

**ASSESSING HARMONY BETWEEN VIETNAM’S LAW AND THE UNITED NATIONS
CONVENTION AGAINST TORTURE (UNCAT), AND SOLUTIONS TO BRING THE
CONVENTION INTO LEGAL REALITY AND HUMAN RIGHTS PROTECTION**

Assoc. Prof. Dr. Truong Thi Hong Ha
Department of Judicial Reform
Party Central Committee’s Commission for Internal Affairs

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted on December 10, 1984. It is one of the nine core international conventions on human rights. UNCAT came into force on June 26, 1987 following ratification by 20 countries. It now has 155 State parties¹. Vietnam signed the Convention on November 7, 2013, and the National Assembly of the Socialist Republic of Vietnam ratified it on November 28, 2014. The signing and ratification of the Convention is of significance, demonstrating the humanitarian criminal policy of the Vietnamese State and the determination to maintain the foundations of human rights –related morality, legality and culture being stated in the policies and guidelines of the Party and the 2013 Constitution. This also mirrors Vietnam’s efforts in acknowledging, respecting, guaranteeing and protecting human rights, creating an important legal basis to effectively contribute to the fight against slanders and distortions of hostile forces which aim to overthrow the Vietnamese State. The ratification of the Convention also facilitates the review, amendment and supplementation of relevant legal regulations, making them more consistent with the Convention and general regulations of international law on human rights. The article focuses on analysing the harmony and compatibility between the Vietnamese law and the Convention, thereby defining problems and necessary solutions to bring the Convention into the political and legal life in Vietnam.

1. Assessing the harmony between the Vietnamese law and UNCAT 1984

¹ On November 7, 2013, Vietnam signed the UNCAT, which was then ratified by the National Assembly on November 28, 2014. The Prime Minister on March 17, 2015 issued Decision No. 364/QĐ-TTg approving the plan on the implementation of the Convention. On January 12, 2018, the Prime Minister signed and issued Decision No. 65/QĐ-TTg ratifying the project on popularising the Convention and Vietnamese laws on torture prevention among officials, civil servants, public employees and the public.

Based on the Convention and common principles and rules, and the review of legal documents, it is clear that Vietnam has a legal system compatible and harmonious with the Convention. The 2013 Constitution and legal documents, whether directly or indirectly related, reflect the spirit of the Convention clearly as follows:

-The harmony and compatibility of the Constitution with the Convention: The 2013 Convention, which was built on the previous Constitutions of Vietnam, specifically stipulates the protection of human rights and the promotion of freedom and dignity of each individual, while committing to the world that there is no excuse for human torture².

Clause 1, Article 20 of the 2013 Constitution prescribes the right not to be subjected to cruel, inhuman torture or degrading treatment: “1. Everyone has the right to inviolability of his or her body and to the protection by law of his or her health, honour 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 honour and dignity.” The Constitution also defines the State’s responsibility for protecting human rights if he/she is the victim of abuse that threatens his/her life, health, honour and dignity, relating to procedural acts.

The 2013 Constitution has one article (Article 31) with many clauses stipulating principles of protecting human rights in criminal justice, in order to integrate the Convention into domestic law.

+ “A person charged with a criminal offense shall be presumed innocent until proven guilty according to a legally established procedure and the sentence of the court takes legal effect.” (Clause 1)

+ “A person who is arrested, held in custody, temporarily detained, charged with a criminal offence, investigated, prosecuted or brought to trial has the right to defend himself or herself in person or choose a defence counsel or another person to defend him or her.” (Clause 4);

+ “A person who is illegally arrested, held in custody, temporarily detained, charged with a criminal offence, investigated, prosecuted, brought to trial or subject to judgment enforcement has the right to compensation for material and mental damage and restoration of honor. A person who violates the law in respect of arrest, detention, holding in custody,

² This matches the provision of the Convention: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” (Clause 2, Article 2 of the Convention).

laying of charges, investigation, prosecution, trial or judgment enforcement, thereby causing damage to others, shall be punished in accordance with law.” (Clause 5);

The 2013 Constitution also stipulates that “The right of the accused or defendants to defence, and the right of concerned parties to protect their legal interests, shall be guaranteed.” (Clause 7, Article 103); the right to lodge complaints or denunciations about illegal acts of agencies, organisations or individuals to competent agencies, organisations or persons. Competent agencies, organisations or persons shall receive and resolve complaints and denunciations. Those suffering damage have the right to material and mental compensation and restoration of honour in accordance with law. Taking revenge on complainants or denunciators, or abusing the right to complaint and denunciation to slander or falsely accuse others, is prohibited (Article 30). These regulations are significant to asserting that the accused, defendants and concerned parties are protected through the right to defence as stipulated in the Constitution, and those who are victims of abuse and torture have the right to lodge complaints and denunciations.

- The harmony and compatibility between the 2015 Civil Code and the Convention: The 2015 Civil Code states that a person has the right to safety of life, health and body, and protection of honour, dignity and prestige; private life, personal secrets and family secrets in Articles 34, 35 and 38.

- ***The harmony and compatibility of the 2015 Criminal Procedure Code³ with the Convention:*** With the aim of integrating the spirit of the Convention and the Constitution on human rights protection in criminal justice and torture prevention and combat, the 2015 Criminal Procedure Code prescribes basic principles of criminal procedures in one chapter with 27 articles as follows:

+ Article 8 of the 2015 Criminal Procedure Code⁴ prescribes the respect and protection of human rights, and individuals’ legal rights and interests.

+ Article 10 of the 2015 Criminal Procedure Code stipulates the right to bodily integrity: Every person is entitled to inviolability of the physical body. No one is arrested without a court’s warrant or a procuracy’s decision or approval, except for acts in flagrante. Emergency arrest, custody and temporary detention must abide by the Criminal Procedure Code. Torture, extortion of deposition, corporal punishment or any treatments violating a person’s body, life and health are prohibited.

³ The 2015 Criminal Procedure Code was approved at the 10th session of the 13th National Assembly on November 27, 2015 and took effect on July 1, 2016.

⁴ To concretise Clause 1, Article 20 of the 2013 Constitution

+ Article 11 of the 2015 Criminal Procedure Code⁵ stipulates the protection of individuals' life, health, honour, dignity and property. All unlawful violations of a person's life, health, honour, dignity and property and a legal entity's honour, prestige and property will be handled in line with law.

+ Article 13 of the 2015 Criminal Procedure Code⁶ matches the content of the Convention: an accused person is deemed innocent until his guilt is evidenced according to the process and procedures as defined in the Criminal Procedure Code and a court passes a valid conviction. If the evidence fails to prove the person is guilty in accordance with the process and procedures defined in the Criminal Procedure Code, competent procedure-conducting agencies and persons shall adjudge the accused person to be not guilty.

+ Article 16 of the 2015 Criminal Procedure Code⁷ prescribes the guarantee of the right to defence of accused persons and the protection of legitimate rights and interests of victims and concerned parties. The stipulation comes from the reality and data of law makers regarding the possibility and risk of torture, extortion of deposition and corporal punishment in the period from custody and temporary detainment to prosecution, for timely prevention. Therefore, it stipulates that the defence counsel has the right to participate in the initial stage of the procedure. Specifically, during the initiation of legal proceedings, the defence counsel will participate in the process from when a person is arrested (in case of emergency and being caught red handed), held in custody and temporarily detained. It also prescribes the right of the defence counsel to being present when taking statements of the person who is arrested and temporarily detained, and questioning the accused. The defence counsel can even question them if allowed by investigators or prosecutors.

+ The 2015 Criminal Procedure Code states that “palpable things not collected in line with the set process and procedures bear no legal effect and are not used as evidence for the settlement of criminal lawsuits” (Article 87). At the same time, it supplements sources for evidence, including: electronic data; asset valuation conclusions; minutes of legal proceedings initiation, prosecution and judgement enforcement; outcomes of the implementation of judicial mandate and international cooperation; the expansion of the subjects who can give evidence - not only participants in the procedure but also agencies, organisations and any individuals can provide evidence, documents, objects and electronic data and present matters relating to the case (Clause 3, Article 88).

⁵ To concretise Clause 5, Article 31 of the 2013 Constitution

⁶ To acknowledge the principles of presumption of innocence in the spirit of Clause 1, Article 31 of the 2013 Constitution

⁷ To concretise Clause 4, Article 31 of the 2013 Constitution

Besides, the 2015 Criminal Procedure Code stipulates a number of measures to ensure the efficiency of investigation, prevention of wrong judgments and torture, protect the accused and defendants during the investigation process such as: (i) regulations on audio and video recording of the questioning (Article 183) and audio and video recording when receiving denunciations and information about crimes and requisitions for charges (Article 146); (ii) regulations on conducting depositions (Articles 187, 188 and 442), confrontation (Article 189), judgement (Article 258); regulations on the right to giving statements and opinions, and not forcing persons held in custody in case of emergency, temporarily detained and arrested, the accused, defendants and legal representatives of legal entities to testify against themselves or admit guilt (Articles 58, 59, 60, 61 and 435); (iii) regulations on the right of defence counsels to being present during the period from the arrest to the confrontation, identification and recognition of voice, and suggesting procedural steps in line with legal regulations (Articles 73 and 80).

- The harmony and compatibility of the 2017 Consolidated Penal Code (the 2017 Penal Code) with the Convention: the current Penal Code and the UNCAT have the harmony and compatibility on sanctions if the authorities, authorized persons or individuals committing torture, or brutal and inhumane punishments, and humiliation against other people. This is a law that has many provisions punishing acts of torture such as corporal punishment, extortion of depositions, bribing or forcing others to make false statements and provide false documents on; murder; causing death while on duty; coercing suicide; threatening to murder; causing injury or harm to the health of others while duty; maltreating others; humiliating others; illegal arrest, custody or temporary detention of people; humiliating or assaulting commanders or those with higher positions; humiliating or using corporal punishments against subordinates; humiliating or assaulting teammates, and maltreating prisoners and surrendered soldiers. Typically as follows:

+ Regulations on crimes directly related to torture, brutal and inhumane treatment or punishment, and humiliation: Corporal punishment (Article 373), extortion of depositions (Article 374). In order to affirm the strictness against the crimes of using corporal punishment and extortion of depositions, and to bring the Convention into practice, the 2017 Penal Code sets the highest penalty for these two crimes, from 12 years in prison (formerly 10 years in prison) to 20 years or life imprisonment and at the same time expanded the subjects to the corporal punishment to those who send others to reformatories, compulsory education and detoxification establishments (judicial measures); and considering the subject to the extortion of depositions a special subject "in procedural activities" and using the term

"the person who has statements obtained, and is interrogated" to replace the term "the person who is questioned".

In addition, in the chapter "crimes infringing upon human life, health, dignity and honour", the 2017 Penal Code features stricter and more specific regulations on the crime of coercing suicide (Article 130), the crime of maltreating others (Article 140), the crime of humiliating others (Article 155). These are crimes related to cruel treatment, frequent bullying, maltreatment or humiliation of dependents, and directly related to the Convention.

- The harmony and compatibility of the 2019 Law on Execution of Criminal Judgments with the Convention: Clause 8, Article 10 of the 2019 Law on Execution of Criminal Judgments stipulates that one of the prohibited acts in the execution of criminal judgments is "torture and other cruel and inhuman treatment or punishment against or humiliation of those executing judgments and judicial measures". This regulation shows the will of the lawmakers in asserting the Vietnamese State's guidelines and policies on torture prevention and control.

- The harmony and compatibility of the Law on Lawyers with the Convention: The Law on Lawyers stipulates the engagement of lawyers in criminal cases and the responsibility of authorised agencies in issuing certificates for lawyers participating in defence in a maximum time of 3 days (temporary detention) and 24 hours (custody); in case of refusal, it had better send a written response specifying the reasons for rejection.

- The harmony and compatibility of the Law on Mutual Legal Assistance with the Convention: The Law on Mutual Legal Assistance includes regulations on the handover and transfer of convicts, which affirm that the transfer will not be conducted if there are grounds proving that the convicted person, upon returning to the country of his nationality to continue serving the penalty, may be subject to torture, revenge or coercion in the host country (Clause 1, Article 51).

- The harmony and compatibility of the Law on Children with the Convention: The 2016 Law on Children: The provisions on the protection of the rights of children are completely appropriate and compatible with, and meet the requirements of the UN Convention against Torture. These are regulations that prohibit "torture" or cruel and inhumane treatment against children (Article 6); stipulate the rights of children quite specifically and comprehensively to ensure the protection of children from torture or cruel and inhumane treatment, and prescribe a number of measures to prevent such acts (Articles 25, 26 and 27). In addition, the Law also sets aside one article to stipulate children's rights in the legal proceedings and handling of administrative violations such as: ensuring the right to defence and self-defence, and to having their legitimate rights and interests protected; to

receiving legal assistance, presenting opinions, not to being deprived of their liberty illegally, not to being subject to torture, coercion, corporal punishment, outrage of honour and dignity, physical abuse, psychological pressure and other forms of abuse. At the same time, it stipulates specific and comprehensive measures to ensure the realization of children's rights, protect children from abusive acts in general and torture in particular, specifically measures on resources, finance, human resources, and responsibilities of agencies, organisations, unions.

- The harmony and compatibility of the Law on State Compensation Liability with the Convention: The 2017 Law on State Compensation Liability adds the scope of the State's compensation liability in different spheres, especially the judicial field, to demonstrate Party policies and State laws in a compatible and harmonious relationship with UNCAT on the case of being compensated, the type of damage to be compensated, and the responsibility for restoration. Specifically as follows:

+ Article 18 of the 2017 Law on State Compensation Liability supplements the case of being compensated due to an emergency detention (Clause 1); (ii) supplements the case of being compensated as the commercial legal entity faces wrong legal proceedings, prosecution, trial and punishments (Clause 9).

+ The 2017 Law on State Compensation Liability stipulates the types of damage to be compensated in accordance with the requirements of Article 14 of the Convention against Torture. Accordingly, the State will compensate the affected person for the infringed property (Article 23), the actual income lost or reduced (Article 24), physical damage caused by the death of the affected person. (Article 25), physical damage from compromised health (Article 26), mental damage (Article 27) and other expenses such as accommodation, travel, printing and sending of documents in the complaint process (Article 28).

+ The 2017 Law on State Compensation Liability also affirms the responsibility of restoring other legitimate rights and interests for the aggrieved person, and compensating for damage as prescribed in regulations on honour restoration (Section 3, Chapter V). Accordingly, the aggrieved person in criminal procedure, the public servant who is disciplined and forced to quit his/her job illegally, the person who is applied administrative punishments and is sent to reformatories, compulsory education and detoxification establishments illegally shall have their honour restored.

- The harmony and compatibility of the Law on Complaints and the Law on Denunciations with the Convention:

The 2011 Law on Complaints and the 2018 Law on Denunciations were amended, supplemented and completed to ensure the realization of the right to denunciation and the

right to complaint of individuals in all fields, especially the judicial aspect and matters related to the protection of individuals from harm to life, health, honour, reputation and dignity⁸. In particular, the 2018 Law on Denunciations has a separate chapter (Chapter VI) stipulating the protection of denunciators, with specific regulations on the protected person, the scope of protection, the rights and obligations of the protected person, and the agency responsible for applying protection measures, order and procedures.

Therefore, regarding the compatibility and harmony with the Convention on ensuring the restoration of the rights of victims of torture, cruel and inhuman treatment, or humiliation, the right to filing a complaint and the right to making a denunciation are assured by the State, the aggrieved person has the right to material and spiritual compensation and restoration of honour in accordance with legal regulations. Taking revenge against complainants or denunciators or abusing the right to filing a complaint or denunciation to slander, calumniate or harm others are prohibited. Complainants and denunciators have the right to requesting competent agencies to conduct protection procedure when they are threatened, brushed or retaliated. All acts of infringing upon the right to filing a complaint or denunciation or taking revenge against complainants and denunciators shall be handled in accordance with legal provisions.

2. Comments and recommendations to ensure the enforcement of the Convention and the Vietnamese laws in the coming time

Research, analysis and comparison show the increasing harmony and compatibility between the current legal system of Vietnam and the contents of the Convention. Basically, Vietnam's current legal system offers relatively sufficient provisions to protect the rights of people arrested, held in custody and temporarily detained, and those serving imprisonment sentences from acts of torture in the spirit of the Convention. Specifically:

Firstly, documents and laws related to the prevention and combat of torture and other cruel, inhuman or degrading treatment have been amended and supplemented with increasing number and content. Recently, especially after the 2013 Constitution was enacted, not only the laws directly related to the prevention and combat of torture or brutal, inhuman or degrading

⁸ To concretise the 2013 Constitution: "Everyone has the right to filing a complaint and denunciation to competent agencies, organisations and individuals about illegal acts of agencies, organisations and individuals. Competent agencies, organisations and individuals are responsible for receiving and handling complaints and denunciations. The aggrieved person has the right to material and spiritual compensation and restoration of honour in accordance with legal regulations. Taking revenge against complainants or denunciators or abusing the right to filing a complaint or denunciation to slander, calumniate or harm others are prohibited."

treatment have been revised, such as the 2017 Penal Code, the 2015 Civil Code, the 2015 Criminal Procedure Code, the 2015 Law on Enforcement of Custody and Temporary Detention, the 2017 Law on Legal Aid, the 2017 Law on State Compensation Liability, the 2018 Law on Denunciations... but the laws on the organisation of the apparatus also prohibit extortion of depositions, corporal punishment and forms of torture and cruel, inhuman or degrading treatment or any other forms that infringe upon legitimate rights and interests of agencies, organisations and individuals like the 2015 the Organisation of Criminal Investigation Agencies, the 2014 Law on the Organisation of People's Procuracies and the 2014 Law on the Organisation of People's Courts. In addition, the Labor Code, the Law on Gender Equality, the Law on Domestic Violence Prevention and Control, and the Law on Children also affirm the principle of protecting workers and people with disabilities, women and children in labor, family and social relations. This is a positive sign, demonstrating the consistency and unity of the legal system on the spirit of the Convention.

- Secondly, the legal system of Vietnam and the Convention is highly harmonious, reflected in each content of the laws. Typically, related crimes bearing the nature of torture, and other cruel, inhuman or degrading treatment in line with the spirit of the Convention are all those stated in the Penal Code; the subjects of crimes are expanded in accordance with those covered by the Convention; and higher penalties are applied. This demonstrates the strictness of the country's criminal policy.

- Thirdly, legal documents aimed at recognizing, respecting, protecting and ensuring human rights all have provisions that prohibit and punish torture and other cruel, inhuman or degrading treatment against people. This shows the Vietnamese law has increasingly affirmed that citizens are prevented from torture with the increasingly full and comprehensive legal system.

- Fourthly, to prevent torture and other cruel, inhuman or degrading treatment, especially in criminal procedure, criminal judgment execution, custody and temporary detention, the Criminal Procedure Code, the Law on Execution of Criminal Judgments, the Law on Custody and Temporary Detention, the Law on Lawyers and the Law on Legal Aid have many provisions to ensure compatibility in terms of preventive measures in the regulations on functions and duties of agencies and individuals engaging in investigation, prosecution, adjudication and judgment execution, etc.

- Fifthly, the competent agencies have issued many rules and regulations to improve professional ethics, integrity and reputation of the sector. For example, the National Council for Judge Selection and Supervision issued Decision No. 87-QD-HDTC promulgating the Code of Ethics and Conduct of Judges. The Minister of Justice also promulgated the professional

ethics of officials, civil servants and public employees in the judicial sector. The procuracy sector has been implementing a project on preventing and combating negative acts in the procuracies' activities, and at the same time carrying out the sector's campaign to build a contingent of officials and prosecutors with political firmness, good professional knowledge, legal expertise, justice and mettle, discipline and responsibility". The Minister of Public Security issued a circular stipulating the code of conduct of the people's public security force, etc.

Sixthly, in reality, cases of extortion of deposition, corporal punishment or related offenses have dropped significantly and crimes such as coercing suicide no longer occur because the law has been gradually improved and become consistent with the Convention and the humane legal tradition of the nation, and the professional knowledge and awareness of investigators have also been raised. They better use investigation skills to investigate and interrogate the accused. In addition, the mindset of persons conducting legal proceedings has been changed towards respecting human rights. This indicates that the law of Vietnam is not only compatible and harmonious with the Convention but has shown its feasibility in practice.

In addition to the results obtained from the compatibility and harmony with the Convention, the improvement of the law and law enforcement towards ensuring the harmony and compatibility in terms of the prevention and control of torture should pay attention to such following issues:

Firstly, in some laws, besides progress and a high level of compatibility with the Convention, there are still issues that are not feasible. For example, the 2015 Criminal Procedure Code stipulates audio and video recording when interrogating the accused. This is a new regulation that creates a basis for prevention and control of torture in the interrogation process. However, to do this, it requires a large amount of money to equip technical equipment, train staff and upgrade facilities in the interrogation rooms. Meanwhile, the deadline for nationwide application under the Resolution of the National Assembly is January 1, 2020. This fact requires a great deal of determination and investment from the state budget so that legal provisions can be put into life, effectively preventing and combating torture-related acts. In addition, the 2015 Criminal Procedure Code regulates the right to silence of arrestees, people held in custody, detainees, defendants and those accused, ensuring the presence of lawyers in the process of taking testimonies and the right to communicate with lawyers. However, there still need regulations to promote more objective investigation and prosecution for timely detection of torture acts committed by procedure conducting persons or inmates.

Secondly, there are still loopholes in investigation control and supervision mechanisms, if the law is not promptly completed, it will lead to unbiases in the investigation process. For

example, the 2015 Criminal Procedure Code stipulates that procuracies are responsible for supervising the law observance in investigation, prosecution, adjudication and judgment execution. However, there is no regulation on agencies outside the procuracy system which are responsible for directly supervising the exercise of the prosecution right and judicial control of the procuracies for specific cases. This creates loopholes in the control of the exercise of state power in the judiciary field, so it is necessary to bring the Convention into life and effectively preventing legal violations.

Thirdly, international cooperation in the criminal field, especially the research and signing of agreements on mutual assistance in criminal justice with regions and countries in the world, has not really been promoted, causing difficulties for the implementation of the UNCAT in Vietnam. The protection of human rights and support for victims of torture will be effectively implemented if agreements on mutual judicial assistance in the fields of criminal, extradition, and transfer of those with imprisonment sentences are paid due attention from the stages of negotiating and signing. Therefore, it is necessary to build an effective cooperation mechanism between central agencies of ASEAN countries in the implementation of the UNCAT and mutual legal assistance agreements to ensure fast, accurate and effective implementation. To do so, it needs to promote cooperation activities both inside and outside the ASEAN region, increase the organisation of conferences, seminars, training courses, multilateral and bilateral forums on judicial assistance in criminal matters according to specific topics, especially on criminal justice and torture prevention, in order to share and learn from experience, improve qualifications and capacities for researchers and teachers and those engaged in field work.

Fourthly, at present, the legal provisions on torture prevention and control are scattered in many legal documents, so it requires the building of a separate law on torture prevention and control in order to have a mechanism to protect victims of torture in the most effective, fast, reasonable and satisfactory way.

Fifthly, the dissemination of the Convention's content and the perfection of the Vietnamese legal system towards ensuring the harmony and compatibility are not really effective. Therefore, it is necessary to renovate methods and forms of dissemination and education of legal regulations on torture prevention and control as well as related legal documents, focusing on measures to bring the issue to the stage and cinema, while conducting re-dissmination in each working environment such as office, factory, enterprise, prison, and detention establishment.

Sixthly, it is a must to attach importance to enhancing the integrity, morality and reputation of officers involved in investigation, prosecution, adjudication and judgement execution related to human rights in criminal justice through improving legal documents on

professional ethics, especially for judicial positions in courts, procuracies, and judgment execution agencies etc... This requires a review of the current Criminal Code to take stronger action and penalties for certain types of crimes related to torture and other cruel, inhuman or degrading punishment or treatment.

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