

Submission on Criminal Code 2015- Vietnam's 4th UPR



## Submission on Vietnam's Criminal Code 2015

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Submitting organization: Defend the Defender (DTD)

### *Methodology and consultation process*

Submitted by Defend the Defenders

## Submission on Criminal Code 2015- Vietnam's 4th UPR

### 1. We focus on the 2019 UPR recommendations:

*Accepted:* 38.174 (Brazil), 38.197 (Seychelles), 38.200 (Spain), 38.203 (United Kingdom of Great Britain and Northern Ireland), 38.206 (Angola), and 38.207 (Australia);

*Rejected:* 38.55 (France), 38.73 (Switzerland), 38.183 (Netherlands), and 38.188 (Norway).

2. Our joint submission is based primarily on reports generated by Defend the Defender and other independent, non-profit and non-governmental organisations which act to protect and promote human rights in Vietnam.

3. Vietnam's highest legislative body National Assembly passed the amended Criminal Code (2015 Criminal Code) in 2017 to replace the 1999 Penal Code. The new law became effective on January 1, 2018. Despite calls made at Vietnam's 2014 and 2019 UPR for removing controversial articles in the Criminal Code, it has retained all these provisions and even made some of them more severe with heavier punishments.

The Criminal Code (No. 100/2015/QH13)<sup>1</sup>, at Chapter XIII, creates several “offences against national security.” Articles 109, 113 and 299 provide prison terms of up to 20 years for establishing or joining an organization that acts against the people's government and for various offences classified as “terrorist,” defined in the Law on Counter-Terrorism (No. 28/2013/QH13)<sup>2</sup>. Article 117 provides a prison term of up to 20 years for “making, storing, or spreading information, materials or items for the purpose of opposing the State of the Socialist Republic of Viet Nam.” Under Article 331, “abusing democratic freedoms to infringe upon the interests of the State, lawful rights and interests of organizations and/or citizens” is punishable with a community sentence or imprisonment of up to 3 years, or up to 7 years if the offence has “a negative impact on social security, order or safety.”

5. Most aggravating, the 2015 Criminal Code imposes punishments for crimes not yet committed: 1-3 years of imprisonment for “making preparation for the commitment” of offences under Articles 116 and 118, and 1-5 years under Articles 109, 117 and 121. The 2015 Criminal Code may thus be used to silence activists who peacefully exercise basic rights enshrined in the 2013 Constitution and the International Covenant on Civil and Political Rights (ICCPR), of which Vietnam is a state-party.

<sup>1</sup>

Amendments to the Criminal Code passed in 2015 increased the number of prohibited conducts under crimes pertaining to “Offenses Against National Security” and introduced heavier penalties for such crimes. Some of these provisions carry sentences up to life imprisonment or death penalty. The definition of certain crimes related to national security may encompass legitimate expression and may violate the principle of proportionality.

These amendments are not in line with international standards, in particular with the principles of legal certainty, necessity and proportionality of sentencing. Articles 109, 116, 117 and 331 are broadly formulated and vaguely worded, making no distinction between violent crimes and the peaceful and legitimate exercise of the right to freedom of opinion and expression.

6. In the 2019 Concluding Observations on Viet Nam<sup>3</sup>, the Human Rights Committee noted “severe restrictions on freedom of opinion and expression in the country, including through laws

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and practices that appear not to comply with the principles of legal certainty, necessity and proportionality, such as:

(a) The vague and broadly formulated offences in Articles 109, 116, 117 and 331 of the Criminal Code and their use to curtail freedom of opinion and expression, and the definition of certain crimes related to national security to encompass legitimate activities, such as exercising the right to freedom of expression.”

7. The criminalization on the basis vague concepts, such as “Offenses Against National Security,” could infringe on protected activities under international human rights law, involving the freedom of opinion and expression and arbitrarily characterize them domestically as “terrorism” allowing for the arrest, detention or harassment of individuals for exercising internationally protected rights. This definitional conundrum would contravene the “principle of legal certainty,” the fundamental principle that the punishment must be commensurate with the crime.

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8. Together with other new laws such as the 2015 Criminal Procedure Code<sup>4</sup>, the 2015 Law on Enforcement of Custody and Temporary Detention<sup>5</sup>, and the 2018 Law on Cyber Security<sup>6</sup>, the Criminal Code has not brought Vietnam's legal framework into compliance with any international human rights instruments and covenants that Vietnam is a state-party of. The national security provisions in the constitution and the laws have yet to be clearly defined. The definition of the offences enumerated in the laws remains broad and vague with great latitude in its interpretation. In practice, it legitimizes government restrictions on citizens' political rights, validates abuses by government authorities, and further limits freedom of speech, peaceful assembly and association instead of safeguarding civil, political, cultural and other basic rights of all persons.

9. Vietnam has consistently used “national security” provisions to target political dissidents, human rights defenders, social activists and bloggers. This has not changed with the 2015 Criminal Code. The following table tracks the number of arrests on charge of “national security” from 2019 through the first nine months of 2023.

Number of activists charged with Article 117 of Article 331 in recent years

| Year                                         | 2019 | 2020 | 2021 | 2022 | 2023 |
|----------------------------------------------|------|------|------|------|------|
| Number of activists charged with Article 117 | 12   | 16   | 12   | 11   | 4    |
| Number of activists charged with Article 331 | 2    | 8    | 14   | 15   | 12   |

Source: Defend the Defenders (vietnamhumanrightsdefenders.net)

10. Vietnam's 2013 Constitution stipulates that human rights and citizens' rights may only be restricted in “cases of necessity for reasons of national defence, national security, social order and safety, social morality and public health” (Constitution, Article 14). At the 2014 and 2019 UPR reviews the Vietnamese government pledged to align the Criminal Code and other laws<sup>7</sup> with international human rights laws and uphold freedom of expression and other fundamental rights as defined in the International Covenant on Civil and Political Rights (ICCPR)<sup>8</sup>. However, it has failed to undertake the comprehensive review of laws and practice this would necessitate.

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11. In the amended 2015 Criminal Procedure Code and 2015 Criminal Code that came into force on January 1, 2018, the vague definition of national security offences has permitted restrictions on fundamental rights as defined in Article 2 of the ICCPR. These restrictions appear to be incompatible with the ICCPR, in particular Article 19, freedom of opinion and expression, and with other international human rights instruments and covenants that Vietnam is a state-party of.

12. Chapter XIII of the 2015 Criminal Code is entirely dedicated to the 15 crimes that are considered criminal offences against national security. These include, among others, any acts deemed by the government as opposing the State of the Socialist Republic of Vietnam, including storing and/or spreading materials, or inciting or persuading other people to disrupt security and national unity. The offenders could face a penalty of 1 to 20 years of imprisonment.

13. National security and national unity provisions have been regularly invoked to target human rights defenders (HRDs), bloggers, lawyers, trade unionists, land rights activists, political dissidents, environmental campaigners, or members of non-registered religious communities. The State has systematically silenced its critics by arresting them for “plotting to overthrow the government” in Article 109; “sabotaging implementation of solidarity policies” in Article 116; and “conducting propaganda against the Socialist Republic of Vietnam” in Article 117.

14. While these 3 provisions are the most frequently used to suppress dissidents, other charges have been used: Article 118- “disrupting security” and Article 121- “fleeing abroad or defecting to stay overseas with a view to opposing the people’s administration.”

15. Provisions in other chapters of the Criminal Code used to suppress freedom of opinion and expression include: Article 318- “causing public disorder;” Article 320- “performing superstitious practices;” Article 330- “resisting persons in the performance of their official duties;” and Article 331- “abusing democratic freedoms to infringe upon the interests of the State.”

### ***Freedom of peaceful assembly and association***

16. Under national law, civilians are prohibited from forming independent unions or associations, even though Article 25 of the Constitution provides the constitutional basis for “freedom of speech, freedom of the press, freedom of association, freedom of assembly.”

17. In November 2019, authorities in Ho Chi Minh City arrested Dr. Pham Chi Dung on allegation of “conducting anti-state propaganda” under Article 117 of the Criminal Code. Mr. Dung, born in 1966 and former security officer, is a president of the unregistered professional group Independent Journalists Association of Vietnam (IJAVN). Six months later, the police arrested its Vice President Nguyen Tuong Thuy (1950) and editor Le Huu Minh Tuan (1989) on the same charge. In a trial in January 2021, Dung was sentenced to 15 years in prison, the heaviest imprisonment given for the charge so far. Thuy and Tuan were given 11 years imprisonment each. Dung denied his right to appeal because he has no belief in Vietnam’s judicial system while Thuy was not allowed to submit his appeal. The three activists have been under inhumane treatment while preserving their sentences in Xuan Loc Prison camp (in case of Dr. Dung) and An Phuoc Prison camp (in case of Mr. Thuy).

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The arrest and conviction of the three activists are part of Vietnam's suppression targeting the unregistered IJAVN- the efforts to form independent group of free journalists.

18. In September 2018, authorities in Ho Chi Minh City arrested eight members of the Constitution Group which advocates for rule of law by providing free copies of Vietnam Constitution 2013 to citizens in a bid to help them better understand their civil and political rights. Members of the group actively took part in the peaceful mass demonstration in HCM City on June 10, 2018 to protest two bills Special Economic Zone and Cyber Security. Their arrests were made after the group called for peaceful demonstration across Vietnam in early September. They were charged with "disrupting security" under Article 118 of the Criminal Code. In 2020, they were convicted and sentenced to between 2 years and 8 years in prison.

### ***Freedom of expression online and offline***

19. Vietnam's authoritarian regime has no tolerance for criticism and used controversial articles in the Criminal Code to silence the government critics, both online and offline.

20. Since the 3rd UPR in 2019, before and after the 12nd National Congress of the ruling Communist of Vietnam (CPV) in early 2021, Vietnam's authoritarian regime has intensified its crackdown on local dissidents and activists, arresting dozens of them on controversial allegations in Criminal Code such as "conducting anti-state propaganda" (Article 117) and "abusing democratic freedom" in (Article 331) and sentenced them to between four and ten years in short trials which do not meet the international standards for a fair hearing.

21. Among them are prominent journalist and human rights defender Pham Doan Trang, human rights advocate Nguyen Thuy Hanh, independent journalists Pham Thanh, Huynh Minh Tam, Huynh Thi To Nga, Nguyen Lan Thang, Dang Dang Phuoc, Tran Van Bang, Bui Van Thuan, Le Anh Hung, Do Nam Trung, etc. They were charged with "conducting anti-state propaganda" under Article 117 of the Criminal Code for their writing online or offline.

22. In June 2020, authorities in Hanoi arrested land right activist Can Thi Theu and her two sons- human rights defenders Trinh Ba Phuong and Trinh Ba Tu and charged them with "conducting anti-state propaganda" due to their support campaign given to land petitioners in Dong Tam (My Duc district, Hanoi) who were violently suppressed by the Vietnam's police in the bloody attack on January 9, 2020. The mother and the sons later were sentenced to between 8 years and 10 years in prison. The sons were beaten by police officers during investigation and after that.

23. About 50 Facebookers and human rights activists have been imprisoned between one and seven years on allegation of "abusing democratic freedom" under Article 331 of the Criminal Code for their posts on social networks such as Facebook and Youtube, the main networks for ordinary people since the state controls the mainstream networks of newspapers, televisions and radio stations.

24. In all cases mentioned above, the UN Working Group on Arbitrary Detention issued its opinions or in joint communications with other Special Rapporteurs sending to the Vietnamese government to urge Hanoi to release them unconditionally and immediately since they were arrested arbitrarily and sentenced unfairly and their arrest and convictions went against Vietnam's international commitments on human rights, particularly Articles 2, 6, 7, 8, 9, 11, 19,

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20 and 21 of the Universal Declaration of Human Rights and Articles 2, 9, 14, 15, 16, 19, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights.

### ***Key Recommendations***

25. To ensure full compliance with 2019 UPR recommendations 38.174 (Brazil), 38.197 (Seychelles), 38.200 (Spain), 38.203 (United Kingdom of Great Britain and Northern Ireland), 38.206 (Angola), and 38.207 (Australia); 38.55 (France), 38.73 (Switzerland), 38.183 (Netherlands), and 38.188 (Norway).

26. Revise the 2015 Criminal Code to remove controversial Articles 109, 116, 117, 118, and 331;

27. Ensure that freedom of expression is protected both offline and online by amending or removing vague national security and public order provisions in the Criminal Code and in other legislations, particularly the newly passed Cybersecurity Law, to make sure that limitations on freedom of expression are strictly in line with ICCPR and all other human rights treaties that Vietnam is a state-party of;

28. Immediately and unconditionally release all human rights defenders, bloggers, journalists, religious and political dissidents detained or imprisoned for their peaceful expression and/or exercising their other civil and political rights./.