

## ЗАРУБЕЖНОЕ ПРАВО

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**Protection of constitutional rights to liberty and security of person in the Penal Code 2015 of Vietnam\****Trinh Tien Viet<sup>1</sup>, Tran Thi Hong Le<sup>2</sup>*

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By referring to the International Conventions on Human Rights, The Constitution of the Socialist Republic of Vietnam of 2013 and the Resolution of the Communist Party of Vietnam on judicial reform, the article points out that the right to liberty and the security of person are human rights and citizenship rights which are protected by Vietnamese law. This is also the basis for the article to evaluate the protection of liberty and personal security provided by the provisions of the Vietnam Penal Code of 2015, revised in 2017. As a result, the article proposes solutions to further improve the criminal policy and the Penal Code regulations towards strengthening the protection of human rights in general, the right to liberty and the security of person in particular. The approach and legal basis of this study is a human rights-based approach, centered on human rights to evaluate and propose solutions to the issues. With this approach, the article adopts the general standards of personal freedom and security in international law as the basic criterion for evaluating and proposing amendments of Vietnamese criminal law regulations on protecting the liberty and personal security. In the process of this study, specific research methods were used including the synthetic method, the analytical method and the comparative method. These methods are used to: synthesize

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the views, awareness of the need to protect freedom and personal security by criminal law; analyze the contents of the relevant regulations in the Vietnamese criminal law; compare with international law standards and crime statistics to assess the suitability and effectiveness of these regulations in Vietnamese criminal law.

*Keywords:* human rights, the right to liberty, the security of person, Vietnam's Penal Code, criminal policy.

## 1. Introduction

The right to liberty and the security of person is one of the basic human rights mentioned in Article 3 of the 1948 Universal Declaration of Human Rights and Clause 1, Article 9 of the 1966 International Covenant on Civil and Political Rights of the United Nations. The Vietnamese Constitution of 2013 affirms the recognition, respect, protection and security of individual liberty and security.

On November 27, 2015, the 13th National Assembly of the Socialist Republic of Vietnam had passed the Penal Code No. 100/2015/QH13 and Resolution No. 109/2015/QH13 on the implementation of this law. This code was later amended by the Law No. 12/2017/QH14 adopted by the 14th National Assembly on June 20. The Penal Code of 2015 is amended and supplemented in 2017 (hereinafter referred to as the Penal Code of 2015), effective from January 1, 2018. Vietnam's Penal Code of 2015 represents a significant development in the state's criminal policy, which marks many advances in criminal justice thinking, continues to show the spirit of active prevention and determined fight against crimes, contributes to protect the sovereignty and security of the country, protect the regime, human rights and citizenship rights (including liberty and personal security), interests of the State and organizations, protect and promote of the socialist-oriented market economy and satisfy the requirements of Vietnam's international integration and globalization.

With the passion to study criminal law and criminology, in 2015 we have published a monograph on the protection of personal liberty and security by the Vietnamese criminal law. However, that study was based on the provisions of the 1999 Penal Code — which has expired. Therefore, with the aim of updating the latest issues in Vietnam's criminal policy regarding the protection of personal liberty and security, we undertake this study to clarify the following issues:

- How is the right to liberty and the security of person enshrined in the Constitution, other laws of Vietnam, and the importance of protecting this right by criminal law?
- How do the provisions of the Vietnam Penal Code in 2015 — which has recently come into force — protect freedom and personal security?
- What reform directions for the Penal Code can improve the effectiveness of protecting freedom and personal security in Vietnam?

By addressing these research issues, we expect our proposals to be of value to lawmakers in Vietnam as well as national and international jurists who take an interest in Vietnamese criminal law, especially the protection of liberty and personal security.

## 2. Main text

### Definition of liberty and security of person and protection of rights to liberty and security of person in the Penal Code

#### 1.1. Liberty and security of the person as basic human rights

Among human rights, liberty (especially physical freedom) and security of person are the most important ones. Thanks to physical freedom and security of person, people are able to have a normal life in society including studying, working, resting and participating in other social activities. Therefore, physical freedom and security of person are considered basic human rights. Article 3 of the Universal Declaration of Human Rights 1948 states “Everyone has the right to life, *liberty and security of person*” (School of Law 2011, 48). Subsequently, paragraph 1 Article 9 of the International Covenant on Political and Civil Rights 1966 further confirms: “Everyone has the right to *liberty and security of person*. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law” (School of Law 2011, 81).

Paragraph 1 Article 20 of the Constitution 2013 provides for “Everyone has *the right to inviolability of his or her body* and to the protection by law of his or her health, honor and dignity; no one shall be subjected to *torture, violence, coercion, corporal punishment* or any form of treatment harming his or her body and health or offending his or her honor and dignity...”. Based on this, many provisions of the Penal Code 1999 formed a legal framework for the protection of rights to liberty and security of person. However, in practice, these rights are not fully ensured in some cases with wrong judgment, illegal detention, forcing testimonies, applying corporal punishment, etc. Consequently, the effectiveness of crime prevention is reduced as rights, liberty and security of person are violated. On 27 November 2015, the National Assembly approved the Penal Code 2015 with important amendments for further protection of liberty and security of person. Therefore, it is important to define and provide for the protection of these rights in the Penal Code 2015 and relevant issues.

Firstly, by definition, “*liberty*” and “*security of person*”<sup>1</sup> are independent but closely linked with each other. Liberty forms the backdrop for the security of person. Meanwhile, *security of person* is one of the impacts of *liberty* to individuals (persons). Liberty does not bring about security but the other way around. Therefore, liberty is only ensured through security. On the other hand, liberty without being detained but associated with attack, assault and battery is not considered real freedom. Meanwhile, “originally, right to liberty means physical freedom of human beings... On the other hand, the right to security of the person is protected by laws during enforcement of rights” (Nihal Jayawickrama 2002, 342). Consequently, while the right to liberty is a precondition for other rights and freedoms, the right to security of person ensures enforcement of rights and freedoms (including liberty).

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<sup>1</sup> Presently, some papers refer to the term “*safety of person*”. In our opinions, both “*security*” and “*safety*” of person have the same comprehension. However, from a general point of view, security of person has a wider meaning. In English, it is fine to use the term *security*. Moreover, the term “*security of person*” also includes responsibilities of the Government in the protection of individuals from infringement of life, health, dignity, personal freedoms in the society (Trinh Tien Viet 2015, 36).

The right to liberty is not defined in international conventions but mainly interpreted in practice. EU Network of Independent Experts on Fundamental Rights confirms as follows “the right to liberty only relates to a specific aspect of freedoms of human beings, freedom of body movement by literal meaning during arrest and detention. Other less serious forms of limiting body movement, such as probation, inhabitation forbidding, expelling, exile, curfew or supervision of prisoners released for reasons not relating to the right to liberty” (EU Network 2006, 67–69). Liberty does not aim to build an ideal society without any prison or detention center but ensures proper procedures. The right to liberty does not deny deprive of this right but opposes arbitrary arrest and detention.

Meanwhile, the right to security of person is not defined in international human right laws. This right is interpreted by the United Nations in Chapter 2 “*New dimensions of human security*” in the Human Development Report 1994 as one of *seven* elements constituting human security (United Nations Development Program 1994, 30). Thus, both liberty and security are normal, stable and happy states in life. These states are the opposite of oppression, injustice, infringement of life, health or property or being affected by disasters caused by human beings. However, from the personal demand point of view, liberty and security of person are considered vital demands to survive in the society as **HUMAN BEINGS**. Without liberty and security of person, human beings would have a miserable and dependent life, being unfairly and cruelly treated, and being vulnerable to infringement of life, honor and dignity. For these reasons, liberty and security of person have always been issues of concern at all time. In a democratic society, the Government should be responsible for the protection of liberty and security of person. Each individual, as an element of the society, has the right to request the Government to have effective measures to ensure his/her real liberty and security of person in order to prevent infringement by other actors and violations of laws by the Government itself, the authorities, agencies, organizations and other individuals in the society. After all, liberty and security of person mean *the right to liberty and security of person*. These are both natural and regulatory rights. As liberty and security of person are natural rights of human beings, they are not ignored or abandoned by the Government. Meanwhile, as liberty and security of person are regulatory rights, the communities (both national and international levels) are responsible for the institutionalization of these rights into binding laws for strict compliance and protection against violations. In brief, based on the above-mentioned approach, from a scientific point of view, a definition is recommended as follows: *liberty and security of person are basic human rights, reflecting existence state of human beings of which each individual is legally protected from infringement upon inviolable rights relating to health, honor, dignity and physical liberty*. Liberty and security of person are only limited within strict provisions of the laws.

### *1.2. Importance of protection of liberty and security of person in the Penal Code*

The Penal Code is one of the effective legal tools in management and ensuring social order. *Functions* of the Penal Code are mainly implemented through full and strict provisions on its tasks, crimes, and penalties. Therefore, the question is which social actors are responsible for the protection of liberty and security of person. Depending on social development in each historical period, social actors might have different characteristics.

In general, social actors might be divided into *three* groups as follows (Trinh Tien Viet 2015, 57):

- *Individuals*;
- *Legal associations and groups of individuals* recognized by the Government and society;
- The State as *a special political organization* responsible for management and maintenance of social order.

Among these *three* social actors, each individual has the right to protect his/her right to liberty and security of person by legal means in accordance with the laws (for example, legitimate defense). Associations and groups of individuals protect the right to liberty and security of person through provisions of the laws, legal procedures, and supervision of enforcement agencies (for example, responsibilities in guiding and preventing crimes). Finally, as “*a special public political organization with an apparatus for social enforcing and management*” (Hoang Thi Kim Que 2006, 83), the State plays a key role in protection of liberty and security of person, fulfilling the most important task of crime control, identifying which acts dangerous to the society are considered crimes, providing for penalties (reflecting reactions of the State) against such crimes.

Consequently, from a scientific point of view, *protection of liberty and security of person in the Penal Code legally protect inviolable rights to life, health, honor, dignity and physical liberty*. Protection of these rights through the Penal Code reflects the highest protection against violations which might cause serious consequences to individuals in society.

## Detailed provisions on liberty and security of person in the Penal Code 2015

With its main function of protection, the most important task of the Penal Code in many jurisdictions including Vietnam is to protect key social relations including human rights. Therefore, based on the Constitution 2013, Article 1 of the Penal Code 2015 confirms its task of protection of “*human rights*” and rights of citizens (formerly called “*legitimate rights and interests of citizens*” in the Penal Code 1999) — which are acknowledged (recognized and accepted) and institutionalized in national laws. Among these rights, the rights to liberty and security of person are highlighted with a number of provisions from the General Part to the Part on Crimes as follows:

### 2.1. Detailed provisions in the General Part

With its unique method, the Penal Code firstly *protects the right to liberty and security of person by identifying these rights as objects of crimes* — i. e. social relations protected by the Penal Code against infringement or threat of infringement by crimes.

Article 8 of the Penal Code 2015 specifies: “1. A crime is an act dangerous to the society prescribed in the Penal Code, committed intentionally or unintentionally by a person having the penal liability capacity or a commercial entity, infringing upon the independence, sovereignty, unity and territorial integrity of the Fatherland, infringing upon the political regime, the economic regime, culture, defense, security, social order and safety, the legitimate rights and interests of organizations, infringing upon *the human rights, the*

*legitimate rights and interests of citizens*, and infringing upon other socialist legislation which is penalized in accordance with this Code...”.

Accordingly, this definition confirms acts of violation of *human rights* in general (including *the right to liberty* in general, *personal liberty*; an infringement upon *life and health* — elements ensuring the security of the person as specified in the Penal Code 1999) *crimes*. Acts of infringement upon these objects are strongly condemned by the State with severe penalties against infringement upon liberty and security of person based on a strict provision on a basis for penal liabilities “*Only those persons who have committed crimes defined by the Penal Code shall bear the penal liabilities therefore*” (Paragraph 1 Article 2).

Subsequently, as acts of infringement upon liberty and security of person are considered crimes, the Penal Code provides for penalties against these acts. This not only deters and warns any person intending to infringe upon liberty and security of person of other persons but also confirms handling principles at Article 3 — “*All acts of criminal offenses must be timely detected and handled in a prompt, just and enlightened manner in strict accordance with laws*” (point a, paragraph 1). Based on objects protected by the Penal Code mentioned in Article 1 and Article 8, Vietnamese lawmakers divide crimes into various types in the Part on Crimes in the Penal Code 2015 (from Chapter XIII to Chapter XXVI).

In addition to traditional measures of prohibition and application of penalties against acts of violation of liberty and security of person, the Penal Code *protects these rights by providing for responsibilities and cooperation regimes in crime prevention (including crimes of infringement upon liberty and security of person) of all forces in the society*. Accordingly, professional state agencies such as public security, procuracies, courts, judicial agencies, inspection agencies, etc., are responsible for crime prevention, timely detection, and fairly settlement of all acts of criminal offenses.

This provision forms the backdrop for cooperation regimes of all organizations and individuals in crime prevention and protection of human rights. However, it is also likely that acts of depriving liberty (for example, arrest and detention of offenders) or physical attack of the accused or the wanted to have acts of resistance, etc., might occur. If such acts of depriving liberty and physical attack are conducted by non-professional forces without a legal knowledge and proper guidance, it might result in a violation of the laws and infringement upon liberty and security of person.

Moreover, the Penal Code also *provides for a legal tool in crime prevention and protection of liberty and security of person by social forces*. This legal tool is the legitimate defense mentioned in Article 15 of the Penal Code 1999, currently in Article 22 of the Penal Code 2015 as “*Cases of penal liability exemption*” (Chapter IV). Legitimate defense allows exemption or reduction of penal liability for acts of violation in order to protect the liberty and security of person (and other legitimate rights and interests) of oneself or other people. Legitimate defense is not only a right but also an ethical obligation of any person for acts dangerous to the society, agencies, organizations, other persons or oneself. As acting beyond the prescribed legitimate defense limit aims to protect and prevent violation of legitimate rights and interests, such act is considered a circumstance extenuating penal liability (point c paragraph 1 Article 51). Meanwhile, acting beyond the prescribed legitimate defense limit is a sign of murder beyond the limit of legitimate defense (Article 126) or intentionally inflicting injury on or causing harm to the health of other persons due to an excess of legitimate defense limit or a necessary level when arresting offenders (Article 136 of the Penal Code 2015).



Noticeably, the Penal Code provides for strict penalties in order to prevent arbitrary and inhuman deprivation of liberty and security of the person as follows:

- *Limited sources and power of application of penalties aim to prevent arbitrary and illegal accusation and application of penalties.* The Penal Code is the only source for penalties while the court is the only agency having the power to apply penalties — “Penalty is the most severe coercive measure applied by the State provided for in the Penal Code and decided by the court...” (Article 30). This means the laws do not allow illegal deprivation of personal liberty by any individual or organization. Competent courts are only entitled to apply penalties to deprive liberty or other rights of the convicted on the basis of the Penal Code. Moreover, this is also in line with provisions of the Universal Declaration of Human Rights 1948 as “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (Pham Khiem Ich, Hoang Van Hao 1995, 626).
- *Penalties aim to prevent inhuman deprivation of liberty and security of person.* Purposes of penalties are specified in Article 31 of the Penal Code — which are not only to punish offenders but also to educate, deter and prevent them and other people in the society from committing new crimes (specific and general prevention). As most severe coercive measures of the State, penalties not only aim to punish, educate, rehabilitate offenders and to prevent crimes. As humanity is highlighted, while penalties provided for in Article 32 (applied against individual offenders) and subsequent provisions might deprive liberty or limit certain rights and interests, they do not aim at terrifying, maltreating, causing physical harm or distorting dignity (for example, cruel penalties existing somewhere in the history of human beings such as torture, cutting body parts, marking by tattoo or burned scar on the face or body); etc. Penalties instead aim at educating and rehabilitating offenders and supporting crime prevention.
- *If liberty and security of person are infringed, the Penal Code provides for recovery measures to compensate for victims.* As infringement upon liberty and security of person often results in physical and spiritual harms to victims, it is important to provide for recovery measures and compensation in accordance with Article 2 of the International Covenant on Civil and Political Rights 1966. Accordingly, Article 48 of the Penal Code confirms that offenders must return the appropriated property to their lawful owners or managers and repair or compensate for material damage determined as having been caused by their offenses. In case of moral damage caused by the offense, the court shall compel the offenders to make material compensation and public apologies to the victims.

## 2.2. Provisions of the Part on crimes

- *For acts of infringement upon liberty,* the Penal Code defines names of crime for acts as follows:
  - + *Trafficking in persons (Article 150 the Penal Code 2015):* according to the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organized Crime, trafficking in persons is an act of *controlling over and*

*abusing another person* through different tricks<sup>2</sup>. Therefore, the Penal Code provides for the highest sentence of 20 years of imprisonment for this act of criminal offense. Similarly, the highest sentence of life imprisonment for trafficking in persons under 16 years old (Article 151).

- + *Kidnapping in order to appropriate property (Article 169 the Penal Code 2015)*: Article 169 of the Penal Code does not aim to deprive liberty and security of person. However, offenders infringe upon liberty using tricks such as kidnapping and threatening the health and life of victims in order to appropriate property. Therefore, kidnapping in order to appropriate property is considered a serious crime with the highest penalty of life imprisonment as this type of crime not only deprives liberty and threatens the security of person but also infringes upon ownership right.
- + *Arresting, detaining persons in contravention of law (Article 157 the Penal Code 2015)*: this is a typical and common act of depriving liberty mentioned in regional and international conventions as confirmed by Mr. J.E.S. Fawcett, an English legal expert and member of the European Human Rights Commission “In recent international and regional legal documents on human rights and in national constitutions, *liberty is defined by clear elements, aiming to protect persons from arbitrary arrest or detention*”. A similar provision can be found in Articles 9 and 11 of the International Covenant on Civil and Political Rights, Article 5 and Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7 of the American Convention on Human Rights (Fawcett 1987, 70). Therefore, the Penal Code provides for strict penalties against this crime with the highest penalty of 12 years of imprisonment.
- + *Examining innocent persons for penal liability (Article 368 the Penal Code 2015)*: this act might result in deprivation of honor, property, liberty or even life. Therefore, it is possible to classify this act as an infringement upon liberty or security of person. This act is strictly punished by the Penal Code with the highest sentence of 15 years of imprisonment not only because of consequences to victims but also the fact that persons committing this act to understand well the law as representatives of the State in the prevention of crimes and protection of human rights.
- *For acts of infringing security of person*, the Penal Code defines crimes and penalties in different types as follows:
  - + *Acts of infringing upon life* are considered the *most serious threat* to the security of person. Chapter XIV of the Penal Code 2015 provides for 11 crimes relating to direct or indirect, accidental or intentional deprivation or threatening to deprive life of other persons in an illegal manner as follows: murder (Article 123); murder or abandonment of new-borns (Article 124); murdering people under

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<sup>2</sup> See: Article 3 (a) *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organized Crime*: “Trafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person...”.



provocation (Article 125); murder beyond the limit of legitimate defense or a necessary level when arresting offenders (Article 126); causing death to people in the performance of official duties (Article 127); accidentally causing human death (Article 128); accidentally causing human death due to breach of professional or administrative regulations (Article 129); forced suicide (Article 130); inciting or assisting other persons to commit suicide (Article 131); refusal to rescue people from life-threatening situation (Article 132) and threatening to murder (Article 133). As the object of these crimes is the life of a person, provisions of the Penal Code and penalties against these crimes are very severe. Among 11 crimes, one is considered serious crime with the highest penalty of the death penalty (Article 123 — Murder) and one is considered less serious crime (Article 124 — Murder or abandonment of newborns).

- + *Acts of infringing upon health* are most common acts of infringing upon the security of person. The Penal Code provides for 14 specific crimes as follows: Intentionally inflicting injury on or causing harm to the health of other persons (Article 134); Intentionally inflicting injury on or causing harm to the health of other persons due to strong provocation (Article 135); Intentionally inflicting injury on or causing harm to the health of other persons due to an excess of legitimate defense limit or a necessary level when arresting persons (Article 136); Inflicting injury on or causing harm to the health of other persons while performing official duty (Article 137); Unintentionally inflicting injury on or causing harm to the health of other persons (Article 138); Unintentionally inflicting injury on or causing harm to the health of other persons due to breach of professional or administrative regulations (Article 139); Ill-treating other persons (Article 140); Spreading HIV to other persons (Article 148); Intentionally spreading HIV to other persons (Article 149); Forcing, inducing other persons into illegal use of narcotics (Article 257); Breaching regulations on medical examination and treatment, drug production, preparations, supply and sale or other medical services (Article 315); Illegal abortion (Article 316); Breaching regulations on food safety and hygiene (Article 317) and Applying corporal punishment (Article 373). Among crimes infringing upon physical health of persons, the highest penalty of *life imprisonment* is applied to Article 134 — intentionally inflicting injury on or causing harm to the health of other persons; Article 149 — Intentionally spreading HIV to other persons; Article 257 — Forcing, inducing other persons into illegal use of narcotics.
- + *Acts of sexual offenses* not only infringe upon physical integrity and sexual freedom but also seriously infringe upon honor and dignity of persons. These acts are prohibited and sanctioned in the Penal Code through *six* crimes as follows: Rape (Article 141); Rape against persons under 16 years old (Article 142); Forcible sexual intercourse (Article 143); Forcible sexual intercourse with persons from full 13 years old to 16 years old (Article 144); Having sexual intercourse or other sexual behaviors with persons from full 13 years old to 16 years old (Article 145) and Obscenity against persons under 16 years old (Article 146). As these acts of sexual offenses infringe upon important rights, strict penalties are applied, especially in cases where victims are from full 13 years old to 16 years old. Among these crimes, one crime has the highest penalty of capital punish-

ment (Article 142 — Rape against persons under 16 years old), two crimes might result in life imprisonment (Article 141 — Rape; Article 144 — Forcible sexual intercourse with persons from full 13 years old to 16 years old). In addition to acts of sexual offenses, other acts of criminal offenses infringing upon sexual freedom and safety are also strictly punished in the Penal Code such as harboring prostitutes (Article 327), procuring prostitutes (Article 328); etc.

- + *Domestic violence* might not cause physical harm as serious as criminal offenses infringing upon health. However, this crime is classified by the United Nations as one of the basic acts of infringing upon the security of person which might be common but often ignored in practice (United Nations Development Program 1994, 30). Acts of domestic violence prohibited by the Penal Code include persecution and ill-treating as mentioned in Article 185 — Persecuting or ill-treating grandparents, parents, spouses, children, grandchildren, and fosterers.
- + *Acts of infringing upon community security and crimes against mankind* not only infringe upon the security of one or several specific individuals but also the security of the person of the whole community or mankind. Acts of infringing upon the security of mankind are provided for in the Penal Code 2015 at Article 186 — Spreading dangerous epidemics to human beings; Article 299 — Terrorism and Article 300 — Sponsoring terrorism. As these acts threaten the security of person at a larger scale, the Penal Code provides for severe penalties such as 12 years of imprisonment for acts of spreading dangerous epidemics to human beings. The highest penalty against terrorism is capital punishment as this act of criminal offense is particularly dangerous and cruel, causing panic to the public, infringing upon a life of other persons or damaging property of agencies, organizations, and individuals. Meanwhile, sponsoring terrorism might only result in 10 years of imprisonment as this act indirectly threatens the security of person through mobilizing, funding, providing property in any kind to terrorist organizations or individuals.

In addition, depending on the extent of seriousness, crimes against mankind might result in 10 to 20 years of imprisonment, life imprisonment or death penalty as provided for in the Penal Code at Article 422 on crimes against mankind, Article 423 on war crimes as these crimes infringe upon security of person in the most cruel and inhuman manner — annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide or destroying the natural environment; or giving the order for or directly undertake the murder of civilians, wounded persons, prisoners of war, the looting of property, the destruction of population quarters, the use of banned war means or methods, and/or commit other acts in serious violation of international laws or international treaties.

## Recommendations on further improvement of criminal policies and the Penal Code in order to protect the liberty and security of person

### 3.1. Improvement of criminal policies

Improvement of criminal policies and further revision of the Penal Code are considered important measures for the protection of liberty and security of person in two aspects — forming the *legal basis* — for protection and the *practical basis* — for action against criminal offenses. Therefore, based on research of international standards and comparative review of competence between international law and national laws, it is recommended as follows:

- Protection of liberty and security of the person or persons actively participating in crime prevention should be added (there is no provision on this issue in the Penal Code 2015);
- Cases automatically considered legitimate defense should be further revised in the Penal Code in order to increase activeness of each individual to deal with threats against liberty and security of person, legitimate rights and interests of oneself, other persons, agencies, organizations and the State (there is no provision on this issue in the Penal Code 2015);
- Possibilities and conditions for application of other penalties but not depriving liberty should be encouraged. The scope of application of the death penalty should be reduced. The Penal Code should be more humanized with strict penalties against persons infringing upon liberty and security of the person of other persons but minimized repressive measures in the Penal Code relating to liberty and security of the person of the offenders. Accordingly, these provisions mainly aim at prevention while deprivation of liberty is only applied in necessary cases. On this issue, the UN Commission on Human Rights confirms “*Prisons should not aim at punishment but re-education and rehabilitation of prisoners*” (School of Law 2008, 323);
- Crimes relating to liberty and security of person in the Penal Code should be reviewed to better protect these rights in general and those of victims in particular, etc.

### 3.2. Recommendations on further revision and amendment of the Penal Code

Based on analysis of criminal policies as well as revisions and amendments of the Penal Code in 2015, it is thought that further revision and amendment should be implemented for the better protection of liberty and security of the person as follows:

- \* *Provision on “Responsibilities in crime prevention” (Article 4 of the Penal Code 2015)*

Paragraph 3 Article 4 of the Penal Code provides for: “*All citizens are responsible for active involvement in crime prevention*”. However, the people and the society are very concerned about a recent case where gangsters beat a “hero” for arresting offenders in Di An town (Binh Duong province) (Minh Duc 2016). Therefore, in order to promote activeness of citizens in crime prevention and to avoid ignorance and guilty in performing this obligation as well as to protect liberty and security of the person of coura-

geous citizens in crime prevention, it is recommended that responsibilities of the State in the protection of these citizens should be provided in the laws. However, as this issue is not clarified in Article 4 of the Penal Code 2015, it should be further revised as follows:

“Article 4. Responsibilities in crime prevention

1...

...

3. All citizens are responsible for active participation in crime prevention. *Any act of obstructing, threatening or infringing upon rights and interests of citizens shall be strictly and fairly sanctioned in accordance with provisions of the laws. The State shall be responsible for the protection of citizens during their participation in crime prevention*”.

...

\* Provision on “Legitimate defense” should be revised (Article 22 of the Penal Code 2015)

Firstly, in order to promote activeness of the people in legitimate defense and to encourage them to commit acts useful for the society, it is perfect that Paragraph 1 Article 15 of the Penal Code 2015 provides for protection of legitimate rights and interests of people committing acts of legitimate defense before those of other persons as well as combines the rights and interests of organizations and the State into those of “*agencies and organizations*”.

However, although the draft Penal Code did provide for cases where legitimate defense is automatically recognized, the final version does not include those cases. Consequently, people committing acts of legitimate defense are subject to decisions of law enforcement agencies (Ministry of Justice 2014, 13). This issue has been provided for in the Penal Code of many countries in the world (Dinh Bich Ha 2007, 44–45; Hanoi University of Law 2011, 50). Noticeably, this aims to prevent crimes infringing upon liberty and security of person (citizens and people on official duties) such as murder, intentionally inflicting injury, rape, robbery of property, drug crimes, etc., which have been manifested through some serious cases in Nghe An, Binh Phuoc, etc. Therefore, Article 22 of the Penal Code 2015 should be further revised as follows:

“Article 22. Legitimate defense

1. Legitimate defense is an act of persons who, for the purpose of protecting legitimate rights and interests of their own or other persons or agencies and organizations, need to fight against persons who are committing acts infringing upon the interests of the above-mentioned.

Legitimate defense shall not be considered a crime.

2. Cases automatically considered legitimate defense:

a) *Fighting against persons using weapons to oppose being arrested or to continue to commit acts of criminal offenses;*

b) *Fighting against persons committing acts of murder, rape, robbery of property, destroying prisons and national security and defense areas;*

c) *Fighting against persons committing acts of assault at houses of other persons at night.*

3. Acting beyond the prescribed legitimate defense limit is the act of fighting back in a manner incompatible with nature, and the extent of the danger posed to the society by the act of infringement”.

...

- \* *Possibilities and conditions for application of penalties not depriving liberty should be increased in the Penal Code*

In the Penal Code, some penalties not depriving liberty include a warning, fining, non-custodial reform. Presently, in order to further improve criminal policies towards humanization and to increase the effectiveness of crime prevention, possibilities and conditions for application of these penalties should be encouraged. It is because “penalty is a combination of punishment and education... The penalty is only mentioned with these two elements” (Trinh Quoc Toan 2011, 28–29). Therefore, lawmakers has extended the application of fining against serious crimes and *environmental crimes* in line with the current situation of a trial. However, non-custodial reform is not applied to *particularly serious crimes caused by unintentional acts*. Penalties not depriving liberty are not applied to juvenile offenders to ensure the principle supplemented in the Law on revision and amendment of a number of provisions of the Penal Code 1999 (2009) — “*When imposing penalties on juvenile offenders, it is necessary to restrict imprisonment ones*”.

Therefore, Article 36 and provisions on penalties applied to juvenile offenders in the Penal Code 2015 should be revised as follows:

“Article 36. Non-custodial reform

1. Non-custodial reform of between six months and three years applies to persons committing less serious crimes, serious crimes *or particularly serious crimes caused by unintentional acts* prescribed by this Code who have stable working places or clear residence places if it is deemed unnecessary to separate the offenders from society.

...”

...

“Article 98a. Warning

1. *For persons from full 14 years old to 16 years old, the warning is the principal penalty in case of committing very serious crimes caused by intentional acts or particularly serious crimes for the first time with at least two circumstances extenuating penal liability as mentioned in paragraph 1 Article 51 of this Code.*

2. *For persons from full 16 years old to 18 years old, the warning is the principal penalty in case of committing less serious crimes with less dangerous consequences”.*

...”

...

“Article 100. Non-custodial reform

1. *For persons from full 14 years old to 16 years old, non-custodial reform is the principal penalty in case of intentionally committing very serious crimes or particularly serious crimes for the first time with circumstances extenuating penal liability.*

2. *For persons from full 16 years old to 18 years old, non-custodial reform is the principal penalty as mentioned in Article 36 of this Code.*

3. *The courts shall assign the juvenile offenders subject to non-custodial reform to the agencies or organizations where such persons work or to the authorities of the places where such persons permanently reside for supervision and education. The sentenced person’s families shall have to coordinate with agencies, organizations and local authorities in the supervision and education of such persons.*

...”

...

\* *Crimes relating to liberty and security of person should be reviewed and amended in the Penal Code*

— *For murder*, actus reus of this crime should be specified. Therefore, Article 123 of the Penal Code 2015 should be further revised as follows:

“Article 123. Murder

1. Those *intentionally committing acts of infringing upon a body of other persons which causes or might cause the death of such persons* in one of the following cases shall be sentenced between 12 and 20 years of imprisonment, life imprisonment or capital punishment:

....”

...

— *For illegal arrest, custody or detention of people*, contents of Article 157 of the Penal Code 2015 should be more comprehensive as follows: “Those who illegally arrest, hold in custody or detain other persons *not in line with provisions of the laws on bases, authority and procedures regardless time limit* shall be subject to...”. Illegal actions should be violations of provisions of the laws on bases, authority and procedures on arrest, custody or detention provided for in the laws such as the Criminal Procedure Code, the Law on settlement of administrative violations 2012 (Article 122 and Article 123) and documents guiding implementation of the Regulation on detention of people under administrative procedures. Meanwhile, the phrase “*regardless time limit*” ensures and respects inviolable rights to physical liberty (Trinh Tien Viet, Nguyen Thi Thanh 2011, 48). Thus, Article 157 of the Penal Code 2015 should be revised as follows:

“Article 157. Illegal arrest, custody or detention of people

1. Those who illegally arrest, hold in custody or detain other persons, *not in line with provisions of the laws on bases, authority and procedures regardless time limit* shall be subject to warning, non-custodial reform up to two years or imprisonment from three months to two years.

....”

...

+ *For examining innocent persons for penal liability* (Article 368 of the Penal Code 2015), penalties against this crime should be increased in all three penalty brackets. Noticeable, the phrase “innocent persons” should be replaced by “persons not committing acts of criminal offenses” to ensure the accuracy of the legal status of such persons in all periods of proceedings in line with the principle of *presumption of innocence* in the Constitution 2013 and the Criminal Procedure Code 2015. Similarly, examining innocent persons for penal liability should be revised (Article 369 of the Penal Code). Therefore, Article 368 and 369 of the Penal Code 2015 should be further revised as follows:

“Article 368. Examining persons not committing acts of criminal offenses for penal liability

1. Those who have competence but examine for penal liability persons whom they know not to commit acts of criminal offenses shall be sentenced to between *three and seven years of imprisonment*.

2. Committing the offense in one of the following circumstances, the offenders shall be sentenced to *between seven and twelve years of imprisonment*:

...



3. Committing the crime and causing very serious or particularly serious consequences, the offenders shall be sentenced to *between twelve and fifteen years of imprisonment*.

....

...

“Article 369. Failing to examine for penal liability persons committing acts of criminal offenses

1. Those who have competence but fail to examine for penal liability persons whom they know to commit acts of criminal offenses, shall be sentenced...

....

...

\* *Torture should be included in the Penal Code*

Presently, the Constitution 2013 provides for prohibition of torture for the first time (paragraph 1 Article 20). However, lower-level legal documents do not define the term of torture but only mention other relevant issues such as corporal punishment, forcing evidence or testimony, etc. Meanwhile, the definition of torture in international human rights laws is much more comprehensive. Under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 approved by the National Assembly of Vietnam in November, 2014, the term “torture”: “*means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...*” (United Nations 1984, Art. 1). Therefore, it is important to include torture in the Penal Code as a separate crime under the group of crimes infringing upon mankind and human rights. As the scope of examining for penal liability against persons committing acts of forcing evidence or testimony and using corporal punishment only limits in judicial procedures (investigation, prosecution, trial, enforcement of criminal judgments) under Chapter XXIV — Crimes infringing upon judicial procedures of the Penal Code. These crimes are not considered legal bases for the criminalization of acts of torture outside judicial procedures and psychological (spiritual) torture. Thus, Article 126a on torture should be added in Chapter XIV of the Penal Code 2015 as follows:

“Article 126a. *Torture*

1. *Those committing the act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, which do not fall into cases stipulated in Article 123, 134, 157, 373 and 374 of this Code, shall be sentenced between six months and three years of imprisonment.*

2. *Committing the crime with serious consequences, the offenders shall be sentenced between two and seven years of imprisonment.*

3. *Committing the crime with very serious consequences, the offenders shall be sentenced between five and twelve years of imprisonment.*

4. *Committing the crime with particularly serious consequences, the offenders shall be sentenced between ten and fifteen years of imprisonment”.*

...

### 3. Conclusion

In summary, this paper focuses on provisions on the protection of liberty and security of person in the Penal Code 2015 with recommendations for further revision and amendment of the Penal Code in compliance with the Constitution 2013. However, further research on international law, assessing the current situation on enforcement of the law, and making recommendations are still an important and urgent task of researchers, practitioners and policy-makers in Vietnam.

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