

# UN Recommendations on the 2015 Penal Code and Criminal Procedural Code of Viet Nam

(17<sup>th</sup> May 2017)



A number of provisions of the latest draft of the Penal Code and amended Criminal Procedural Code adopted by the National Assembly in November 2015 appear to be incompatible with Viet Nam's international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) (to which Viet Nam became a State party in 1982) and the Convention against Torture (CAT) (ratified by Viet Nam in 2015).

Beyond the specific recommendations provided about some selected provisions of the Codes, a general recommendation would be to review the Penal Code to ensure that aggravating and mitigating factors for sentencing be strictly limited to those recognized by international standards and free from any kind of discrimination.

## **1) Crimes Infringing National Security and Administrative Order: Broad and vague provisions under the draft Penal Code, Chapter XIII dealing with “crimes infringing national security” and Chapter XXII on crimes of infringement of administrative order**

- *Article 109 - Carrying out activities aimed at overthrowing the people's administration*
  - *Article 116 - Undermining the unity policy*
  - *Article 117 - Making, storing, distributing or disseminating information, documents, content articles, distorting and defaming the people's administration*
  - *Article 118 - Disrupting security*
  - *Article 331 - Abusing democratic freedoms to infringe upon the interests of the State, the legitimate rights and interests of organizations and/or citizens*
- These provisions are vague and broad without defining which action or activities are prohibited, what are the constitutive elements of the prohibited offences, and therefore, individuals may not regulate their actions and behaviours accordingly, as required by the legal certainty principle, which is essential for the rule of law.<sup>1</sup>
- These provisions do not differentiate between use of violent means, which should be prohibited, and legitimate peaceful activities to protest, express one's opinion, including criticism of the Government's policies and actions, or advocate for any kind of changes, including of the political system, which directly fall under the rights to freedom of expression, opinion, assembly, religion as well as participation in public life, and as such should be guaranteed and protected in accordance with international human rights law (articles 18, 19, 21 and 25 of ICCPR).

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<sup>1</sup> For example, no definition of what constitutes “sowing division” and “undermining the implementation of policies for international solidarity” under article 116 or even “opposing people's administration” what constitutes “an abuse of freedom” or what could be considered as “serious circumstances” under article 331; Human Rights Council Resolution 19/36 “recalls that the interdependence between a functioning democracy, strong and accountable institutions, transparent and inclusive decision-making and effective rule of law is essential for a legitimate and effective Government that is respectful of human Rights”, and in para. 17(b) of the same resolution, calls on States to strengthen the rule of law by ensuring “a sufficient degree of legal certainty and predictability is provided in the application of the law, in order to avoid any arbitrariness”;

- While certain restrictions to the exercise of fundamental freedoms are permitted under international human rights law, the enjoyment of the rights should be the norm and the restrictions should “not put in jeopardy the right itself”.<sup>2</sup> Any restriction of a human right should comply with the following cumulative criteria: 1) be clearly prescribed by law (legal certainty principle); 2) be based solely on one of the permissible grounds: in the interests of national security, public safety, public order, public health or morals or protection of the rights and freedoms of others; and 3) “pass the strict tests of necessity and proportionality”.<sup>3</sup>
- States are not provided with blanket grounds for restricting human rights on the basis of national security or public order reasons. While there is no precise definition of “threats to national security” in international law, it should be considered as referring to situations where there is an actual and direct threat or use of force against the “existence of the nation or its territorial integrity or political independence” and should not include hypothetical threats or local and relatively isolated threats or infringements to law and order.<sup>4</sup> The State should demonstrate that there is a direct and immediate connection between the prohibited exercise of the fundamental freedom and the threat.<sup>5</sup>
- It is important that the domestic legal framework provisions be in conformity with international human rights law and be clear and precise enough to avoid abusive and arbitrary implementation of these provisions, which could result in the criminalisation of the exercise of fundamental rights and freedoms.
- During the 2014 UPR 2nd cycle review, the Government of Viet Nam accepted the recommendations that it should “amend or remove vague provisions of its penal code, as well as new legislation to make sure that limitations on freedom of expression are strictly in line with ICCPR”.<sup>6</sup>

**Recommendation 1: Repeal articles 116, 117 and 331 of the 2015 Penal Code. consider adopting a new provision establishing clear restrictions of the exercise of the freedom of expression strictly in line with articles 19 and 20 of ICCPR, including with regard to the possible sentence and bearing in mind that defamation should never be a criminal offence. Revise articles 109 and 118 to include clear definitions of the prohibited activities that should be exclusively actual violent actions.**

## **2) Definition and Criminalization of Torture**

- In accordance with articles 1, 4 and 5 of the Convention Against Torture, torture should be clearly defined and criminalised in domestic legislation. However the draft Penal Code does not include any such provision.
- During the 2014 UPR 2nd cycle review, the Government of Viet Nam accepted to “ratify and implement CAT”.<sup>7</sup>

<sup>2</sup> See for example article 19 (3) of ICCPR, see also Human Rights Committee, General Comment, no. 34 on article 19 (CCPR/CGC/34), par. 21.

<sup>3</sup> Human Rights Committee, General Comment, no. 34 on article 19 (CCPR/CGC/34), par. 22.

<sup>4</sup> See principle B. vi of the Siracusa Principles on the limitation and derogation provisions of the ICCPR, U.N. Doc. E/CN.4/1985/4, Annex (1985).

<sup>5</sup> See Human Rights Committee, General comment, no. 34 on article 19 (CCPR/CGC/34), par. 35.

<sup>6</sup> Recommendation 143.166 by Sweden. See also convergent recommendations also accepted by Viet Nam: 143.34; 143.144; 143.145; 143.146; 143.150/143.156; 143.157; 143.164; 143.171; and 143.173 in A/HRC/26/6 and Add.1.

<sup>7</sup> Recommendation 143.14 by the USA. See also convergent recommendations accepted by Viet Nam: 143.11; 143.12; 143.13; 143.21, in in A/HRC/26/6 and Add.1.

- It is important that the domestic legal framework recognizes torture as a crime that can be prosecuted in national courts to ensure that the prohibition of torture is absolute and of non-derogable character and that the Government can effectively prevent it, including through the deterrent effect inherent to criminalisation.

**Recommendation 2: Adopt a new article, which includes a definition of torture in line with article 1 of CAT, criminalises torture and establishes jurisdiction over this crime.**

### **3) Offences Punishable by Death: Retention of death penalty for crimes other than the “most serious ones”.**

- In the draft Penal Code, death penalty is retained for 18 offences and crimes. Some are related to national security: High treason (article 108), carrying out activities aimed at overthrowing the people’s administration (art. 109), spying (art. 110), rebellion (art. 112), terrorist activities aimed at opposing people’s administration (art. 113), and sabotage (art. 114). Some others are murder (art. 123), rape of children under 10 years old (art 142), and manufacturing and trading of counterfeited medicines (art. 194). Some are still related to the production (art. 248), transport (art. 250) and trade (art. 251) of narcotics in certain circumstances. Terrorism (art. 299) and crimes related to “position” such as embezzlement (art. 353) and corruption (art. 354) as well as crimes of undermining peace and provoking war of aggression (art. 421), crimes against humanity (art. 422) and war crimes (art. 423) are also, in certain circumstances, punishable by death.
- According to article 6 (2) of ICCPR, in the countries where it has not yet been abolished, the death penalty should only be retained for the “most serious crimes”. The notion of most serious crimes is widely recognised as referring to the crime of murder or intentional killing.<sup>8</sup> Narcotics-related crimes, economic and political crimes, and crimes related to national security that are vaguely and broadly defined and do not differentiate between peaceful and violent activities, cannot be considered as falling under the definition of “most serious crime”.
- It is important that where the death penalty is not yet prohibited, its exercise should be strictly limited to exceptional cases in order to protect the right to life of all individuals as a supreme right from which no derogation is permitted.
- During the 2014 UPR 2nd cycle review, the Government of Viet Nam accepted the recommendations to “consider at least further restricting the use of death penalty for most serious crimes, as stated in article 6 of ICCPR with a view to soon adopting a de facto moratorium on executions” as well as “reduce the list of crimes punishable by death, in particular economic crimes and those linked to drugs ...”.<sup>9</sup>

**Recommendation 3: Consider abolishing the death penalty in all cases and in the interim revise the articles still carrying death penalty to apply it only to the “most serious crimes” as required under ICCPR, and adopt a de facto moratorium on executions.**

### **4) Incommunicado Pre-trial Detention: Prolonged incommunicado pre-trial detention in cases related to national security under the 2015 Criminal Procedural Code.**

- Article 119 of the 2015 Criminal Procedural Code provides for the possibility for the investigators and/or procuracy to detain a person suspected of a crime during the investigation of the alleged crime, without establishing any criteria or grounds for the

<sup>8</sup> See Report of the Secretary-General on the “question of the death penalty”, A/HRC/24/18, par. 24 and Special Rapporteur on extrajudicial, summary or arbitrary executions, A/67/275, par. 67.

<sup>9</sup> Recommendations 143.94 by Italy and 143.92 by Switzerland. See also convergent recommendations also accepted by Viet Nam: 143.89; 143.90; 143.95 in A/HRC/26/6 and Add.1.

decision. Only women who are pregnant or are nursing children aged under 36 months, old and weak people, or suffering from serious diseases and having clear residences, are exempted by law of pre-trial detention, provided they are not charged under a national security crime. There is no provision allowing the suspected person to appeal the pre-trial detention or have its necessity reviewed by a court of law.

- Articles 172 and 173 of the 2015 Criminal Procedural Code regulate the timeframe for investigation and the related pre-trial detention: a person charged with “extremely serious” national security crimes can be detained “until completion of the investigation”, which means pre-trial detention may be extended after the 20 months provided by law for less serious offences (five times four-month periods).
- Article 74 of the 2015 Criminal Procedural Code provides that for cases related to “national security” crimes, the accused person may be detained *incommunicado* during the whole investigation period to “keep the secrets of the investigation”.<sup>10</sup>
- As a result of the combined provisions of articles 119, 172, 173 and 74 of the 2015 Criminal Procedural Code, a person accused of having committed a national security crime such as articles 109, 116 and 117, can be detained *incommunicado* for a prolonged and even indefinite period of time without a trial.
- According to international standards and in particular under article 9 of ICCPR, pre-trial detention “shall be the exception rather than the rule”,<sup>11</sup> and limited to situations where detention appears necessary and proportionate to prevent the suspected person from absconding, committing another offence, or interfering with the course of justice and impending procedures.<sup>12</sup> Any person deprived of liberty shall be entitled to be brought before a court that may decide without delay of the unlawfulness of the detention and order his/her release.<sup>13</sup>
- *Incommunicado* detention, especially during the early stage of the investigation, is a conducive environment to torture, cruel and inhuman treatment, as it may be used to coerce the individual to confess to the commission of the alleged crimes and admit guilt.<sup>14</sup> It may also be considered as amounting in itself to a form of torture or ill-treatment, prohibited under article 7 of ICCPR, articles 1 and 16 of CAT.<sup>15</sup>
- It is important that the State Party takes all effective measures in law and in practice to prevent that individuals be subjected - or at risk to be subjected - to torture and ill-treatment, by guaranteeing the internationally recognized legal safeguards in this regard.
- During the 2014 UPR 2nd cycle review, the Government of Viet Nam accepted the recommendation to “guarantee the right to family visits and legal assistance, in particular during police enquiries” as well as to “ensure that efficient procedures and responsive

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<sup>10</sup> The article states that the person may have access to a lawyer and family from the moment the investigation is concluded.

<sup>11</sup> Human Rights Committee, General Comment no. 35 on article 9 (CCPR/C/GC/35) par. 38.

<sup>12</sup> See Human Rights Committee, General Comment no. 35 on article 9 (CCPR/C/GC/35) par. 38 in. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2012), UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990), UN Standard Minimum Rules for the Treatment of Prisoners (1957).

<sup>13</sup> Article 9(4) of ICCPR. See also Human Rights Committee, General Comment no. 35 on article 9 (CCPR/C/GC/35) par. 31-38.

<sup>14</sup> See report of the Special Rapporteur on torture, A/56/156, par. 39 (f), and Human Rights Committee, General Comment no. 35 on article 9 (CCPR/C/GC/35), par. 35 and 56.

<sup>15</sup> See Human Rights Committee, General Comment no. 35 on article 9 (CCPR/C/GC/35) par. 35; Special rapporteur on torture, report A/56/156, par. 39 (f)

mechanisms for effective and equal access to lawyers are provided for at all stages of legal proceedings”.<sup>16</sup>

**Recommendation 4: Revise articles 119, 172, 173 and 74 of the 2015 Criminal Procedural Code to bring them into line with article 9 of ICCPR and the related international standards, including for cases under national security offences. In particular, revised articles should establish clear grounds for pre-trial detention, guarantee the right of any person arrested and detained to be brought promptly before a judge who will review the necessity and legality of the detention, and ensure access to a lawyer from the onset of the detention, including for cases under national security offences.**

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<sup>16</sup> Recommendations 143.137 by Switzerland and 143.135 by Denmark. See also converging recommendation 143.133 in A/HRC/26/6 and Add.1.