

# SOME ISSUES ON THE ROLE AND RESPONSIBILITY OF JUDGES IN THE CREATION AND ENFORCEMENT OF LAW IN VIETNAM

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## ABSTRACT:

Being aware of the role and responsibilities of judges in developing and applying criminal legal cases does not only help the judge solve the case properly but also help to increase the judge's awareness of the value and significance of the criminal judgment in the creation and enforcement of law uniformly.

**Keywords:** Judge, criminal legal case, role, responsibility, law.

## 1. Foundation

A judge is a person with key positions and roles in the performance of procedural tasks of People's Courts at all levels. The role and responsibilities of judges in formulating and applying criminal cases are expressed right in the proceedings. Case law is created by the court during the hearing process, especially during the trial. Judicial functions of judges are exercised through powers and responsibilities prescribed by law. Those are the provisions of the Law on Organization of the People's Courts, the Ordinance on Judges and Assessors of the People's Courts, and the Criminal Procedure Code.

## 2. Roles and responsibilities of judges in the construction and application of criminal cases

The Resolution No. 48 / NQ-TC of May 24, 2005 of the Politburo on the Strategy for building and perfecting the Vietnamese legal system up to

2020 has identified: "Research on the possibility of legal case exploitation and use". The Resolution No. 49 / NQ-TW of June 2, 2005 of the Politburo on the Strategy on Judicial Reform to 2020 set out the purpose of building and perfecting step by step operations of the People's Court: "The Supreme People's Court is responsible for summarizing trial experience, guiding the uniform application of laws, developing legal case and cassation and reopening trial". Implementing the direction of the Central Resolution, the Supreme People's Court issued Decision No.74/QĐ-TANDTC on October 31, 2012 approving the project "Development of precedents of the Supreme People's Court", according to which clearly indicated the objectives, viewpoints of direction, orientation and measures to develop case law in our country. Next, the Council of Judges of the Supreme People's Court issued Resolution No. 03 / TC-CĐTTP dated

October 28, 2015 on the process of announcing, selecting and using case law (Resolution No. 03 / NQ- HDTP) and Resolution No. 04/2019 / NQ- HDTP on the process of selecting, announcing and applying case law (Resolution No. 04 / NQ- HDTP). Besides, the 2015 Civil Procedure Code is amended and supplemented in 2015, Article 262, Clause 2, point b; Article 308, Clause 4 has officially recognized the legal case as a "basis" with laws, practices and similar laws for the Court to analyze and evaluate. Thus, the legal case has become a source in the practice of law application, particularly in the judicial activities of the Court in our country.

Article 1 of Resolution No. 03 / NQ-HDTP and Resolution No. 04 / NQ-HDTP: "Case law is the arguments and rulings in a legally effective judgment or decision of a Court on a specific case It can be selected by the Council of Judges and announced by the Chief Justice of the Supreme People's Court, which is a precedent for courts to study and apply in trial."

From the above-mentioned concept, it can be seen that the chosen case law must meet the following criteria: It is valuable to clarify the provisions of the law and there are different ways of understanding, analyzing and explaining the issues and legal events and point out the principles and lines of handling legal documents that need to be applied in a specific case or show fairness on matters that have not been specified by laws, are standard, valuable guide uniform application of the law in trial.

The case law in Vietnam as well as the case law in other countries are shaped by the judiciary. Therefore, judges play an important role in proposing, developing and applying case law

Firstly, the judge can consider and select the judgments based on the criteria of selecting case law to propose and develop into a case law.

Case law is formed from facts in each specific criminal case. In the course of adjudicating specific cases, judges with their competence and creativity apply the law to solve cases still involving acts and circumstances with different interpretations. Making a decision, the sentence can become a criminal case.

Judges through the practice of adjudication, scientific forums on case law or the publication of judgments, decisions of the Court... if detecting and having clear evidences and grounded analysis on the matter topics, legal events, indicating principles, ways of handling or legal procedures to be applied in resolving cases, may propose the selection of legally effective judgments and decisions of The courts, meeting the criteria of case law, send them to the Supreme People's Court (via the Department of Legal and Scientific Management).

Second, the judge can change and abolish the case law.

Case law can be abolished by laws passed by Congress. In fact, the National Assembly's promulgation of laws to change or supplement old laws or to stipulate new issues will be able to change cases based on the revised law sources. The awareness of case law is abolished in this case which belongs to the judge. If the judge cited cases that were denied by new laws, then it wouldn't be convincing.

Third, judges need to uphold their roles and responsibilities in order to apply case law most effectively.

Up to now (December 2019), the Supreme People's Court has issued 29 cases, including 06 criminal cases. For 29 cases in general, 06 criminal cases in particular when applying to hear criminal cases of similar nature and circumstances, requires each judge to uphold all the roles and responsibilities of yourself in the steps of applying the case law, specifically as follows:

Firstly, analyzing criminal cases.

This is the first step in the process of applying the case law, so the judge should study objectively, comprehensively and fully the facts, circumstances and conditions of the criminal case. In addition, it is also necessary to identify the legal characteristics of the case from which to select specific case law, which are appropriate to apply to the resolution of criminal cases.

Second, choosing a criminal case.

The Judge must select the correct case law that is expected for the case to be applied, namely the number of court judgments and decisions

containing the same precedent, nature and circumstances of the case mentioned in case law. Collation and comparison with the nature and circumstances of the case being resolved to determine whether the case is similar? Are the facts and legal events the same? Determining the selected case law is in effect so it can apply to the case being settled.

Resolution No 04/2019 / NQ-HDTP on the process of selecting, announcing and applying case law: During adjudication, the Judges and Assessors must study and apply case law, ensure cases with situations Similar legislation must be addressed equally. In cases where the case has similar legal circumstances but the Court does not apply the precedent, it must clearly state the reasons in the court's judgments and decisions.

As such, the judge needs to carefully study the case file and the sentence that was recognized as precedent before trial. Particular attention should be paid to the judgments which are somewhat considered to be of valid criminal law; When citing the case law, the judge must be the person who clearly explains the reason for the case law. To do this, judges need to develop the skills of reading and analyzing the content of case law: how to invoke case law in judgments.

Third, deciding to apply, not apply criminal law.

When adjudicating cases involving a decision that has become a precedent, the Judges must be responsible for invoking the case law, applying such case law if they find that the case being tried is similar. If the case law is not applicable, it must show the plausible reasons for not applying the precedent law and take responsibility for the case of not citing the case law relating to the case being tried.

The results of analyzing a criminal case, selecting a criminal case will allow the judge to assert that the case in the case law and the case being resolved is similar, with similar facts and legal facts, then that criminal case will be applied to the same resolution. In case of application of a case law, the number of court judgments and decisions containing the case law, the nature and circumstances of the case mentioned in the case law, and the nature and details of the case being settled or questioned, Legal issues in case law must

be invoked, analyzed and clarified in court judgments and decisions. In case of not applying the case law, the reasoning and analysis must clearly state the reason in the court judgment or decision.

If the Judges of the lower Courts do not decide according to the line and trial solution set up in the case law of the Supreme People's Court, they must clearly explain the reasons why they do not comply a specific case law. This reasonable explanation of the Court may contribute to the identification of the conviction with respect to X law of the Supreme People's Court. The fact that the Supreme People's Court supports the lower Court in arguing that it does not follow the rules of the Supreme People's Court can be considered as a move for this case to be abolished.

### 3. Difficulties and obstacles in building and applying criminal cases

Firstly, the limited qualifications and capacity of many judges who directly develop and apply case law will be difficult in building and applying case law in Vietnam today.

In countries with a long history of case law, a team of judges, lawyers, and lawyers trained in a common legal environment, the technical knowledge in identifying and applying judgments Rules have been imbued in their legal thinking ever since they received legal training. The skill in analyzing and using case law in connection with the technical issues of case law will penetrate into the legal thinking of lawyers and judges over time, experience in research and practical application for their law l.

Difficulties in the construction and application of case law in Vietnam stem from the qualifications of many judges in the judge team. If only general, superficial and general knowledge is provided, the judge will not be able to make sufficient, accurate and convincing arguments in the application of case law. Annually, the Supreme People's Court in its summary reports pointed out the flaws in the application of the laws of domestic judges due to the failure to update and fully understand the laws promulgated. However, in many cases, many lower court judges still do not update, if do not use it promptly in trial, after the Court of Judges has issued a Resolution guiding the application of the

law on a specific field. When the qualifications and capacity of the judge is limited, the implementation of case law will face difficulties such as: delay in updating the practice of practice, the way of trial through specific case law. The study and understanding of laws through case law requires the judge to invest time and reasoning thinking in order to properly understand the legal solution of each specific case law for each type of case.

Secondly, the Criminal Procedure Code does not require mandatory research and application of precedents for trial.

This is also the difference between criminal case law and other types of criminal law. The Criminal Procedure Code 2015 has not recorded the application of precedent law in the trial but only noted at Point d, Clause 2, Article 260, "Judgment of the Trial panel must analyze evidences that identify crimes, evidence evidencing not guilty, determining whether the defendant is guilty or not and if the defendant is guilty, what crime, according to Points, Clause, Article of the Criminal Code and other applicable legal documents use, aggravating circumstances, mitigating criminal liability and how to handle it. If the defendant is not guilty, the judgment must clearly state the grounds that the defendant is not guilty and the resolution of their honor, rights and legitimate interests in accordance with law;" and Point b Clause 3, Article 260 is "Summary of case contents and decisions in first instance judgments; contents of appeals and protests; judgments of the appellate trial panels, grounds for accepting or not accepting appeals or protests; points, clauses and articles of the Penal Code and other legal documents on which the appellate trial panels base to settle the cases."

Thus, the Judgment of the Trial panel must analyze evidences determining whether to be guilty, evidence to determine not guilty, determine whether the defendant is guilty or not and if the defendant is guilty, what is the crime, according to Point, Clause, Article of the Criminal Code and other applicable legal documents, aggravating circumstances, extenuating circumstances of criminal liability and how to handle them. If the defendant is not guilty, the judgment must clearly state the grounds that the defendant is not guilty

and the resolution of his / her honor, rights and legitimate interests in accordance with law and in the judgment of the defendant. The trial panel can accept appeals and protests based on the provisions of the Criminal Code and other legal documents. Here we need to clarify what other legal documents are? Does the criminal case include?

Thirdly, how to understand the basic facts of similar nature in the practice of law application.

There is currently no consensus on how the basic facts are understood, so the situation remains the same, but the courts that apply precedent have different views. The court held that it was a basic episode but another court did not consider it a basic episode.

Fourthly, the current number of criminal cases is small.

#### **4. Solutions to promote the role and responsibility of judges in the construction and application of criminal cases in Vietnam today**

Firstly, raising awareness and renewing judicial thinking for the judges' staff in the process of carrying out the trial task.

The application of case law as a supplementary law source to increase the persuasion of the Court's judgments has become a prominent trend in the content of the Court's judgments.

The judges are those who participate directly in the work of the Court. Therefore, in order to apply case law as a supplementary law source to increase the conviction of the Court's judgments, it is necessary to first raise the awareness of law application, and the application of case law. This is considered an important factor in making all activities of law application in people's courts always ensure consistency in the practice of trial.

Only when the team of Judges are truly fluent in the law when applied, then they will hear the law properly. The regular publication of the rules of the Supreme People's Court will be a means to help Judges in countries to update laws and improve their qualifications and trial experience. The reference to case law and the proper application of legal provisions in the process of resolving cases will be an effective method for judges in Vietnam to make the right, legal and appropriate decisions, persuasion of the public.

It is necessary to maintain regular discussion of case law at courts of all levels, regularly fostering knowledge on how to look up case law and using case law when handling cases. Whenever a Supreme People's Court issues a new precedent that has not had a precedent or precedent law that replaces the old precedent, a research discussion should be held. The training of knowledge of case law is not exclusive to judges but must be maintained in training institutions of judges, secretaries, experts and examiners of the Court branch.

Secondly, strengthening training on case law, skills to apply case law in judges' professional training program.

It is necessary to strengthen the case-related training content into the training programs of judicial titles in general and the professional training curriculum in particular. Detail:

Strengthening the development of private lessons on case law in the curriculum of compulsory subjects, electives or extra-curricular activities; building a number of appropriate modules on the skills of Judges related to case law in the professional training program.

Or to build an independent course of Judge's skills related to case law in the elective subjects of training, retraining, credit-based training programs, especially training programs, about the trial.

Whether building a law lesson in a compulsory program or in elective subjects, it is necessary to ensure that the content of training on law practice in the general view consists of two specific parts: case law theory, case law / common practice skill and case law practice / practice practice.

Thirdly, open training courses for the Judges in identifying similar details

In fact, determining the same details is also the determination of the scope of the rule of law (mandatory element of case law). Therefore, the content of training to identify similar circumstances needs to focus on the following: (i) Equipping methods of determining the compulsory elements of case law for judges on the basis of factors: Basic facts of the case considered by the court; arguments leading to decisions, decision; (ii) Equip basic judgment skills for the judges. The content of the case selected by the Supreme People's Court to be

published as a case-making law has no details, if the Courts at all levels cannot determine the basic circumstances, they will not be able to apply the case effectively.

Fourthly, it is necessary to build a basis for applying criminal cases during trial

In order to solve this problem in order to ensure that the value of all kinds of case law (criminal law, civil law, administrative case ...) is guaranteed to be applied equally in practice, it is necessary to study the handling philosophy in one of two directions: amending and supplementing Article 260 on criminal law provisions; or providing written instructions to explain the provisions of Article 260 on the application of criminal cases.

Fifth, to issue a separate process on the order, procedures, scope of selection, publication, application and expansion of the scope of criminal cases in order to increase the number of criminal cases.

It is necessary to provide more detailed provisions for selecting precedents in the direction of expanding the scope of criminal law for other acts and circumstances with different signals, in criminal proceedings and civil responsibilities, in criminal cases .... Especially with the criteria of the judgment, the decision must be "standard", the Supreme Court needs a clear explanation and guidance based on what criteria, what level, a judgment, a decision The survey is considered to be standard. Regarding the content, form of judgments, decisions of the Court must meet the requirements. Only when there are such clear criteria and regulations can the Courts as well as individuals and organizations in society be able to consider and select and propose judgments and decisions that meet the criteria? This issue is a precedent and then, the choice of the Council of Judges of the Supreme Court is also convincing. Clearly and more specifically regulating subjects, responsibilities to receive opinions and accountability for receiving opinions of subjects in the stage of collecting comments on judgments and decisions proposed for selection into projects rate. Public disclosure in the process of obtaining opinions will avoid having the competent subjects impose subjective opinions when selecting and announcing precedents ■

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## MỘT SỐ VẤN ĐỀ VỀ VAI TRÒ, TRÁCH NHIỆM CỦA THẨM PHÁN TRONG XÂY DỰNG VÀ ÁP DỤNG ÁN LỆ HÌNH SỰ Ở VIỆT NAM HIỆN NAY

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### TÓM TẮT:

Nhận thức rõ vai trò, trách nhiệm của thẩm phán trong xây dựng và áp dụng án lệ hình sự không chỉ giúp thẩm phán giải quyết đúng vụ án, mà còn giúp tăng cường nhận thức của các thẩm phán về giá trị và ý nghĩa của án lệ hình sự trong xây dựng và áp dụng thống nhất pháp luật.

**Từ khóa:** Thẩm phán, án lệ hình sự, vai trò, trách nhiệm, pháp luật.