

# SOME FUNDAMENTAL ISSUES OF NON-CRIMINAL LAW AND CRIMINAL LAW ON THE SAFEGUARDING OF NATIONAL SECURITY

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## I. Introduction

In the process of building up a state by law in our country, in our current judicial reform, and in the natural trend of integration and globalization, the scientific analysis to theoretically clarify the fundamental issues relating to the safeguarding of national security in non-criminal law and criminal law plays a very important role which can be seen in the following three aspects.

### 1. Legislation

Although Vietnam has passed several legal documents relating to national security during the last 20 years of renovation from 1986 to 2006 including Politburo's Resolution 08/NQ-TW "*On several focal points of the judicial work in the time ahead*", it is obvious that the judicial system still reveals certain weaknesses not in conformity with some adopted principles of a law-based state. These weak points need repairing and perfecting in accordance with Politburo's Resolution 49/NQ-TW "*On the strategies for judicial reform until 2020*", and can be listed as follows: (1) the investigative bodies are not arranged in an orderly and simplified manner in accordance with

Politburo's Resolution 08/NQ-TW; (2) the judicial system in general and criminal justice in particular do not function in an independent, scientific, just and law-abiding manner so as to effectively carry out judicial procedure in general and criminal procedure in particular; and (3) there remains a shortage of legal documents in general and criminal-law-related documents in particular which have proved to be of vital importance toward a more effective measure of safeguarding of national security, etc.

### 2. Reality

Living reality of civilized and highly-developed law-based states in the 20<sup>th</sup> century and at the beginning of the 21<sup>st</sup> century has led us to a well-founded, objective and persuasive conclusion that unless measures to national security are taken together with efforts to preserve peace and global security made by members of the United Nations, there will be no final victory of the business of judicial reform or building up a law-based state in Vietnam.

### 3. Theory

The above reality, and the close ties between non-criminal norms and criminal norms relating to national

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security have presented legal experts in general and criminal experts in particular in Vietnam an important and urgent task of searching for solutions not only responsive to the urgent needs of the society but also suitable to the country's socio-economy, politics, law, culture, history, tradition, etc. So far, there has been no research work in legal publication in Vietnam focusing on analyzing all basic features of non-criminal law and criminal law over the matter of national security to help gather scientific evidence for the process of judicial reform until 2020 and the building up of Vietnam as a law-based state in a relatively systematic and comprehensive manner.

In short, the scientific analysis to theoretically clarify the basic features of non-criminal law and criminal law over the matter of national security in the three aspects above serves not only as one of the basic directions for research in legal sciences in general and criminal sciences in particular in Vietnam, but also as the factual foundations for selecting issues discussed in this article. Still, our discussion does not intend to cover all legal issues in general and all criminal issues in particular over the matter of national security because that would be beyond the scope of an article in a scientific periodical, and because there are still controversies over these issues, each of which can serve as a separate topic for research. We, therefore, only intend to touch upon

several subjectively perceived common and key issues.

## **II. Basic features of non-criminal norms concerning the issue of national security**

The study of non-criminal norms over the issue of national security in Vietnam in different periods of time from the August Revolution in 1945 until now reveals the following features:

### **1. Feature 1**

The non-criminal norms relating to the issue of national security is almost always realized at the constitutional levels, and this can be seen in some articles of the Constitutions of Vietnam in the years 1959, 1980 and 1992 [6] as follows:

1) The 1959 Constitution of the Democratic Republic of Vietnam stipulates: "The State strictly forbids and shall punish all acts against the Vietnamese motherland, against the democratic republic regime, and against the national unity" (Article 7).

2) The 1980 Constitution of the Socialist Republic of Vietnam stipulates: "All machinations and acts directed against the independence, sovereignty, unity, and territorial integrity of the motherland, against the socialist revolution and construction of socialism, shall be severely punished" (Article 13).

3) The 1992 Constitution of the Socialist Republic of Vietnam stipulates: "The Vietnamese motherland is sacred

and inviolable; All machinations and acts directed against the independence, sovereignty, unity, and territorial integrity of the motherland, against the construction and defence of the socialist Vietnamese motherland, shall be severely punished in accordance with the law" (Article 12).

## 2. Feature 2

Besides the above mentioned three Constitutions - the state's most powerful and fundamental laws, the second most powerful legal document now in action containing non-criminal norms adjusting the safeguarding of national security in overall manner is the 2004 *National Security Law* passed by the XI National Assembly in its 6<sup>th</sup> meeting from October 23<sup>rd</sup> to December 3<sup>rd</sup>, 2004 [7] with 5 chapters further divided into 36 articles, 15 of which are about the safeguarding of national security in 2 separate chapters being chapter II "*The safeguarding of national security*" (Articles 14 till 21), and chapter III "*Bodies in charge of the safeguarding of national security*" (Article 22 till 28).

## 3. Feature 3

Non-criminal norms in the 2004 National Security Law acknowledge fundamental issues relating to the safeguarding of national security such as: (1) Legal terms: "*national security*", "*safeguarding of national security*", "*acts violating national security*", "*threat to national security*" (Article 3); (2) General stipulation: principles to the

safeguarding of national security, setting up of the guarding force for national security, ensuring favourable conditions for the safeguarding of national security, international cooperation for the safeguarding of national security, policies dealing with violation of national security, strictly forbidden acts (Articles 5 - 8 and Articles 11 - 13), etc.

## 4. Feature 4

The non-criminal norms in the 2004 *National Security Law* stipulate the most fundamental matters concerning the safeguarding of national security and bodies in charge of the issue in the above mentioned chapters as follows: (1) The task of safeguarding national security (Article 14); (2) Key measures in safeguarding national security (Article 15); Rights and duties of the citizen in ensuring national security (Article 17); (4) Responsibility of organisations in national security (Article 18); and (5) System of bodies in charge of national security and their tasks, rights and duties as well as their persons in charge's rights and duties (Articles 22 till 25), etc.

## 5. Feature 5

A country's safeguarding of national security must include the task to fight against crimes, especially organized crimes and inter-continental crimes such as terrorism, spying, illegal trading of military weapons, transportation of narcotics, smuggling, etc. However, non-criminal norms specified in the 2004

*National Security Law* do not include this in the list of tasks concerning the safeguarding of national security as stipulated in Article 14, and it should definitely be added.

### III. Fundamental features of criminal norms concerning the issue of national security

The study of criminal norms concerning the issue of national security in Vietnam, ones concerning different levels of penal liability applied for crimes infringing upon national security during different periods of time from the August Revolution in 1945 until now shows the following features:

#### 1. Feature 1

During the period of 40 years (1945-1985) from the August Revolution in 1945 to the first Penal Code in Vietnam, the criminal norms concerning crimes infringing upon national security were found in 2 groups of legal documents stipulating penal liability as follows:

Group 1 includes legal documents directly concerning the fight against crimes aimed at endangering national security such as: (a) Decree 128 dated July 17<sup>th</sup>, 1950 stipulating "*penalties for illegal reading, stealing, discarding official documents or letters*" [3, tr.194]; (b) Decree 154 dated November 17<sup>th</sup>, 1950 stipulating "*penalties for illegal disclose office or government's secrets*" [2, p.303]; (c) Decree 133 dated November 20<sup>th</sup>, 1953 stipulating "*penalties for*

*crimes infringing upon state's safety, internal and foreign affairs*" [4, p.16]; (d) Decree 256 dated June 15<sup>th</sup>, 1956 stipulating "*penalties for machinations and acts directed to destroy properties of the State, co-operatives, people and to impede the implementation of the state's policies and plans*" [5, p.165]; and (e) Ordinance dated July 30<sup>th</sup>, 1967 stipulating "*penalties for crimes against the country's revolution*" [9, p.193], etc.

Group 2 includes criminal documents not directly concerned with the fight against crimes aimed at endangering national security, but concerning the criminal sanctions for the violation of forbidden acts such as: (a) Decree 6 dated September 5<sup>th</sup>, 1945 forbidding "*servicing in unofficial military, and supplying food for or cooperating with the French imperialist*" [1, p.5]; (b) Decree 93 dated May 22<sup>nd</sup>, 1950 stipulating "*the responsibility to carry out of a war of resistance*" [3, p.150]; (c) Decree 69 dated October 12<sup>th</sup>, 1951 stipulating "*the preserving of the State's secrets*" [9, p.133]; etc.

#### 2. Feature 2

During the period of 14 years (1985-1999) from the first Penal Code in Vietnam to the second Penal Code, the criminal norms concerning crimes infringing upon national security were acknowledged in a separate chapter in the Part stipulating Crimes of 1985 Penal Code - chapter I: "*Crimes infringing upon national security*" with

30 articles from Article 72 till 100. This chapter stipulates "*Especially serious crimes infringing upon national security*" in Articles from 72 till 86 in Item A and "*Other crimes infringing upon national security*" in Articles from 87 till 100.

### 3. Feature 3

From the second Penal Code in Vietnam until now, criminal norms concerning crimes infringing upon national security are prescribed in a separate chapter in the Part stipulating Crimes of 1999 Penal Code - chapter XI: "*Crimes infringing upon national security*" with 14 articles from Article 78 till Article 91.

### 4. Feature 4

Criminal norms concerning crimes infringing upon national security prescribed in the current 1999 Penal Code in Vietnam are different from the corresponding norms in the 1985 Penal Code: (1) The 1999 Penal Code only considers an act dangerous to the society a crime infringing upon national security if it fully consists of elements of such a crime being the intention "*against people's power*"; b) On the contrary, Chapter I (14 articles from 87 to 100) of the Part stipulating Crimes in the 1985 Penal Code not only prescribed especially serious crimes infringing upon national security in Item A, but also considered some acts dangerous to the society crimes infringing upon national security even though they lack elements

of such crimes in Item B "*Other crimes infringing upon national security*".

### 5. Feature 5

Nevertheless, the current legal norms concerning crimes infringing upon national security in our 1999 Penal Code still reveal some shortcomings as follows:

(1) There has been no clarity in specifying the object entitled to protection of the criminal law in Article 78 "High treason" meaning an act of betraying the *country* while this crime only concerns the betrayal of the *State*. It is, therefore, recommended that the broad-meaning and abstract term "*country*" be replaced by the term "*State*" as used by President Ho Chi Minh in Article 50 of the 1946 Constitution.

(2) There has been no clarity in specifying what is really going on in the acts considered crimes prescribes in articles from 86 till 88 because the stipulation in these articles only reflects a person's points of view with such terms as "*undermining the implementation of...*" (Article 86), "*sowing division*", "*sowing hatred*" (Article 87), "*propagating against, distorting*" (Article 88), etc. These terms are not only inappropriate scientifically but also not in accordance with reality, especially that in prosecution or trial where it is very difficult to combat crimes if criminal acts are so vaguely stipulated.

(3) Therefore, to make good these shortcomings when stipulating the acts satisfying signs for determining crimes infringing upon national security in particular and all kinds of crimes prescribed in the specific part of the Penal Code in general, it is necessary to stipulate specific crimes as acts that can be committed, not as abstract and vague concepts that can be understood and treated in different ways. For example, the crimes prescribed in Article 88 of the 1999 Penal Code can be stipulated in a more specific way, and should be renamed "*Conducting public call to change the constitutional regime of the Socialist Republic of Vietnam*". Taking over S. Montekia's progressive outlook that the law should punish people's wrong doings only, criticizing the punishment just to show political or religious beliefs, and supporting the view that intelligent lawmakers should only attribute legal responsibilities to specific acts performed in reality, the great jurist Karl Max, the founder of scientific socialism, wrote "*Any code against natural tendency without introducing objective criteria is a terror code*". Obviously, any code whose fundamental criteria do not base on human's behaviours but on human's thinking is "*a true reflection of a chaotic society*" [8] as "*nobody should be imprisoned because of his conduct, political opinion or religious belief*" [8].

#### **IV. Connotation, concept and key features of the safeguarding of national security prescribed by criminal law - the three key factors that need theoretical clarification**

##### **1. Connotation of the safeguarding of national security prescribed by criminal law**

In the construction of a law-based state in Vietnam, the safeguarding of national security stipulated in criminal norms has proved its importance in the two fields of internal affairs and foreign affairs security as follows:

###### **1) Internal affairs**

The treating of national security as a special object to be protected by criminal law from the infringement of crimes will play a decisive part in stabilizing a country's socio-politics so that its people can enjoy happiness and stay away from all kinds of civil conflicts or wars because national security of a state reflects the stability of its constitutional regime, the existence and solidity of its political system and apparatus of government from the centre to localities, the inviolability of its independence, sovereignty and territorial integrity in accordance with a certain legal order.

###### **2) Foreign affairs**

If a country's national security is effectively protected from the threat of crimes coming from abroad infringing

upon peace and human kind, it will be of great help to raise the country's prestige in the global community and in maintaining a foreign policy of peace, friendship and cooperation with the world.

## **2. The concept of safeguarding of national security prescribed by criminal law**

Although the concept has never been recorded in any laws and is still in the drafting process to be realized in criminal science, we can base on the above analysis of the issue to propose a definition of the concept under study as follows: *The safeguarding of a country's national security prescribed by criminal law as a special object is the construction of particular crimes corresponding to acts considered dangerous to society infringing upon social relations to maintain the stability of the constitutional regime, the development, existence or solidity of its political system and apparatus of government from the centre to localities, the inviolability of its independence, sovereignty and territorial integrity in accordance with a certain legal order. It is also the stipulation of corresponding coercive measures in criminal law, and the application of these measures in reality to prevent and combat the above mentioned crimes.*

## **3. Fundamental features of the safeguarding of national security prescribed by criminal law**

From the scientific analysis of the concept's connotation, based on legal

norms concerning crimes infringing upon national security recorded in criminal law of Vietnam, and according to the study of the prevention and combat of this kind of crimes in reality (especially during the application of the criminal norms to reality), we can point out the following fundamental features of the safeguarding of national security prescribed by criminal law:

### **1) Feature 1**

The safeguarding of national security as a special object prescribed by criminal law is the scientific construction in law (especially in the particular part of the Penal Code) of particular crimes corresponding to acts considered dangerous to society infringing upon social relations to maintain the stability of the constitutional regime, the development, existence or solidity of its political system and apparatus of the government from the centre to the localities, the inviolability of its independence, sovereignty and territorial integrity in accordance with a certain legal order.

### **2) Feature 2**

The safeguarding of national security as an especially important object in the system of objects protected by criminal law is the appropriate stipulation in law (especially in the particular part of the Penal Code) of corresponding coercive measures in criminal law applicable to acts considered dangerous to society infringing upon the mentioned relations.

### 3) *Feature 3*

The safeguarding of national security prescribed by criminal law is the application of coercive measures in criminal law in the process of prevention and combat of crimes infringing upon national security with an aim to maintain the stability of the constitutional regime, the development, existence or solidity of its political system and apparatus of government from the centre to the localities, the inviolability of its independence, sovereignty and territorial integrity.

### 4) *Feature 4*

The safeguarding of national security prescribed by criminal law is the precise specification of components making up crimes committed in violation of national security and the application in accordance with the law of corresponding coercive measures in criminal law to offenders with an aim to promote preventive functions both publicly and privately, and to reach the purpose of the penalty declared in the verdict and the judgement.

### 5) *Feature 5*

A country's safeguarding of national security prescribed by criminal law only proves effective if the country's authorities strictly observe laws and the legal system, respect and protect democratic values and the rights and freedom of people in general and of the country's citizens in particular, and

show goodwill toward the cooperation with other countries in the region and all over the world in the safeguarding of national security which is also of world peace and security.

## V. Conclusion

Based on the study of the most common and fundamental issues in non-criminal and criminal law on the safeguarding of national security, we now conclude on the following 5 theoretical points:

1. *First*, if national security is seen in the light of general law as the stability of the constitutional regime, the existence or solidity of its political system and apparatus of government from the centre to the localities, the inviolability of its independence, sovereignty and territorial integrity in accordance with a certain legal order, it is, in the light of criminal law, the kind of object under special protection by criminal sanctions from the infringement of crimes.

2. *Second*, if national security is effectively protected from the infringement of crimes by criminal sanctions, this will have a very important meaning to a country's security of internal affairs and foreign affairs as well as to the preservation of world peace and security of human kind.

3. *Third*, in order to defend national security using criminal law, lawmakers should build up, in a scientific manner, specific definitions of crimes infringing

upon corresponding social relations to maintain the stability of the constitutional regime, the development, existence or solidity of its political system and apparatus of government from the centre to the localities, the inviolability of its independence, sovereignty and territorial integrity in accordance with a certain legal order. Furthermore, lawmakers should prescribe appropriate and feasible coercive measures in criminal law so that they can be applied in preventing and combating crimes infringing upon national security.

4. *Fourth*, one of the essential conditions to help improve the efficiency of the safeguarding of national security using criminal law's stipulation is that the bodies and persons competent to conduct procedural activities have to

determine the right crimes and apply the right coercive measures so that a just, reasonable and law-abiding penalty can result.

5. *Fifth*, a country's safeguarding of national security using criminal law's stipulation can prove effective only when there exist strict and clear stipulation of the country's criminal law (Law of Content) and criminal procedure law (Law of Form), actual respect and protection of human and citizen's right and freedom as the noble social values in human civilization, mechanism to guarantee the effective cooperation of courts and bodies competent to protect laws within a country and all over the globe in a joint-task of protecting international security from crimes infringing upon world peace and security.

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