

INTERNATIONAL LAW AND CONSTITUTIONAL RIGHT: FREEDOM FROM TORTURE IN VIETNAM AND CHINA

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There have been many scholarly debates on the impact of international norms and domestic implementations of human rights. They share the different attitudes, ranging from rather pessimism to extreme optimism, about the possible affect of international treaties on human rights and freedom. Though a majority of authors appear to be skeptical about the possibility of improving civil and political rights in less-open regimes such as Vietnam and China, the reality of each is very various to address. This paper is about to focus on the case of freedom from torture, based on an argument that the main barriers inhibiting the improvements in both countries lie with the weak constitutional guarantee of freedom of association and other freedom as essential tools for sustaining human rights.

The first part of this paper provides a brief introduction of theoretical frameworks and views on the relationship between international law and domestic practice of human rights in general. Then, the cases of Vietnam and China concerning international standards against torture, and the progress of implementing practices would be discussed in Part 2. The last one, Part 3 considers the role of non-state actors in advocating against torture, in addition to the need of a better constitutional guarantee for freedom of association.

1. Introduction

Freedom from torture has been widely acknowledged as a basic human right; torture and other forms of ill-treatment have been internationally outlawed for decades. However, torture is still growing as a very controversial and complex issue. In all continents, there are states failing to criminalize torture as a specific offence under their national laws, and more severely torturing people.

Vietnam and China are two neighbouring countries that share the Communist political ideology and state-party model. They have been the subjects for comparison from many perspectives of relating to legal, economic, social, cultural dimensions.¹ But human rights seem to be a less attractive topic for scholars to compare.

Both Vietnam and China are members of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). As CAT's member states, their obligations includes taking effective legislative, administrative, judicial or other measures to prevent the acts of torture and similar violation in any territory under their jurisdiction; ensuring that all acts of torture are classified as offences under their criminal law, submitting to the Committee against Torture periodic reports on the measures to give effect to their undertakings under CAT.... While the international human rights treaty against torture are creating certain

¹ Some work on legal comparison are: John Gillespie, Pip Nicholson (eds), *Asian Socialism And Legal Change: the Dynamics Of Vietnamese And Chinese Reform* (ANU 2005); John Gillespie, Albert H.Y. Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge 2010).

driving force for change, the delaying of institutional reform seems to be the main reason for the slow improvement of situations. The practice of torture are still believed to be “deeply entrenched in the criminal justice system” in China², and there are “allegations of the widespread use” in Vietnam³.

The impact of international human rights law on the implementation of human rights via countries is a long-lasting debate that has been theorized by many authors, e.g., Harold Hongju Koh⁴, Thomas Risse and Stephen C. Ropp⁵, Linda Camp Keith⁶, Oona A. Hathaway⁷, and Beth A. Simmons⁸. Authors are varied in their views, from very optimistic to very pessimistic about the possible affects of human rights treaties in national practice. Oona A. Hathaway, one of the most pessimists, indicates: “not a single treaty for which ratification seems to be reliably associated with better human rights practices and several for which it appears to be associated with worse practices”⁹. Directly relating to CAT, she concludes that “the Torture and Genocide Conventions appear to have the smallest impact on human rights practices of all the universal treaties.”¹⁰

Thomas Risse and Beth A. Simmons seem to be more optimistic sharing the view that non-state actors should have played the important role. Thomas Risse and his colleagues put forward a five-phase “spiral model” shifting the emphasize on domestic groups, e.g., national opposition groups, NGOs and social movements, etc., that “link up with international networks and INGOs which then convince international human rights organizations, donor institutions, and/ or great power to pressure norm-violating states”¹¹. Beth A. Simmons, while stays somewhere between the two extremes, also claims the important part of activism. In her famous book’s chapter on torture, she concludes that “the CAT had an important impact on a considerable subset of countries in which stakeholders and other activists have the motive and the means to mobilize politically to demand compliance with CAT and to use CAT in domestic legal struggles over the meaning and use of torture.”¹² Similarly, Harold Hongju Koh’s Transnational Legal Process mentions the role of actors in interaction, interpretation and internationalization of norms without specifically prioritizing or focusing on non-state actors.¹³

Alternatively, non-state actors including human rights NGOs and activists, have been viewed as having very crucial role to protect and promote human right, at both international and

² The United Nations Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 9 December 2015, para. 20.

³ The United Nations Committee against Torture, *Concluding observations on the initial report of Viet Nam*, CAT/C/VNM/CO/1, 29 November 2018, para. 14.

⁴ Harold Hongju Koh, ‘Why Do Nations Obey International Law?’ [1997] 106, issue 8 Yale Law Journal 2599.

⁵ Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Law and Domestic Change* (Cambridge University Press 1999), at 1 - 38.

⁶ Linda Camp Keith, ‘The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?’ [1999] 36, issue 1 Journal of Peace Research 95.

⁷ Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ [2002] 111, issue 8 Yale Law Journal 1935.

⁸ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

⁹ Hathaway (n 7), at 1940.

¹⁰ Hathaway (n 7), at 1988.

¹¹ Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Law and Domestic Change* (Cambridge University Press 1999), at 17-38.

¹² Simmons (n 8), at 284.

¹³ Koh (n 4), at 2599-2660.

national levels.¹⁴ The contributions of NGOs have been considered as resting on two premises: their expertise and representative.¹⁵ The experiences of East Asian countries witness the active and critical roles of NGOs in enhancing human rights practices, both prior and after their democratic transitions.¹⁶ However, the development of domestic civil society in countries should depend on the openness of their civic spaces, including freedom of association, assembly and expression. On the other hand, to skeptical politicians, those freedoms might pose direct or indirect challenges to the regimes. The cases of Vietnam and China have been used to illustrate the pattern of “states can raise and lower restrictions on civil society virtually at their discretion, carefully calibrating the space accorded different types of organization, the work that they do, and the needs of the state or ruling party.”¹⁷

Looking at the torture from three dimensions - international law, constitutional rights and separation of power, we accept the important role of national constitution in defending freedom and creating the check and balance among branches of government. Correspondingly, the implementations of CAT may urge governments to make institutional reforms through independent investigation of torture allegation and independent monitoring of detention facilities. Moreover, without constitutional guarantee of basic freedoms, civil society cannot make contribution to the fight against torture. Examining Thomas Risse and Beth A. Simmons’ theory on the role of domestic groups, this paper focus on the position of NGOs which treasure freedom of association, assembly and expression the most.

Three major interrelated questions should be addressed here: What are the limitations of international standards’ impact on preventing torture in Vietnam and China? What kind of constitutional and institutional reforms are needed to make positive changes in both countries? Should freedom of association, in the context of weak constitutional guarantee, be regarded as an entry point to push forward the fight against torture?

2. International engagement, current situation and pressures for change

2.1. Engagement with international human rights mechanism

Both Vietnam and China have been maintaining their state structures and legal systems based on the Marxist political ideology and Stalinist state - party models. They usually try to incorporate national sovereignty and cultural characteristics into the application of human rights. However, in terms of economics, the compliance of China and Vietnam with bilateral and multilateral trade agreements have been observed and recognized. Furthermore, they are attempting to promote the socialist rule of law as a crucial policy to uphold the social order and stabilization. For that reason, both elements of international economic integration and the development of the rule of law are believed to affect human rights.

Vietnam and China share the history of great influences the Soviet Union criminal justice system, as well as Russian style practice of torture and interrogation.¹⁸ While transitioning to free market, the state-party apparatus still remains doubtful to any kind of reform.

¹⁴ Peter R. Baehr, *Non-Governmental Human Rights Organizations in International Relations* (Palgrave Macmillan 2009), at 123; Jack Donnelly, *International Human Rights* (4 edition, Routledge 2013), at 149 – 155.

¹⁵ Baehr (n 4), at 7.

¹⁶ Jerome A. Cohen, William P. Alford and Chang-fa Lo, *Taiwan and International Human Rights: A Story of Transformation* (Springer Singapore 2019), at 3-17.

¹⁷ Mark Sidel, ‘Civil Society and Civil Liberties’ in Michael Edwards (eds), *The Oxford Handbook of Civil Society* (Oxford University Press 2011), at 298.

¹⁸ Darius Rejali, *Torture and Democracy* (Princeton University Press 2007), at 83-87.

China became a member of the United Nations (UN) in 1971, seven years before the beginning of its “reform and open up” policy. China has been member of seven of the UN nine core international human rights treaties. However, the country’s engagement with the UN human rights mechanisms seems to be very cautious and tactical. China submitted its initial report to CAT in 1989, the same year of Tiananmen Square incident, after its ratification in 1988, and the latest one (the fifth report) was made in 2015. The country has signed the International Covenant on Civil and Political Rights (ICCPR, 1966) in 1998, but has not ratified it yet.

Vietnam joined the United Nations in 1977, since the reunion after 30 years of war (1945-1975). A decade later, the country began to open its economy adopting the market driven in 1986. To date, Vietnam is the member of seven of the UN nine core international human rights treaties. Although Vietnam joined the ICCPR quite early, in 1982, its history of interaction with CAT and the international monitoring mechanism was much shorter than China. The National Assembly of Vietnam passed a resolution approving CAT in November 2014, in concurrence to the ratification of the Convention on the Rights of Persons with Disabilities. The Committee against Torture considered Vietnam’s initial report, and adopted the concluding observations in November 2018.

2.2. Current situation and pressures for institutional reform

Some positive changes in the fight against torture have been made and recognized in both countries, along with the persistent problems. Among those, it is the improvement of national legislation. In 2013, Vietnam adopted new Constitution including the concept of “torture” for the first time in the Article 20’s statement “no one shall be subject to tortured”. In 2015, the country went further by approving new Criminal Code and Criminal Procedure Code. Like China, Vietnam’s criminal procedure law has been supplemented the existing regulations on audio and video records during criminal interrogation.

In China, the Standing Committee of National Assembly abolished the reform labor (laogai) system in December 2013, after more than 50 years of its enforcement. The “shuanggui” detention system of the Chinese Communist Party (CCP), which functions beyond the reach of criminal justice system, was replaced with a system called “liuzhi” that intern the subject up to six months without trial. The Criminal Procedure Code 1979, amended in 1996 and 2010, was revised again in 2012. One key features of the revised Code is the inclusion of the phrase “respect and protect human rights” as a general principle (Article 2).

However, there are still many chocking points in the two countries regarding the practice of torture. Several of them have been constantly being discussed by the UN human rights mechanisms, international and national NGOs, and academia. They reflect the Committee against Torture’s concluding observations on China and Vietnam. Hence, this paper mostly aim to clarify the Committee’s latest concluding observations on the fifth periodic report of China (CAT COB on China) in 2015, and on the initial report of Vietnam (CAT COB on Vietnam) in 2018.

Vietnam and China share common problems such as having no definition of torture in national legislation,¹⁹ the abuse of prolonged and widespread use of pretrial detention,²⁰ many

¹⁹ While some provisions of the Criminal Law prohibit and punish specific acts that could be considered as torture. However, the Committee against Torture “remains concerned that those provisions do not include all the elements of the definition of torture set out in article 1 of the Convention”. Similarly, the Committee is concerned that in Vietnam Criminal Code does not criminalize torture in a separate provision specifically prohibiting this crime.

²⁰ The CAT COB on China 2015, at para. 10, and the CAT COB on Vietnam 2018, at para. 24.

allegations of torture and ill-treatment by public security officers, the conditions of detention do not meet the minimum standards,²¹ disproportionate detention of members of religious and ethnic groups, etc.²²

Alternatively, there are specific issues facing each country. Due to its enormous territory, huge population of diverse religious and ethnic minorities, e.g. Tibetan, Uyghurs, Choang, etc., the situation of China seems to be much more complicated than Vietnam. The typical problems are harassment, suppression of lawyers, human rights defenders, laws on protection of state secrets, information on places of secret detention, duplex system of the Communist Party, coercive measures related to population policy, victims of massacre at Tiananmen Square in 1989...²³ Meanwhile, the matters of Vietnam which were noticed by the Committee against Torture include the excessive use of violence, unusual deaths in custody, and the corporal punishment of children...²⁴

From the constitutional perspectives, this paper examines the two major urging problems for state institutional reform in both countries. Those are the lack of independent investigation of torture allegations by police, and of independent monitoring mechanism for detention facilities.

Firstly, there is a lack of appropriate, independent and effective investigations of torture allegations by police, both in Vietnam and China. That leads to the poor number of investigations and prosecutions of torture and ill-treatment cases.²⁵ Besides, the insufficiency in protecting the rights of the accused has been recognized as one of the weakest points of the contemporary Chinese and Vietnamese criminal justice systems, even though the criminal procedure laws have been amended several times in recent decades.

Beside the Criminal Procedure Code of 2015, Vietnam passed a specific Law on Organizing Investigation Agencies in 2015. Accordingly, there are three system of investigation agencies under police, army and procuracy system. However, the majority of criminal cases are under the mandate of police system, which have been restructured recently, but mostly because of the financial pressure. Another controversial aspect of the restructuring is how to “officialize” or “replace” the untrained local polices at commune level with professional ones. While many cases of torture in previous years involving the police at communes level, it might be a positive development if the replacement was made.

Many torture allegations, in China and Vietnam, are investigated by the procurators. The procuratorate system in these two countries, which have been adopted from the Soviet model, seems to be a little bit more independent, but hold its own problem, too. The Committee against Torture has many times expressed its concern about “the dual functions of procuratorates, namely, prosecution and pre-indictment review of the police investigation, creates a conflict of interest that could taint the impartiality of its actions”.²⁶

²¹ In the CAT COB on China 2015, the Committee “is deeply concerned with systematic reports that torture and mistreatment are still deeply rooted in the justice system” (paragraph 20). Similarly, on Vietnam, the Committee is “deeply concerned” about “widespread use of torture and mistreatment, especially at police stations” (CAT COB on Vietnam 2018, paragraph 14).

²² The CAT COB on China 2015, at para. 40, the CAT COB on Vietnam 2018, at para. 22.

²³ The CAT COB on China 2015, at para. 18, 30, 42, 44, 51 and 53.

²⁴ The CAT COB on Vietnam 2018, at para. 20 and 36.

²⁵ The Committee against Torture is concerned about “the low number of investigations and prosecutions of cases of torture and ill-treatment, with only 10 cases of torture brought before domestic courts between 2010 and 2015” (the CAT COB on Vietnam 2018, at para. 14)

²⁶ The CAT COB on China 2015, at para. 22.

Another solid cohesion is the relationship between Communist Party's agencies and the investigators. The Vietnamese Law on People's Police (2014) defines some principles of organization and operation of the police forces, and the first one is that: "police are placed under the absolute, direct and overall leadership of the Communist Party of Vietnam" (Article 5). Similarly, the Chinese Communist Party (CCP) Politics and Law Committees' role in coordinating the work of judicial bodies also raises the concern of the Committee against Torture about "a potential to interfere in judicial affairs, particularly in cases of political relevance".²⁷

Secondly, there is a lack of effective and independent monitoring mechanism for detention facilities and complaints processing in China and Vietnam.²⁸ There are various kinds of detention, from pretrial, administrative facilities to prisons. A positive feature of prison management in China comparing to Vietnam is that the prison police are under the leadership of the Chinese Ministry of Justice. The Bureau of Prison Management within the Ministry of Justice has the responsibility of for supervising the administration and operation of the country prison system, and a department of prison management is set up in each provincial-level Bureau of Justice.²⁹ However, the system is still limited regarding to openness. Moreover, the prosecution and oversight function of the Chinese Procuratorate system are making worrisome about the possibility of compromising the "independence of functions".³⁰ In addition, the effectiveness of other supervisory agencies, such as specialized inspectors or National Assembly deputies, is still questionable.³¹

Vietnam adopted a new Law on Temporary Detainment, Pretrial Detention in 2015. While the temporary and pretrial detentions, which are commonly called "preventive measures", are usually applied in most of the criminal cases. Other preventive measures, such as bail, residential confinement, travel restriction, are not used very often, while pretrial detention is often considered more harsh or severe in comparing to prison condition. On the other hand, there are also concerns from the advocates and NGOs about the situation of prisons.³² Recently, Vietnam has already adopted Law on Enforcement of Criminal Judgments 2019, to replace the 2010's Law after fierce debates at the National Assembly on allowing prisoners to work for businesses, organizations outside the prison.³³ In this Law, as well as in the Criminal Code, and Law on Temporary Detainment, Pretrial Detention, there are specific regulations on dealing with complaint and denouncement, including the duties of procuracies in governing the settlement of those subjects. However, the trustworthy and effectiveness of that system is still in question.

Good governance highlighting the role of transparency and accountability as two key pillars has been encouraged by the UNDP and many international partners, in both Vietnam and China. However, the new fight against corruption in China (since 2013) and in Vietnam (since

²⁷ The CAT COB on China 2015, at para. 22.

²⁸ The CAT COB on Vietnam 2018, at para. 34.

²⁹ Yue Ma, 'The Chinese Police' in M.R. Harberfeld, Ibrahim Cerrah (eds), *Comparative Policing: the Struggle for Democratization* (Sage Publication 2008), at 22.

³⁰ The CAT COB on China 2015, at para. 22.

³¹ The CAT COB on China 2015, at para. 28.

³² In the summer of 2019, relatives, activists and groups express their worries about the health of some prisoners in the hot weather condition and rumour of hunger-strike in a prison in the central province of Nghe An.

³³ Minh An, 'NA Deputies discuss amended law on enforcement of criminal judgments' (*Ministry of Public Security*, 23 May 2019) <<http://en.bocongan.gov.vn/news-events/na-deputies-discuss-amended-law-on-enforcement-of-criminal-judgments-t5674.html>> accessed 19 October 2019.

2016) appear to not accompany any concrete institutional improvements toward transparency and openness. Unlike many expectations, the Vietnam's new Law on Access to Information of 2017 failed to create a good catalyst to enhance the citizens' practice of freedom of information. A main reason comes from its very limited scope, while the inaccessible information is much broader, including the "information classified as state secrets, including information with important contents relating to politics, national defense and security, foreign relations, economy, science and technology and other fields as prescribed by a law" (Article 6).

The debates on national human rights institution (NHRI) in China and Vietnam have been being carried out in the past two decades, under the pressures of international agents. In the forum of UN Human Rights Council's Universal Periodic Review (UPR) process, many countries have recommended both countries to establish NHRI in line with the Paris Principle.³⁴ However, they do not fully accept the recommendation, just a part in hesitation to continue studying and considering the possibility of its. That implies they want to act in their own approaches, to balance the requirement of independence and being out of control.

Those problems, which are closely related to the constitutional institutions, requiring comprehensive political reforms. Otherwise, the practice of torture may lead to further wrong convictions like many regretful cases in the past which were admitted by the Vietnamese authorities, e.g., Han Duc Long (Bac Giang province), Nguyen Thanh Chan (Bac Giang), Huynh Van Nen (Binh Thuan), Tran Van Thiem (Bac Ninh), etc. However, the situation seems not to end soon.

3. The role of non-state actors and challenges

Torture, by international law's definition, is related to public authority. According to the most widely recognized definition of the CAT's Article 1, torture means "any act by which severe pain or suffering, whether physical or mental, ... which 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." To fight against torture, the role of non-state actors, thanks to their independence position, is legitimate and irreplaceable.

Nonetheless, the civic spaces in China and Vietnam, despite of achieving some positive development in recent decades, have never been easy for human right defenders. In a current world of "serious restrictions in civic space on every continent", and "institutions of governance failed the people",³⁵ there are likely no breakthrough in near future.

Regarding the Constitutional right to freedom of association, rights and obligations of citizens in China's 1982 Constitution are set out in very a detail and far exceeding the ones provided in 1954 and 1978 constitutions respectively. Article 35 of 1982 Constitution proclaims that "citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration." Meanwhile, freedom of

³⁴ In the UN's UPR process of China in 2018, 10 countries have recommended China to establish NHRI, including India, Republic of Korea, Bulgaria...(Report of the Working Group on the Universal Periodic Review: China, 26 December 2018, A/HRC/40/6, at 28.66 to 28.71); In the UN's UPR process of Vietnam in 2019, nearly 10 countries have recommended Vietnam to establish NHRI, including South Africa, Ukraine, Uzbekistan, Bangladesh, Kuwait ...(Report of the Working Group on the Universal Periodic Review: Vietnam, 28 March 2019, A/HRC/41/7, at 38.68, 38.71, 38.75, 38.79, 38.85, 38.88).

³⁵ Civicus, 'State of Civil Society Report 2018' <https://www.civics.org/documents/reports-and-publications/SOCS/2019/state-of-civil-society-report-2019_executive-summary.pdf> accessed 19 October 2019.

association is claimed to be protected in Vietnam's 1946, 1959, 1980, 1992 and 2013 Constitutions. Article 25 of 2013 Constitution proclaims that citizens have "the right to assembly, the right to association", and the exercise of those rights "shall be prescribed by law."

In China, the control on civil society has been loosen under Deng Xiaoping regime (1978-1992).³⁶ However, the current regulation to govern domestic and foreign NGOs are somehow messy. The state officially refers to a whole range of domestic not-for-profits organizations as "social organizations" (shehui zuzhi), equivalent to NGOs in the West. The legal framework includes Law of the Red Cross Society (1993), Regulations on the Registration and Management of Social Organizations (1998), Charity Law (2016), Law on the Management of Overseas NGOs' Activities in Mainland China (2016)... The "dual management system" established by the Regulations on the Registration and Management of Social Organizations, requiring approvals by both professional ministries or agencies and the Ministry of Civil Affairs or its local offices, has been used to restrain the development of NGOs. Since Xi Jin-ping raised to power in 2012, the civic space has been much more tightly controlled.

The "dual management system", which also exists in Vietnam, continues to be a kind of barrier for freedom of association. Perhaps, some may say that freedom of association has been "increasingly expanded" in the past three decades, and there are various type of organizations in Vietnam contributing to "liberalize the society".³⁷ The Draft Law on Association have been postponed twice after discussions at the National Assembly in 2005 - 2006 and 2016. While the Government Decree No. 45/2010/ND-CP of 2010, on the organization, operation and management of associations, was implemented to define the procedure for founding associations. The Decree requires several approvals to establish an association, including approval of the boards to campaign for the establishment of associations, and approval of its charter.

Torture is somehow a more difficult issue to deal with comparing to other human rights, such as economic, social rights, anti-human trafficking or information access. There are not many NGOs handling on torture in such countries like Vietnam or China. Organizations advocating against torture in China are mostly abroad based, for example the Network of Chinese Human Rights Defenders (CHRD) and Human Rights in China (HRIC).³⁸ The domestic organizations are mostly lawyers' organizations providing legal aid, and academic institutions conducting research and training.

In Vietnam, there are several small groups, in the form of foundations, and individuals working to support prisoners and their families. Beside financial support, they also travel to visit prisons periodically with the relatives, and raise their voice on social networks about prisons condition in some cases. All of these groups are un-registered, and even considered to be "reactionary" by the government. Another loosely network, the Former Vietnamese Prisoners of Conscience (FVPOC), has been able to organize annual events to celebrate the UN's International Day in Support of Victims of Torture on June 26 in recent years in Hochiminh City.

³⁶ Karla W.Simon, *Civil Society in China: the Legal Framework from Ancient Times to the "New Reform Era"* (Oxford University Press 2013), at 184-186.

³⁷ Le Quang Binh, *Associational Life from Citizens' Perspectives* (Tri Thuc Press 2016), at 35.

³⁸ The Network of Chinese Human Rights Defenders (CHRD): <https://www.nchrd.org>; Human Rights in China (HRIC): <https://www.hrichina.org/en/about-us>, the organization has an international office in New York and a China office in Hong Kong.

Engaging with the UN human rights system is a popular channel for advocating against torture by NGOs all over the world. Many Chinese domestic NGOs, academic institutions have worked with the UN Committee against Torture by submitting shadow reports. In 2015, there were about 20 shadow reports sent to CAT, in addition to the ones made by international NGOs such as Amnesty International, Human Rights Watch, International Service for Human Rights, Human Rights in China, and other abroad based Chinese NGOs, etc.³⁹

The participation of NGOs from Vietnam in reporting to CAT process in 2018 was not as visible as China in its recent cycles. Except 5 independent reports of international NGOs network working in Vietnam and some abroad based NGOs, there are only one joint report by Vietnamese local groups in collaboration with an US based NGO which was sent to the Committee against Torture.⁴⁰ All of the local groups are unregistered and unrecognized by the government. On the other hand, there are no report from academia or state-supported NGO. The participation of civil society has become better in the ICCPR third reporting cycle since the early 2019. There are 15 shadow reports sent to the UN's Human Rights Committee, and at least three of them are from the local unregistered groups.⁴¹ Besides, some other domestic registered groups also send reports, but to introduce themselves rather than express concerns about the implementation of civil and political rights.⁴²

The position of individual lawyers in Vietnam and China has been an interesting topic for discussions. The promising role of Chinese human rights protection (weiquan) lawyers observed in the previous years has been broken by the recent crackdown pointing toward them and other activists.⁴³ However, owing to the rising number of lawyers, some of them are still ready to shoulder politically sensitive cases, include defending the victims of torture. Among 110,000 individual members of All China Lawyers Association (ACLA), there are more and more lawyers showing interest in the public affairs.⁴⁴

Meanwhile, the Vietnamese lawyers are encountering various kinds of danger in their work, too. For instance, an outspoken lawyer from the central province of Phu Yen has been disbarred in 2017 for "abusing freedom of expression", after his defending one death in custody victim against five Tuy Hoa city's policemen accused of using torture. In another case, two active lawyers in Hanoi were beaten by eight men on their way to home of a 17-year-old boy

³⁹ Academic institutions include Research Center for Human Rights and Humanitarian Law of Law School Peking University, China University of Political Science and Law, Human Rights Research Center, China Foreign Affairs University, China Society for Human Rights Studies and Human Rights Education and Research Center of Jilin University. Domestic NGOs include Center for Education and Study of Human Rights, Southwest University of Political Science & Law, China Society for Human Rights Studies, Human Rights Research Center - Chinese Academy of Social Sciences, Beijing Children's Legal Aid and Research Center from China, China Association for Preservation and Development of Tibetan Culture. (Office of High Commissioner for Human Rights).

⁴⁰ Joint report by Boat People SOS (BPSOS), Defend the Defenders (DTD), Vietnamese Women for Human Rights (VNWHR), the Independent Journalists Association of Vietnam (IJAVN), Former Vietnamese Prisoners of Conscience (FVPOC) and Association of Bau Bi Tuong Than.

⁴¹ They are: Human Rights Space (HRS) and the Cooperation Group for Governance and Public Administration Reform (GPAR), Vietnamese Women for Human Rights (VNWHR).

⁴² Such as Viet Nam Women's Union (VWU), Vietnam Peace and Development Foundation and Ho Chi Minh City Muslim Representative Committee.

⁴³ Fu Hualing and Richard Cullen, 'Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers' [2011] 205 *China Quarterly* 40; Hualing Fu and Richard Cullen, 'Weiquan (rights protection) Lawyering in an Authoritarian State: Building a Cultural of Public-Interest Lawyering' [2008] No.59 *China Journal* 111.

⁴⁴ Fu and Cullen [2008] (n 43), at 111 – 127.

who died after falling into a coma while in the police custody in 2015. The individual activism also faces many risks and inconveniences. The 2016's arrest of Nguyen Ngoc Nhu Quynh, under Article 88 of the Penal Code, has raised concerns of the UN human rights bodies, many international organizations and governments.⁴⁵ Among the excuses for the arrest is the female blogger's compilation "Stop police killing civilians" and a list of 31 citizens or victims died after interrogations at the police stations nationwide. However, the police considers "those documents prompt the readers to misunderstand the nature of the issue, besmirches the reputation of the people's police force, and damages the relationship between police and the people".⁴⁶

The lack of judicial review and strong constitutional guarantee of basic freedom, including freedom of association, makes the fight against torture very fragile. In the past decade, the academic discussion on constitutionalism has become more lively in China, but a less extend in Vietnam.⁴⁷ The concept of constitutionalism is understood very limited by the Vietnamese people, just in the academia and scholarly discussions⁴⁸, while lawyers, judges and the public are almost unfamiliar with it.

In the process of discussion on amending the Vietnam's 1992 Constitution, a 2013 draft proposed to incorporate Constitutional Council and raised hopes to the public. However, it is said to be rejected by some of the most conservative leaders in the Politburo. Then, the Article 119 of Vietnam's 2013 Constitution regulates that "all violations of the Constitution shall be dealt with", all agencies of the dtate and the people shall "defend the Constitution", and "the mechanism to defend the Constitution shall be prescribed by a law". Up till now, the constitutional promise to build a mechanism dealing with the constitutional violations has not been realized yet.

Non-state actors are playing their roles in advocating against torture and protecting victims of torture's rights. But the weak constitutional guarantee of basic freedom, including freedoms of association, assembly and expression, may lead to various challenges for them to overcome. And vice versa, without the active voice of non-state actors, the possibility of institutional reform is less likely to happen soon in the two countries.

4. Conclusion

The human rights struggle against torture in Vietnam or China, like in other countries, is inevitable and on-going. The international human rights law and national constitutions are playing the different important roles in this battle. International law are creating certain driving force for changes, and pressing the governments to make institutional reform via implementing independent investigation of torture allegation and independent monitoring of detention facilities. However, the delay of state institutional reform continues to be a big resistance to the progress. The weak constitutional guarantee of freedom of association is another barrier for non-

⁴⁵ UN Human Rights Chief urges Viet Nam to halt crackdown on bloggers and rights defenders (*OHCHR* 14 October 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20679&LangID=E>> accessed 19 October 2019.

⁴⁶ Tuoi Tre News, 'Vietnamese blogger arrested for anti-state propaganda' (*Tuoitrenews*, 11 October 2016) <<https://tuoitrenews.vn/society/37486/vietnamese-blogger-arrested-for-antistate-propaganda>> accessed 19 October 2019.

⁴⁷ Stéphanie Balme, Michael W. Dowdle (Eds.), *Building Constitutionalism in China* (Palgrave Macmillan 2009), at 1-20.

⁴⁸ There are several concepts have been used to translate constitutionalism into Vietnamese, including "chu nghĩa lap hien", "chu nghĩa hop hien" and "chu nghĩa hien phap".

state actors to play their right parts in dealing with the practice of torture. The limitation of non-state actors also makes the institutional reform be far from occurring in the near future, and more seriously creates a deadlock and unjust circle in observation.

Bibliography:

1. An, M., 'NA Deputies discuss amended law on enforcement of criminal judgments' (*Vietnam's Ministry of Public Security*, 23 May 2019) <<http://en.bocongan.gov.vn/news-events/na-deputies-discuss-amended-law-on-enforcement-of-criminal-judgments-t5674.html>> accessed 19 October 2019
2. Baehr, P. R., *Non-Governmental Human Rights Organizations in International Relations* (Palgrave Macmillan 2009)
3. Balme, S., Dowdle M. W. (Eds.), *Building Constitutionalism in China* (Palgrave Macmillan 2009)
4. Binh, L. Q., *Associational Life from Citizens' Perspectives* (Tri Thuc Press 2016)
5. Civicus, 'State of Civil Society Report 2018' <https://www.civicus.org/documents/reports-and-publications/SOCS/2019/state-of-civil-society-report-2019_executive-summary.pdf > accessed 19 October 2019
6. Cohen, J. A., Alford, W. P., and Lo, C., *Taiwan and International Human Rights: A Story of Transformation* (Springer Singapore 2019)
7. Donnelly, J., *International Human Rights* (4 edition, Routledge 2013)
8. Gillespie, J. and Nicholson, P. (eds), *Asian Socialism And Legal Change: the Dynamics Of Vietnamese And Chinese Reform* (ANU 2005)
9. Gillespie, J. and Chen, A. H.Y. (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge 2010)
10. Hathaway, O. A., 'Do Human Rights Treaties Make a Difference?' [2002] 111, issue 8 Yale Law Journal 1935
11. Hualing F. and Cullen R., 'Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers' [2011] 205 China Quarterly 40
12. Hualing F. and Cullen R., 'Weiquan (rights protection) Lawyering in an Authoritarian State: Building a Cultural of Public-Interest Lawyering' [2008] No.59 China Journal 111
13. Keith, L. C., 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?' [1999] 36, issue 1 Journal of Peace Research 95
14. Koh, H H., 'Why Do Nations Obey International Law?' [1997] 106, issue 8 Yale Law Journal 2599
15. Ma, Y., 'The Chinese Police' in M.R. Harberfeld, Ibrahim Cerrah (eds), *Comparative Policing: the Struggle for Democratization* (Sage Publication 2008)
16. OHCHR, 'UN Human Rights Chief urges Viet Nam to halt crackdown on bloggers and rights defenders' (*OHCHR* 14 October 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20679&LangID=E> > accessed 19 October 2019
17. Rejali, D., *Torture and Democracy* (Princeton University Press 2007)
18. Risse, T, Ropp, S. C. and Sikkink, K., *The Power of Human Rights: International Law and Domestic Change* (Cambridge University Press 1999)

19. Sidel, M., 'Civil Society and Civil Liberties' in Michael Edwards (eds), *The Oxford Handbook of Civil Society* (Oxford University Press 2011)
20. Simmons, B. A., *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009)
21. Simon, K. W., *Civil Society in China: the Legal Framework from Ancient Times to the "New Reform Era"* (Oxford University Press 2013)
22. The United Nations Committee against Torture, *Concluding observations on the fifth periodic report of China*, CAT/C/CHN/CO/5, 9 December 2015
23. The United Nations Committee against Torture, *Concluding observations on the initial report of Viet Nam*, CAT/C/VNM/CO/1, 29 November 2018
24. Tuoi Tre News, 'Vietnamese blogger arrested for anti-state propaganda' (*Tuoi tre news*, 11 October 2016) <<https://tuoitrenews.vn/society/37486/vietnamese-blogger-arrested-for-antistate-propaganda>> accessed 19 October 2019