direction of the higher-level adjudication agencies to inspect and supervise lower-level judicial agencies. Consequently, the control of judicial activities is eliminated because it not only violates the principle of independent adjudication but also differs from other countries. In addition to controlling judicial activities, the People's Procuracy also exercises prosecution rights, but the prosecution is associated with trial. It is obvious that although the People's Procuracy in Vietnam is under the current Constitution, it is also assigned the function of exercising prosecution rights, that is, in the name of the state power to prosecute and accuse the offenders before the Court, but even prosecution cannot be considered as judicial activity.
- v. The fifth and final issue discusses whether the independence of judges in adjudication can grasp the presumption of innocence thoroughly. These two subjects are almost opposite: because criminally charged persons and accusers, all participate in the proceedings, especially in criminal procedures. The judge who is

in the middle tries to decide between right and wrong in the name of the State. The Judges' position must be independent of the two subjects. Many people argue that a common approach should be used by the proceeding agencies, otherwise the criminally charged person will often be considered as a criminal. Moreover, the way they dress, address, and treat a criminally charged person almost create a psychology that you are in a real trial, that you are guilty, and that you are losing the independence of trial in the Court. Meanwhile, the law clearly stipulates that: A citizen is only considered guilty when a judgment of the competent Court has been in effect. Thus, the independence of trial of the Court expects the Judge must follow the laws and prevent the abuse of legal status in litigation relations. The practice of investigation, prosecution and adjudication activities tend to recognize the accused and the defendant as offenders, even though their crimes have not been proven. This is one of the causes of the wrongful cases. For example, the wrongful convictions of Huynh Van Nen in Binh Thuan, Nguyen Thanh Chan in Bac Giang and Ho Duy Hai has caused a lot of domestic debate. The decision of the cassation review of the Council of Judges of the Supreme People's Court contained inconclusive details and arguments, which can cause an inappropriate precedence with the presumption of innocence provided by the Criminal Procedure Code. This is an ongoing issue and the Congressman Le Thanh Van has proposed that Congress should supreme supervise this case.

To sum up, the independent judiciary is the special operating principle of the Court which is also noted in the 2013 Constitution of the Socialist Republic of Vietnam. In order to ensure the independence of the Court, many large cases have been brought to trial, but the basis for ensuring the independence of the Court has not been respected and followed. The cause of this wrong decision leading to the above result is due to the limitations of the factors affecting the guarantee of the independence of the Court, seriously affecting benefits of rights and the legitimate interests of citizens. Moreover, these debates have pointed out to the successes and limitations of the independent judicial reform policy in Vietnam. Hence, The Communist Party and the State of Vietnam can appreciate the truth and objectivity of the reality, summarized into thinking, promoting the completion of progressive judicial reform policies, and coming closer to international justice.

There is a need for the State governance to think about Vietnam's independent judicial reform. In order to achieve this, the state power is unified and delegated to state agencies which coordinate with and control one another in the exercise of the legislative, executive and judicial powers, as stated in Article 2 of the constitution. Although Vietnam enforced the law governed by the rule of law's power on the principle of centralization, there was a change in the perception of the independence of judicial power. Vietnam's Constitution legitimated the rationality of the principle of separation of powers, including the division of state power into specific branches of power. These branches did not exist independently and separately, but are related, supervised, and controlled by each other. This is one of the three mainstays of the Socialist Republic of Vietnam's power, which can be distinguished by function, judicial power and always keep an independent position.

In order to ensure judicial independence, Vietnam has imposed strict

requirements specifying how to keep the Court independent in trial and ensure the principle of independent Court to take effect. The constitution asserts that: "Judges and Jurors conduct trials independently and obey only the law; Agencies, organizations and individuals are strictly forbidden to interfere in the trials of judges and jurors". The fact that Jurors are included in the Constitution showing people's representation and power over judicial activities and the implementation of the independent judiciary in the law governed by the rule of law of Socialist of Vietnam.

In order to clarify Vietnam's thinking about judicial independence and Court's independence in trial, this study came across a few factors that ensured judicial independence and Court's independence. These factors are as follows:

*i. The factor of court's awareness about judicial independence*

The innovation and reform of judicial independence in Vietnam has created a dramatic change in awareness throughout the political system and the whole society, including a new awareness about the position of judicial power in State power and independent judicial rights of the People's Court. The 2013 Constitution of the Socialist Republic of Vietnam stipulated "The People's Courts are the judicial bodies of the Socialist Republic of Vietnam that exercise only judicial power". The problem lies in the fact that the court needs to be ensured to exercise its judicial power, which is judicial independence, and independence of the Court in judicial activities. To solve the problem, the Constitution had already asserted: "Courts in Vietnam exercise judicial rights through judicial activities based on the principles of independence and objectivity and only obey the law".

In order to make the Court operate independently, it is important to change perceptions about the Court thus: "The Court is the only body on behalf of the State conducting judicial activities, protecting justice, protecting human rights, protecting legitimate rights and interests of organizations and individuals, and exercising national judicial rights. Thus, the State has to have a sound point of view to set up institutional, operational principles, organizational structure, infrastructure, remuneration and operating funds for the judges; retirement age, term and salary of Judges, and so on. If accomplished, there will be a strong development, a renewed thinking and a better awareness of judicial independence in Vietnam's national governance.

*ii. The factor of judge's responsibility, capacity, and ethical qualities.*

A good national governance requires fair and impartial legal institutions. It means that the independence of the judicial decision-making process is not governed by any intervention. An independent judicial system for the Government or parties involved in judicial activities is the best support which can help Vietnamese law become effective. To be fair, there must be institutions and policies that make judges accountable for their actions before justice and the people. The independence of the judiciary must go together with the mechanism and accountability in the justice system, elected bodies, and like. When judges are held accountable for their actions, the justice system becomes more efficient and fairer. Therefore, responsibility, jurisdiction and moral qualities are indispensable qualities of a judge; therefore, judges should not only pay attention to having high professional qualifications; they should also care about morality and professional conscience. Therefore, there should



be a set of ethical rules that clearly and specifically stipulate ethical and behavioral standards which the judge must not do or should avoid to ensure the integrity of the judge. With the support of UNODC, in 2018, the Supreme People's Court of Vietnam issued the Code of Ethics and Conduct of Judges, which specified ethical standards and code of conduct of Judges. This Code was also the basis for evaluating and disciplining the judges. So far, Vietnam had not had any specific document on ethics for Judges(Chan, 2005).

*iii. The factor that a judge has a solid and long working term.*

Judges cannot have a faithful attitude towards the Constitution and the people if their working term only lasts for a certain period of time. Once appointed for a short term in any manner, judges will not be able to have an independent and determined spirit in the trial. There is another reason that determines that a judge should have a long working term, which is their qualifications. The freer a society is, the more confusing and meticulous its rules become. More and more cases are adjudicated, disputes become more and more complex, so the judges need to have higher professional qualifications. A long working term will enhance the professional skills and the independence of the judges. Vietnam has made a completely appropriate regulation: the working term of judge in Vietnam lasts for 5 years, the next term lasts for 10 years. Especially, if a judge does not make serious mistakes, he will surely be reappointed. This motivates the judge to cultivate, train himself, uphold the professional ethics, and strengthen the judicial integrity. The State and society can monitor and evaluate the capacity and quality of judges. This can make the Vietnamese justice system more independent, fair and effective. Vietnam has also shown a change in perception about the independence of the judge; but for a judge to have a stronger and more permanent term (or lifetime term), it depends on the practical situation of Vietnam in future.

*iv. The factor of judges' salaries.*

Besides a long working term, perhaps no other element could be more convenient to maintain a judge's independence by controlling their means of living. The Judges' income in Vietnam makes it difficult for them to ensure their daily life so it is impossible for the judge to resist material temptations from the objective side during the trial. Unreasonable salary of the Judge is quite a big resistance affecting the assurance of the independence of Judges. An underestimation of the importance of the Judge's independence in judicial activity is the main reason. Investing the budget to pay for the Judges adequately will bring strategic interest and intangible value, although it is hard to count like other investments. Corruption or ineffective operation of the judicial system will cause much greater damage than the State budget's budget to pay a satisfactory salary to the Judge. Although Vietnam has made changes in its mindset on ensuring the independence of the Judge, it is still a big problem of Vietnam's budget to perform, institutionalize and regulate these insights into practice.

In short, fulfilling elements that ensure the independence of the Court as well as the independence of the judiciary and the importance of the judge as analyzed above elucidates Vietnam's core thinking in national governance of judicial independence. Stemming from the reality of the Court system in particular, the judiciary in general, Vietnam has been aware of the limitations, and it has assessed and reviewed lessons

domestically and internationally in judicial reform. From now on, Vietnam has formed its own national governance thinking of independent justice.

## Conclusion

To sum up, this study made evident that judicial independence is an important factor and that courts must be objective and fair in passing their judgements. Judicial independence is an indispensable element in the law governed by the rule of law. It has a special role in ensuring the supremacy of law and Constitution, balancing and controlling the state power and guaranteeing human rights. The independence of justice is the principle embedded in the constitutional judicial powers to ensure the building of the law governed by the rule of law of Socialist of Vietnam. Judicial independence is also the demand of society and the people to increase access to justice to guarantee citizen's rights and human rights.

Judicial independence does not mean that it is independent without limitations. This is the independence which is limited by the law-abiding nature of judges, supervision of elected bodies, and Procurators. Moreover, legal compliance is a solid basis to ensure the independence of the Justice. In other words, the Justice is only independent within the framework of the law. Judicial independence and law-abiding always go together. Due to the important role of the law governed by the rule of law of Socialist of Vietnam, reforming the Party's leading role in judicial activities should also be emphasized as a solution to enhance the independence of the judiciary.

Although judicial independence is not a new issue, the judicial reforms in the government machinery would not always mean that the issue of judicial independence has been completely solved. In Vietnam, this is still an issue faced by the Communist Party and the State of Vietnam, who attach special importance to this issue. A prosperous and sustainable society requires a strong judiciary - the things that we have never had in history and in the present, but very much needed for the future.

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