

# Procurator's Litigation in Cases of Sexual Abuse of Under-16-Year-Old people to Protect Human Rights, Citizenship in Accordance With The Law of Vietnam

Dr. Mai DacBien<sup>a</sup>

<sup>a</sup>VICE PRINCIPAL, HANOI PROCURATORATE UNIVERSITY, VIETNAM

Email: [bienmd@tku.edu.vn](mailto:bienmd@tku.edu.vn)

DOI: 10.26821/IJSRC.9.4.2021.9410

## ABSTRACT

*The main purpose of this study is to empirically test the procurator's litigation in cases of sexual abuse of under-16-year-old people to protect human rights, citizenship in accordance with the law of Vietnam. The author collected secondary data from previous studies. The results of the research show that (i) the prosecution, investigation, prosecution and adjudication of criminal cases belong to procedural agencies, including: Investigation agencies, Agencies assigned to carry out a number of investigating activities; The Procuracy and the Court; (ii) Procurators perform the duties and powers of Procuracy in accordance with provisions of applicable laws and regulations in Article 266 of the Vietnam Criminal Procedure Code 2015. Based on the findings, some recommendations are given to Procurators.*

**Keywords:** Procurators, Sexual abuse, under-16-year olds, civil rights, law

**JEL codes:** K10, K14, K19

## 1. INTRODUCTION

Over the past years, the situation of sexual abuse of people under 16 years old in Vietnam has been very complicated. According to the statistics of the Ministry of Labour, War invalids and Social Affairs, there are about 1,600-1,800 rape cases nationwide each year (Khuyen, 2020).

In Vietnam, from 2011 to June 2019, there were 15,302 abused children nationwide (on average 150 abused children / month; 0.5 abused children / day). The main forms of abuse are child sexual abuse (rape, sexual assault, sexual intercourse, lust), other forms (trafficking, kidnapping, appropriation ...) children who are victims under 6 years old account for 7.2% (Ha & Hien, 2020).

In recent years, the mass media has reflected many cases of child sexual abuse in many localities, many of which have not been handled or handled not seriously, causing frustration in social essay (Trang, 2020).

This paper analyzes and evaluates procurator's litigation in cases of sexual abuse of under-16-year-old people to protect human rights, citizenship in accordance with the law of Vietnam in accordance with the Vietnam Criminal Procedure Code 2015, since then presenting recommendations to prosecutors.

## 2. THEORETICAL BACKGROUND AND LITERATURE REVIEW

According to Khuyen (2020), Children are prioritized for health and spiritual protection. However, in recent years there have been many severe sexual abuses on the under-16-year olds, causing much anxiety and worry to the public. In addition, sexual abuse crimes against people under 16 years old not only leave pain to the victim's family, but also cause pain for branches, levels and the whole society. Therefore, it is essential to provide effective solutions to effectively prevent sexual offenses against people under 16 years old.

Sex crimes against children tend to increase, causing negative impacts on society. This is also a dangerous crime that greatly affects the psychology of children who are victims of sexual abuse. The increase in child sexual abuse cases has many causes, one of which is that cases have not been completely handled (Trang, 2020).

Litigation in criminal proceedings is a major content in the Vietnam Criminal Procedure Code 2015 (CPC) (National Assembly, 2015). Article 26 of the Criminal Procedure Code for the first time stipulates the principle: Disputes in trial are guaranteed with the content: Documents, evidences in the case file are sent by the Procuracy to the Court for the trial must be complete and legal, etc. The Court has the responsibility to create conditions for procurators, defendants, defense counsels and other procedure participants to fully perform their rights, obligations and take democratic, equal proceedings before the Court.

All evidences of guilt, innocence, aggravation, extenuating circumstances of criminal liability, application of points, clauses and articles of the Criminal Procedure Code to determine the crime, the criminal decision fines, compensation for the defendant, handling of evidences and other facts that are significant for the settlement of the case must all be presented, debated and clarified at the court. Judgments, Court decisions must be based on the results of the examination and assessment of evidences and the results of litigation at court sessions.

Litigation in trial is guaranteed in a number of aspects as follows: Firstly, providing for the equality of the accusing and detractors in giving evidence and requests in the proceedings; secondly, to stipulate that evidence and documents transferred to the Court by the Procuracy must be complete and legal; thirdly, stipulating that the Court is responsible and enabling the litigation subjects to fully exercise their rights and obligations to determine the truth of the case in an objective, comprehensive and complete manner (Vu, 2017).

To concretize the principles of litigation, Section V, Chapter 21 of the Criminal Procedure Code stipulates Procedure at trial, in which, Article 322 of the Criminal Procedure Code (National Assembly, 2015), Argument is the highest expression of the content of litigation in criminal proceedings.

According to Vietnam's criminal law, the crimes of sexual abuse of people under 16 years of age (children) are specified in Chapter XIV of the Vietnam Criminal Procedure Code 2015 (CPC): Crimes infringing upon human life, health, dignity and honor, includes the following crimes: Rape of a person under 16 years of age (Article 142); Sexual assault of a person from full 13 to under 16 years of age (Article 144); Committing sexual intercourse or performing other sexual acts with a person from full 13 to under 16 years of age (Article 145); Obscenity against people under 16 years of age (Article 146); Crime of using a person under 16 years of age for pornographic purposes (Article 147); Crime of trafficking in people under 16 years of age (Article 151).

The object of the crime in this criminal group is the life, health, dignity and honor of a person under 16 years of age. Objective acts of crimes include many different acts of sexual and related sexual abuse, such as: using force, threatening to use force or other tricks to have sex inadvertently with the victim; other sexual intercourse, obscenity, buying porn, using persons under 16 years of age for pornography, trafficking in persons under 16 years of age. The subjective side of the crime is the offender with intentional sin: The offender is well aware that his offense is dangerous to the society, foreseeing consequences and desires for consequences to happen. The subject of the crime is a person of age for penal liability, capable of criminal responsibility. For crimes: having sexual intercourse or other acts of having sex with a person from full 13 years to under 16 years of age (Article 145 of CPC); Obscenity against people under 16 years of age (Article 146 of the CPC); Crime of using a person under 16 years of age for pornographic purposes (Article 147 of the CPC), the subject must be a person aged full 18 years old.

### **3. METHODOLOGY**

This study uses qualitative research methods.

The author used techniques of synthesis, analysis, comparison to evaluate the the procurator's litigation in cases of sexual abuse of under-16-year-old people to protect human rights, citizenship in accordance with the law of Vietnam. In addition, the author collected previous studies. Qualitative research methods orientated and refined the research results of previous studies; from there, this study inherited and applied.

### **4. RESEARCH RESULTS AND IMPLICATIONS**

According to the Vietnam Criminal Procedure Code 2015 (National Assembly, 2015), the prosecution, investigation, prosecution and adjudication of criminal cases belong to procedural agencies, including: Investigation agencies, Agencies assigned to carry out a number of investigating activities (hereinafter referred to as Investigating agencies); The Procuracy and the Court. Investigation agencies have the duties, powers as well as responsibility to promptly detect all crimes, criminal acts, prosecute the case, promptly conduct all investigation measures to clarify criminals and offenders. The Procuracy exercises prosecution rights in criminal cases, conducts prosecution, accuses and administers judicial activities of Investigation agencies and Courts to ensure the investigation, prosecution and adjudication of the right person, right crime, right law, not to happen injustice and crime neglect.

Practicing prosecution rights in criminal court in general and trial court for sexual abuse cases of people under 16 years of age in particular, Procurators perform the duties and powers of Procuracy in accordance with provisions of applicable laws and regulations in Article 266 of the CPC, in which the Procurator argues (litigation) with the participants in the proceedings (defense counsels, defendants, defendants, defense counsels of legitimate rights and interests of involved parties, victims), using evidences and arguments to prove and defend his accusing point of view (Mai, 2020). Prosecutors take legal action to defend the Procuracy's point of prosecution and accusations on crimes, penalties, civil damages, the handling of material evidence and other

matters related to the settlement of the correct case (Linh, 2021). Defendants, defense counsels and defendants, defense counsels of the involved parties' legitimate rights and interests, victims; other procedure participants have the right and obligation to litigate with Procurators in order to protect their legitimate rights and interests. According to statistics of the Court industry, from 2009 to the first 6 months of 2019, during the first-instance trial of a criminal case, the number of cases without a defense that the defendant defends is relatively high (from 89.6% to 93.7%)(Ha, 2020).

To ensure high quality litigation at criminal court for cases of sexual abuse of under-16-year-old person, from the provisions of law and those of the Procuracy, from the practice of adjudicating criminal cases; Procurators should well perform the following professional skill steps:

***(i) Study carefully the case file, prepare well outlines of questioning and debate***

Careful study of criminal case files is a requirement as well as the most important work of the Procurator when he is assigned to exercise prosecution rights and administer the trial at court for the case of sexual abuse of under-16-year-old person. Only with a very careful study of the case (incriminating evidence, detention evidence, aggravating or mitigating criminal liability circumstances, other relevant facts) can the Procurator be able to express their right views and have a firm belief in defending them. Besides, a careful study of the content of the case helps the Procurator to identify and give valuable arguments to produce clear proof of the crime and the offender in the litigation process. There can only be miscarriages of justice happening when the Procurator has not studied the case well, i.e. there cannot be miscarriages of justice happening when the Procurator has studied the case carefully, including examining every detail, comparing and evaluating evidences objectively and comprehensively in the overall content of the case from different perspectives (Bien, 2018). When studying case files, the Procurator must carefully read each page of documents, extract (record) the full content and details of the case as well as procedural documents. He must also check and compare evidences, detect inconsistencies or suspicious points in the dossier to come up with solutions. Procurators shall examine photos, audio and video documents, and exhibits seized during an investigation or prosecution. In necessary cases, procurators can directly examine where the crime took place. Especially, the Procurator should carefully study the results of the initial examination of the victim's genital injury, the content of sexual forensic examination, and the consequences of the case (Dung, 2020). With a careful study of the case, the Procurator fully prepares the questioning outline and argumenting outline to clarify the points that are still unclear or have doubts about the authenticity of the evidence. In addition, to protect victims and their families from retaliation during the pre-trial phase, preventive measures should be taken to detain offenders (Tuyen, 2020).

***(ii) Debate in court***

At the end of the questioning session at the trial, the Procurator representing the Procuracy presents the impeachment. In the impeachment, the Procurator analyzes, evaluates objectively, comprehensively and fully evidences of guilt, evidences of innocence; the nature and degree of danger to the society of the criminal act; consequences of crime; the defendant's role; aggravating or mitigating criminal liability circumstances; causes and conditions for the crime and other significant facts to the case; assesses the possibility to educate the defendant. On the basis of analysis and evaluation, the Procurator requests the Jury to apply the crime name (articles, clauses and points of the Penal Code), the penalty level, the level of compensation for damage, measures to deal with exhibits, and judicial measures against the defendant.

After the impeachment of the Procurator, defendants, attorneys and other procedural participants have the right to present their opinions, evidences, documents and arguments to respond to Procurators about evidences of guilt, evidence of innocence; the nature and degree of danger to the society of the criminal act; consequences caused by criminal acts; the defendant's identity and role in the case; aggravating or mitigating criminal liability circumstances; penalty level; civil liability; handling of exhibits; judicial measures; criminal causes and conditions and other significant facts to the case. Defendants, attorneys and other procedural participants have the right to make their proposals.

Procurators must attentively listen to the parties presenting their opinions, record summaries to grasp the proposed content, rebuttal opinions, quickly identify the content to be answered, the evidence and documents which should be presented to prove their allegation. Evidences and documents presented by the Procurators must be related to the case and must be in the file or examined and evaluated at the court hearing. In case new documents arise, they must also be documents related to the case and origin and legality of such documents must be checked in order that procurators will have a counter argument. Procurators argue and respond to clarify the contents of the issues raised by procedural participants, not to avoid difficult issues but to calmly step by step argue and respond to each opinion to protect the views of the Procuracy.

When arguing, the Procurator has a calm, proper, respectful attitude towards the respondents, argues, and behaves in a culturally appropriate manner at the court hearing (Xuan, 2016). The procurator bases on the theory of the criminal constituent, analyzes and evaluates the four elements constituting the crime, the argument of evidence; bases on the evidences of the case, the provisions of law to dispute scientific and logical arguments, asserting their correct views, resolutely rejecting unreasonable opinions of attorneys, defendants or other procedural participants.

The practice of prosecution at the first instance trial of criminal cases for cases of sexual abuse of people under 16 years old shows that the procurator often focuses on debating with the defense counsel, the accused, and the victim on the following issues:

*The defendant does not admit to the crime according to the prosecution's indictment of the Procuracy, the conclusion in the impeachment document of the Procurator*

In this case, the Procurator should analyze the theory of the crime composition, evaluate the defendant's behavior, the motives, the purpose, the consequences of the damage caused, the causal relationship between the act and the consequence; citing the clerk numbers in the case file containing the relevant evidence gathered during the investigation, prosecution and adjudication is enough to confirm that the defendant's behavior is a crime under the article of The Criminal Code that the Procuracy has invoked to prosecute, the Procurator has concluded in the impeachment document. Acts committed by the defendant are consistent with the objective acts in a specific crime in the above crime group (National Assembly, 2015). The reasons given by defendants or defense counsels such as underage for criminal responsibility, loss of criminal capacity, behavior not to the extent of criminal liability or other circumstances of exclusion of criminal liability, etc is unfounded, inconsistent with the objective facts of the case, inconsistent with the provisions of the criminal law.

*The defendants and defense counsels admit that defendants commit crimes but committing other crimes less than those crime that the Procuracy has prosecuted, conclude, and propose to change the crime*

In this case, the Procurator analyzes the theory about the crime composition of the crime that the Procuracy has prosecuted, accuses, assesses the defendant's objective behavior, the age of the victim, the consequences of damage, and mechanism, the purpose of the crime, the causal relationship between the act and the consequences, the reference to the clerk numbers containing evidence proving the offense ... These factors are consistent with the description in the article of the Penal Code that the Procuracy has prosecuted, thereby confirming the crime acts of the defendant has committed a crime that the Procuracy has prosecuted, the Prosecutor has charged. The prosecutor also analyzes the elements of the crime composition that is brought by the defendant, the defense counsel, and compares them with the criminal acts committed by the defendant, confirming the defendant's criminal acts inconsistent with that crime composition, thereby concluding that the change of the crime at the request of the defendant, the defense counsel is unfounded, not in accordance with the provisions of law.

*Admit that the accused commits a crime in accordance with the Article prosecuted by the Procuracy but commits another Clause less than the Clause prosecuted by the Procuracy*

In this case, the Procurator, in addition to analyzing the signs of the crime, also analyzes in detail the defendant's actions that have caused very serious or particularly serious damage or other circumstances as grounds for determination aggravated penalty frameworks such as: Being incestuous; committing two or more crimes; crimes against 02 or more people; Dangerous recidivism, etc. to confirm that the Clause has prosecuted by the Procuracy is grounded and lawful.

*Admit that the accused committed a crime in accordance with the crime, the article, the clause that the Procuracy prosecuted, charged, but the investigation, prosecution and adjudication process has seriously violated the proceedings, thus propose the trial panel postpones the court hearing and returns the file to request additional investigation*

According to the provisions of the Criminal Procedure Code, a serious violation of procedural procedures is one of the grounds for returning a file to request additional investigation or canceling a court judgment or decision. Prosecutors analyze the provisions of criminal law, criminal proceedings, and sub-law documents to determine if the issues are a serious violation of the proceedings? If there is a violation, the Procurator evaluates the extent and nature of the violation to determine whether this is a basis for returning the file to request for additional investigation, or it can be overcome at the court hearing. In addition to the grounds for returning the file as provided in Articles 245 and 280 of the Criminal Procedure Code, Procurators must grasp and apply the provisions and instructions in Joint Circular No. 02/2017 / TTLT / VKSNDTC - TANDTC- BCA - BQP of the Supreme People's Procuracy, Supreme People's Court, Ministry of Public Security, Ministry of National Defense dated December 22, 2017 (hereinafter referred to as Joint Circular No. 02/2017) returns the file to Additional investigation to argue and respond (The People's Testing Institute - The People's Test High - The Ministry of Public Security - The Ministry of National Defence, 2017). In case the defendant believes that during the process of investigation and prosecution, Investigators, Procurators have committed acts of violation such as harassment or corporal punishment, the Procurator may request the Trial Panel to summon Investigators, Procurators come to court to participate in confrontation or present contents related to denunciations. Accountability of investigators and procurators so that human rights and citizenship are guaranteed and effectively protected (Khoi, 2020). In case of determining that there is a procedural violation, the Procurator

must carefully consider and evaluate each type of violation, if the violation does not affect the determination of the objective truth of the case or does not affect the right and the legitimate interests of defendants, litigants and crime victims, the procurator expresses his/her disagreement with the request to postpone the court hearing and return the files for additional investigation. At the same time, the Procurator proposes measures to overcome the violation. In case of serious violation of procedural procedures and deems it necessary to clarify the investigation, ensure the objectivity of the cases, and fall into the cases where the file is returned for additional investigation, the Procurator shall request the Council to postpone the court hearing, returned the files for additional investigation.

*Disagree with aggravating or mitigating of criminal liability circumstances, so suggest removing or increasing aggravating or mitigating circumstances.*

In this case, the Procurator needs to argue and respond based on the analysis and assessment of the defendant's criminal acts, the defendant's identity, the victim's violation acts in the case (if any), other relevant details, citing the provisions of the Criminal Code, the Criminal Procedure Code, and sub-law documents to identify and affirm aggravating and mitigating of criminal liability circumstances that the Procuracy imposes is correct and grounded. The reasons, aggravating and mitigating of criminal liability circumstances given by the parties are ungrounded, inconsistent with the provisions of law, of the case content.

*Disagree with the type and level of punishment that is proposed by the Procurator*

Defendants and defense counsels often believe that the type and level of punishment proposed by the Procurator is too heavy for the defendant, incompatible with the offense, inconsistent with the criminal law policies of the State, need to change to a different type of penalty or reduced punishment.

In this case, the procurator must argue and respond based on the analysis and assessment of the nature and danger level of the criminal act, based on the harmed object, the impacted object, the method, tricks for performing the act, the form and extent of the error, the consequences of damage caused, the measures and ability to overcome the damage, the aggravating, mitigation of criminal liability circumstances, the defendant's personal identity, the defendant's ability to reform and educate. In addition, the Procurator can assess the negative impact of the crime that the defendant has caused on the local security and order situation. The procurator shall compare with the type and level of the penalty of the law in the Penal Code to conclude and confirm that the type and level of the penalty proposed by the Procurator are grounded, in accordance with the provisions of law, has shown the leniency policy of the State, enough to educate and reform the defendant into a good citizen, useful person to the society.

*The defendant, the defense counsels disagree with the level of compensation for damage or the measure of evidence handling that is proposed by the procurator*

In this case, the Procurator argues and responds based on the analysis of the criminal law provisions, civil law provisions on non-contractual damage compensation, other sub-law documents on compensation, regarding the handling of evidence, reviewed and assessed the defendant's financial situation, age of defendant ... to confirm that the level of compensation for damage or evidence handling measures proposed by the Procurator is reasonable, well-grounded, and legal.

**REFERENCES**

- [1]. Bien, M. D. (2018). Some issues Procurators should pay attention to when arguing in criminal court. *Journal of Procuracy* (Supreme People's Procuracy), 10, 15-20.[Vietnamese]
- [2]. Dung, L. T. T. (2020). Some experiences in prosecuting and handling child rape cases. *Journal of Procuracy* (Supreme People's Procuracy), 23, 28-33.[Vietnamese]
- [3].Ha, C. T. N. (2020). Practical exercise of the right to defend the accused and complete solution.*Journal of Lawyers* (Judicial Academy), 5, 44-51.[Vietnamese]
- [4]. Ha, D. D. H., & Do, T. Hien.(2020). Current situation of child abuse in Vietnam and a forecast of child abuse in Vietnam in the coming time.*Journal of Law Profession* (Judicial Academy), 4, 60-65. [Vietnamese]
- [5].Khoi, H. M. (2020). Accountability of Investigators and Procurators in criminal proceedings in Vietnam.*Journal of Legislative Studies* (Legislative Research Institute under the National Assembly Standing Committee), 16 (416), 11-16.[Vietnamese]
- [6].Khuyen, N. T.(2020). Current situation and solutions to prevent sexual abuses on the under-16-year olds in TienGiang province.*The Journal of Scientific, Dong Thap University*, 9(2), 92-99 [Vietnamese]
- [7].Linh, N. V. (2021). Ensuring the right to defend the Defendant - Current status and recommendations for legal improvement.*Journal of Democracy and Law*, 2(347), 46-50, 61.[Vietnamese]
- [8].Mai, N. T. (2020). Some solutions to improve the quality of litigation at first instance criminal court. *Journal of People's Court*, 12(2), 5-12.[Vietnamese]
- [9].National Assembly (2015). Vietnam Criminal Procedure Code 2015, No 101/2015/QH13, November 27, 2015. [Vietnamese]
- [10].The People's Testing Institute - The People's Test High - The Ministry of Public Security - The Ministry of National Defence (2017). Joint circular, Regulations on coordination between procedure-proceeding agencies in implementation of a number of provisions of the law on criminal procedures on repaying of dossiers for additional investigation. No 02/2017/TTLT-VKSNDTC-TANDTC-BCA-BQP, December 22, 2017.[Vietnamese]
- [11].Trang, P. V. M.(2020).About sexual abuse crimes against people under 16 years old.*Journal of Procuracy*, 9, 43-48.[Vietnamese]
- [12].Tuyen, P. M. (2020). Protection of the victim in the trial of the trafficking case.*Journal of People's Court*, 22, 7-9.[Vietnamese]
- [13].Vu, G. L.(2017).Principles of litigation in adjudication of the 2015 Criminal Procedure Code and its implementation.*Journal of Procuracy* (Supreme People's Procuracy), 21, 18-19. [Vietnamese]