

OPPORTUNITIES AND CHALLENGES FOR VIETNAM IN IMPLEMENTING RECOMMENDATIONS BY UN COMMITTEE AGAINST TORTURE

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Background

As a member of the UN Convention Against Torture, Vietnam has the obligation to review its legal system and implement uniformly legislative, administrative and judiciary measures in preventing and fighting torture. After ratifying the Convention, Vietnam is considered as a responsible and active member. The consideration is based on Vietnam's efforts in rapidly improving its legal framework to meet requirements of the Convention. However, in the conclusion regarding its First National Report on Implementation of the Convention Against Torture and brutal, inhuman or insulting treatment or punishment, the UN Committee Against Torture shows concerns about some torture cases taking place recently in the country and makes some recommendations for Vietnam for implementation of the Convention.

Besides, in today's context, Vietnam on the one hand has to focus on economic development and on the other hand has to implement international commitments it has put its signature on. Doing both at the same time is not an easy job. However, since its signing of the Convention Vietnam has always highly considered and protected values of human rights during the development and implementation of its policies and laws. Therefore, the signing of the Convention can be said to have been prepared relatively. Due to its level of development, there is lack of economic resources and awareness among civil servants and people about torture is not comprehensive. This is a big challenge for Vietnam in implementing the Convention.

Due to these reasons, it is meaningful to clarify opportunities and challenges facing Vietnam in implementing recommendations by the Committee Against Torture by analyzing the reality of the legal framework and law enforcement for the purpose of making solutions. This paper focuses on anti-torture issues in criminal judiciary.

1. Reality of legal provisions against torture in Vietnam

In Vietnam's legislative history, anti-torture, anti-physical attack and maltreatment provisions have been written in the 1946 Constitution¹ but they are limited to defendants and prisoners. That means prohibition of torture is applied only to judicial sphere, not to all areas of society. Only members of judicial agencies are considered actors of torturing because these provisions fall in the Chapter 6 on judicial bodies. After the 1946 Constitution, though the Constitutions of 1959, 1980, and 1992 did not mention the term "torture" they did mention terms such as "inviolability of body", "forced confession", "inflicting pain", "violating honor and dignity"...

As for the current Constitution, right after signing the Convention on 07/11/2013 the National Assembly ratified the Constitution on 28/11/2013. The Constitution was ratified just some weeks after Vietnam's signing of the Convention. In fact, earlier in the drafting and consultation process of the

¹ Article 68 of the Constitution of the Democratic Republic of Vietnam 1946

Constitution the provision “strictly prohibiting any acts of torture, violence, forcing confession, inflicting pain or any other treatments violating bodies or violating honor and dignity of people” was put in the Draft Constitution². Due to prior preparation, the right “not to be subject to torture, violence, forced confession, inflicting pain...” was officially written as a general principle in this supreme legal document. Accordingly, item 1 Article 20 of the Consitution 2013 specifies: “Everybody has the right to inviolability of body, being protected by law in terms of health, honor and dignity; not to be tortured, subject to violence, forced confesion, inflicint pain or any other treatments violating body, health, honor or dignity.” It is easy to see that careful choice of wording has been used to ensure linguistic conformity with the Convention. This shows that the Naitonal Asembly was serious and highly responisble in implementing the interational committments as a member.

With the Constitutions, internalization of international committmetns are always considered in drafting all legal documetns in Vietnma’s legal sytem always. Previously, some laws rarely directly mentioned of “torture”, “brutal” (such a the Criminal Code in 1985 and 1999; the Criminal Procedures Code 1989 and 2003 though they had provisions against violation of life, health, honor and dignity. With the Convention, these laws have been updated fully regarding provisions against torture. Specifically:

The 2015 Criminal Code, apart from prohibiting acts of “cruelty”, “dishonoring”, “inflicting pain”, “harming health” or “seriously violating honor, dignity” of people, added other prohibited acts such as “brutal treatment”, “brutal punishment”, “dishonoring”, “inhumane”, “torturing”. In some cases, “torturing, treat of punish brutally, inhumanely or violating dignity of victims” constitute elements of enhanced punishment in the point d, item 2, Article 374 on Forced Confession. Other cases are specified in the designation of basic offenses as incriminating elements.

The 2015 Criminal Code not only provided for protection of life, health, dignity, honor of people and prohibition of forced confession and torture but also added provisions on strictly prohibiting torture or any other forms of treatment that violates body, life, health of people³.

Especially, in all criminal procedure activities, the accused, defendants and prisoners are always vulnerable people and Vietnamese laws have seen many changes to protect their rights and lawful interests. For example, before the enactment of the Law on temporary arrest or imprisonment, the temporary custody and imprisonment activities are regulated by Criminal Code and Regulations on temporary custody and imprisonment in 1998 (amended and added in 2011). The Regulations only specified that “all acts of violating life, health, assets, honor, dignity of those arrested or imprisoned temporarily are strictly prohibited”⁴. When the Law on conducting temporary arrest and imprisonment 2015 was enacted in 2015, provisions on principles of ensuring humanity; no torture, forced confession, inflicting pain or any other treatment violating rights and lawful interests of those temporarily arrested or imprisoned⁵. Next, the Law on enforcing criminal judgements 2010 only specified principles of ensuring humane treatment, respecting dignity, rights and lawful interests of

² Item 2, Article 22 of the Draft Constitution, posted for public comments from 2/1/2013 – 31/3/2013 on the Government’s Portal, accessible at http://www.chinhphu.vn/portal/page/portal/chinhphu/congdan/DuThaoVanBan?piref135_27935_135_27927_27927.m ode=detail&piref135_27935_135_27927_27927.id=748

³ Article 10 of the 2015 Criminal Code

⁴ Article 5, Regulations of Temporary Arrest and Imprisonment 1998 (amended and added in 2011)

⁵ Item 3, Article 4 Law on conducting temporary arrest and imprisonment 2015.

convicts, lacking provisions on respecting and ensuring health of convicts. Of course, by now this Law has been replaced by the Law on enforcing criminal judgements 2019 with relatively detailed provisions in line with the 2013 Constitution and the Convention as well. According, the Law on enforcing criminal judgements 2019 has only provisions on principles of ensuring humane treatment, respecting honor, dignity, rights and lawful interests of convicts⁶ but also provisions prohibiting torture and other forms of treatment of punishment that are brutal, inhumane or dishonoring convicts⁷.

As such, from legal point of view in the criminal procedure field, we have basis to say that the Vietnam's legal system has been upgraded considerably to prevent and fight torture or brutal, inhumane treatment of people. This achievement is due to Vietnam's determination in implementing recommendations of the UN Committee Against Torture. Each time laws are revised, the National Assembly always try to make sure that international commitments are implemented⁸. Since signing the Convention, drafting committees of the Criminal Code and the Criminal Procedures Code, the Law on temporary arrest and imprisonment have done studies and proposed ways to internalized requirements of the Convention which has shown results in legal provisions adopted in 2015. Consequently, Vietnam has timely internalized the provisions of the Convention in the first of its membership⁹.

2. The reality of implementing laws against torture in Vietnam

According to the first national report on implementing the Convention, the crimes of torturing in Vietnam is not popular and there are only some criminal cases involving inflicting pain and they account for a very small percentage of criminal cases heard annually. For example, in 2014 there are 3 cases with 7 defendants in the total of 65858 criminal cases and 118372 defendants (0.0045%); in 2015 there are 2 cases with 9 defendants in the total of 59196 criminal cases and 106078 defendants (0.0033%). These cases were heard lawfully and strictly. For example, defendants Nguyễn Thân Thảo Thành, Nguyễn Minh Quyền, Phạm Ngọc Mẫn, Nguyễn Tấn Quang, Đỗ Như Huy (policemen of Tuy Hoa City, Phu Yen province) were convicted of inflicting pain and given five-year sentences. This shows that Vietnam is determined to punish all acts of torture, forced confession, inflicting pain and does not cover up for anybody, including law enforcement officers and confirms Vietnam's strong commitment in respecting and protecting human rights¹⁰.

These practices show that Vietnam has rather complete legal framework on preventing and fighting torture, there number of cases are limited. However, it is still a big challenge to implement these legal provisions because somewhere there are symptoms of torture crimes. The figures are revealed cases and we are not sure the number undisclosed crimes. There are a number of reasons and we propose some here:

First, though Vietnam has implemented early and strongly plans to implement the Convention the awareness of government officials is not even. The process of changing awareness requires time and interest of trainers and learners and it sometimes requires a whole generation.

⁶ Item 3, Article 4 Law on enforcing criminal judgements 2019

⁷ Item 8, Article 10 Law on enforcing criminal judgements 2019

⁸ See reports on appraising the legislative projects of Criminal Code (revision) and the Criminal Procedures Code (revision).

⁹ First national report on implementing the Convention.

¹⁰ First National Report, see more at <https://vnexpress.net/cong-an-dung-nhuc-hinh-gay-chet-nguoi-duoc-giam-an-3467115.html>

Second, though the law has provided for application of litigation in court hearing and the quality of litigation has improved but there are still limitations. Barrister's rights have been broadened under the Criminal Procedures Code 2015 but the skills and experience in litigation have sharpened (previous laws did not broaden the rights). Therefore, the prosecutors often have the advantage over the barristers. This perhaps is the precondition for misconduct, impatience or prejudice of prosecutors at the cost of the accused and defendants – one of the reasons leading to acts of forced confession and inflicting pain...

Third, monitoring mechanism for criminal procedures has not been effective, leading to some shocking injustice cases when people without crime are judged with serious crimes, even serving sentences for a long time before acquitted. The question is why they confess and admit crime and serve long sentences? Perhaps the public will not have doubt if the monitoring mechanism on criminal procedures works better.

Fourth, in today's context, Vietnam has many problems to solve for development. Despite its focus and active implementation of the Convention it lacks resources for training and technical skill for judicial officials and related parties in order to prevent and fight torture. This is a common challenge for developing countries, not just Vietnam.

3. Some recommendations for improving the efficiency of preventing and fighting torture in Vietnam

a. Recommendation for improving the legal framework

Vietnam's legal system is relatively complete but for raising deep awareness of people and especially law enforcement officers about preventing and fighting torture, and for strengthening legal foundation for strictly punishing torture activities, we posit that legal documents should be improved continuously to show the unequivocal attitude of the State towards punishment of torture activities and realize provisions of the Constitution 2013 and the Convention

For the Criminal Code 2015, we propose criminalizing more acts of torture nature by way of adding "abusing, causing serious physical pain" as element for raising punishment bracket in some crimes because when this sign appears the danger of the act to constitute the crime will increase markedly. Specially, for offences of violating dignity, honor of others, when taking place in combination with causing serious physical pain (below the criminalizing threshold), the level of danger will be clearly higher than the normal offences of violating dignity, honor. For example, causing injury or damaging victims' health by 31% or higher is the punishment-determining provision specified in the item 2, Article 141 on Crime of Raping. Raping with abusing and cause of serious physical pain at a level below 31%, if applying basic punish bracket, will not be punished in accordance with the nature of the act's danger.

For the Criminal Procedure Code 2019, we propose to move the provision "torture and other forms of treatment of punishment that are brutal, inhumane or dishonoring convicts and people subject to judicial measures" from item 8 Article 10 (prohibited acts in enforcing criminal sentences) to Article 4 and emerged into the item 3, Article 4 as a principle in enforcing criminal sentences. The making of provision against torture as a principle of enforcing criminal sentences is very important: 1) this is specified in the Constitution 2013 in the item 1, Article 20; 2) as a principle, the content of the provision will be guiding theory and the fundamental orientation recorded in the law, manifested

in the practices and shown in explaining or guiding laws¹¹. As a principle, the content of the provision will serve as “doctrine, important orientation, core and primary” in enforcing criminal sentences in both developing and implementing the law¹². It should be the case that making it a principle can both highlight the importance of a constitution-based provision and ensure the consistency of the legal system. In fact, both the Criminal Procedure Code and the Law on enforcing temporary arrest and imprisonment consider prohibition of torture as their principles.

b. Recommendation for capacity building for judicial officials

Even with a complete legal system human factor is indispensable. Specifically, competency, knowledge and character of judicial officials are very important. For competency, the government should invest to train them in judicial skills, especially investigation, and raise their awareness about requirements and responsibility in preventing and fighting crimes in general and torture in particular. In terms of character, it is necessary to recruit judicial officials with careful screening, enhancing training about professional ethics, and giving them better salary to keep their integrity.

c. Recommendations for improving quality of criminal litigation

WE cannot deny that in recent times the intensity and quality of litigation by barristers at courts have improved but the quality needs further improving. The principle of litigation at courts in the Constitution and the Criminal Procedure Code 2015 can be considered as platform for parties involved to train and make full use of their knowledge and skills, thus creating a strong judicial system. When the litigation quality is improved barristers will be better at making arguments to protect their clients, including pointing out wrongdoings, violations of procedures by prosecutors and investigators. The higher litigation quality will create pressure for investigators and prosecutors to improve themselves and be more careful in prosecution, thus reducing mistakes and violations and limiting acts of forced confession and inflicting pain.

d. Building effective monitoring mechanism for criminal procedures

It is always necessary to have monitoring mechanism in implementing laws. We agree with the idea that it is important to enhance the monitoring role of the Judicial Committee and members of the National Assembly and broaden access for public media to activities of judicial agencies, including prison facilities. Besides, it is necessary to promote the establishment of non-governmental organizations in the area of human rights, especially those specialized in protecting rights of people who have lost their freedom and fighting torture and supporting victims of torture¹³.

4. Conclusion

Vietnam has advantages in implementing the Convention thanks to determination and a legal framework on criminal procedures relatively complete and compatible with international law. However, for effective implementation Vietnam still needs more time to heighten awareness and quality of judicial officials and to improve the quality of criminal litigation and strengthen the monitoring mechanism for criminal procedure activities. Besides, though rather complete the criminal procedure law should be improved continuously to ensure consistency and uphold the principle of no

¹¹ Le Van Cam (2020), Criminal Law textbook – Overview, National University Ha Noi Publisher, 95-96.

¹² Nguyen Ngoc Chi (2019), Criminal procedure textbook, Overview, National University Ha Noi Publisher, 68-70.

¹³ Pham Thanh Son, Vu Cong Giao (2019), Improving legal framework for preventing and fighting torture in Vietnam, accessible at <http://tapchicongthuong.vn/bai-viet/hoan-thien-khuon-kho-phap-luat-ve-phong-chong-tra-tan-o-viet-nam-62242.htm>

torture, violence, forced confession, inflicting pain or any other forms of treatment violating body, health, honor or dignity as warranted by item 1 Article 20 of the Constitution 2013.

Reference

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