PREVENTION OF TORTURE BY CONSOLIDATING DETERRENT MEASURES IN THE CRIMINAL PROCEDURES: THE CASE OF VIETNAM

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Abstract:

One of the "favourable" conditions for the competent authorities to conduct torturous behaviours upon the accused is during the exercise of deterrent measures such as temporary detention, custody or emergency custody.

The abuse of these measures coming from state agencies has directly violated the life, the health (both physically and mentally) of the accused, as well as their honour and dignity. However, the consequences will not end there. Losing the trust of victims as well as their families and loved ones in the national criminal justice system is going to be inevitable. In the long run, this will have a very negative impact on the citizen's faith in the state, as well as being a huge violation to the values that humanity has been cultivating for centuries.

For these reasons, to ensure the rights to be protected from torture, brutality, inhuman or degrading treatment of the accused in the process of internalizing the 1984 “Torture Convention” in Vietnam, from detecting and analyzing shortcomings when applying deterrent measures, the paper will present several suggestions on amendments to some provisions of the 2015 Criminal Procedure Code. Specifically on: (1) the ground for applicating and terminating deterrent measures when deemed unnecessary and appear of human rights violation; (2) the jurisdiction; (3) the period of application.

Keywords: deterrent measures, 2015 Criminal Procedure Code, the accused, torture.

1. Reason for choosing the topic

In 2014, Vietnam signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT), the internalization of this Convention is a concrete step in a nation's proactive and zealous international integration. And in 2018, when the 2015 Vietnam Criminal Procedure Code (2015 Criminal Procedure Code) officially takes into effect, deterrent measures have been fairly regulated in the process of resolving criminal cases. However, the process of internalizing UNCAT is not easy due to many barriers, from legal awareness to legal enforcement. In particular, many legislative "loopholes" are still existing within Deterrent measures regulations, resulted in torturous acts from the public authorities against the accused.

To ensure that the rights of the accused in the application of Deterrent measures would be in accordance with the International Human Rights Convention (in which Vietnam has become a member of) and in line with the spirit of the 2005 **Resolution No. 49-NQ/TW**[1] of the Politburo on the Judicial Reform Strategy to 2020, which identified its mandates as *"Clearly determining the grounds for detention; restricting the application of detention measures to a number of crimes; narrowing the subjects who have the authority to decide on the application of the detention measure".*

Therefore, the two central issues that we want to present below will be:

(i). Analyze the shortcomings of current Deterrent measures provisions in the 2015 Criminal Procedure Code;

(ii). Proposing several solutions to improve the legal regulations in order to eliminate torturous behaviours in the process of dealing with the accused.

2. The appearance of torturous behaviours in Vietnamese criminal proceedings

2.1. The concept of torture according to the Convention against torture and Vietnamese law

A brief overview of the concept of torture is provided in Article 1 of UNCAT, setting that: *"The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".*

Article 4 of UNCAT also requires that torture be recognized in criminal law by states with appropriate penalties commensurate with the danger level of the person committing torture.

Despite being a member and having internalized UNCAT, at present, Vietnam's regulation has not given a definition of torture, but only stipulates that all acts with torturous nature are criminal acts, which have been named in the 2015 Penal Code. Although such provisions will help criminal proceedings to be closely aligned with reality, and easy to identify some torturous behaviours, the disadvantage is that it risks not listing every manifestations of tortures.

2.2. An overview of the Vietnamese criminal justice system

[1] Resolution No. 49-NQ/TW, link: http://hoiluatgiavn.org.vn/nghi-quyet-so-49-nqtw-ngay-02-thang-06-nam-2005-cua-bo-chinh-tri-ve-chien-luoc-cai-cach-tu-phap-den-nam-2020-d563.html, access on May 2nd, 2021.

First of all, the assessment of which model of criminal justice that Vietnam belongs to is still in debate ... But basically, the Vietnamese model of criminal justice is interrogation. State procedural bodies are proactive and play an active role during the entire proceedings. At the same time in this procedural model, the investigation stage bears a very heavy task of determining the truth of the case, the State has given the Investigation authorities great authority, the investigation time limit is very long and the investigation is relatively closed, with most of the litigation elements not presents as much as in the trial stage. This comes from the efficiency of the criminal prosecution - the product of a prosecution model heavily focus on controlling crime, but also more or less reflects the high consensus of the Court with the Investigation Agency, the Procuracy and the low independence of the Court itself[2]. The combination of all of these factors has created a favorable environment for the acts of torture to exist.

According to Herbert Packer's model[3], Vietnamese criminal justice belongs in the group of criminal control. This procedural model emphasizes the need to detect, investigate, discover and prosecute criminals and offenders with high efficiency, it is this so-called high performance that is considered as a criterion to evaluate the effectiveness, the quality of the proceeding system. In the investigation stage, which plays a very important role in the journey of determining the truth of the case, the person assigned to the investigation must bear a heavy responsibility, leading to the mentality of wanting to quickly close the case by abusing the accused. The 2015 Penal Code provides many rules on crimes related to torture, such as **Article 373: Use of torture**, and **Article 374: Obtainment of testimony by duress**. To extort depositions from the accused is understood as the Investigator's use of violence or oppression to force the accused to confess to the Investor's subjective wishes while there are no grounds for confirmation whether the accused is related to the case or not.

The consequences of these abuses are the negative effect on the accused's mental and physical health, infringing on their human rights and causing biased or even false testimony.

3. Causes of the torture in Vietnamese criminal proceedings

In the field of Criminal Justice in general and Criminal Procedure in particular, torture can happen to multiples groups of subjects, but the accused[4] is

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[2] Le Lan Chi (2020), *THE PRINCIPLE OF PRESUMPTION OF INNOCENCE IN THE HISTORY OF CRIMINAL PROCEDURE IN VIETNAM*, PRESUMPTION OF INNOCENCE (INTERNATIONAL WORKSHOP PROCEEDINGS), 498-514, pp.510, Hong Duc Publishing House, Ha Noi.

[3] Herbert Packer (1968), Two Models of the Criminal Process, http://my.ilstu.edu/~mgizzi/packer.pdf access on May 2nd, 2021.

[4] According to Vietnam Criminal Procedure Code, Accused persons include those arrest, detainees, suspects, defendants; In the eye of the law, they have not been considered as offenders, but only as suspects, accused of the crimes.

especially vulnerable the process of dealing with a criminal case for the following reasons:

(i). They are holding or are suspected of holding the needed information to solve the case;

(ii). Though the "presumption of innocence" principle states that a person is not compelled to testify against his or herself, criminal justice officers - due to many reasons, including frustration for the victims[5], may act out and abuse the accused persons;

(iii). Torture in the UNCAT is specified at the level of *"any act by which severe pain or suffering, whether physical or mental"*. However due to the application of Deterrent measures many Constitution rights (especially mobility rights) are significantly limited, posing potential for torturous behaviors coming from fellow inmates or judicial officers;

The nature of Deterrent measures in Criminal Procedure is the restriction on personal freedom of the accused that is Authorities and persons given authority to institute proceedings with the coercive power given from the State, in order to prevent crime, and prevent the obstruction of investigation – prosecution - adjudica tion - enforcement, ensure the accordance of the case to the specified timeline. However, because they "can" use Deterrent measures, state authorities "can" also abuse it.

The results of previous researches show that particular dangers of a person being torture often appear during interrogation detention before they are brought to trial. And the early stage of Criminal Procedure is considered to pose the biggest risk of torture for the accused in which they are detained, subject of Deterrent measures (mainly emergency detention, arrest,...): *They can be neglected or asked for bribes, they can be forced to confess and suffer from unlawful detention[6]. Therefore, an early intervention of legal advocate is crucial to make sure that rights are respected, as well as improving the effectiveness and fairness of the criminal justice system[7].*

The abuse of these measures coming from state agencies has directly violated the life, the health (both physically and mentally) of the accused, as well as their honour and dignity. However, the consequences will not end there. Losing the trust of victims as well as their families and loved ones in the national criminal justice system is going to be inevitable. In the long run, this will have a very negative impact

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[5] Le Lan Chi (2019), *Bảo đảm quyền của nạn nhân tội phạm và một số nhóm yếu thế trong tư pháp hình sự. Từ quy định của pháp luật đến hoạt động của người hành nghề luật*, Ly luan chinh tri Publishing House, Hanoi, pp.22.

[6] Moritz Birk and associates, Giam giữ và Tra tấn Trước khi xét xử: Tại sao Người bị tạm giam Trước khi xét xử phải Đối mặt với Rủi ro Lớn nhất (New York: Open Society Foundation, 2011);

[7] The Office of the United Nations High Commissioner for Human Rights (OHCHR), the Association for the Prevention of Torture (APT) and the Asia Pacific Forum of National Human Rights Institutions (APF), Preventing Torture: An Operational Guide for National Human Rights Institutions , HR /PUB /10/1 (May 2010).

on the citizen's faith in the state, as well as being a huge violation of the values of human rights that humanity has been cultivating for centuries.

4. Problems with regulations on Deterrent measures in the 2015 Criminal Procedure Code

4.1. Characteristics of Deterrent measures in Vietnam's criminal procedure

The Deterrent measures in Criminal Procedure is an indispensable requirement to resolve Criminal case. Looking at the internal structure of Criminal Procedure, Deterrent measures includes a comprehensive set of legal provisions, governing mechanisms, procedures, jurisdictions, responsibilities and legal obligations of multiple related subjects. Therefore, Deterrent measures in Criminal Procedure possesses these following characteristics:

(i). Coercion;

(ii). Limitation on freedom;

(iii). Grounds, procedures, authorities, strict and clear time limit when applying[8].

And stemming from one of the characteristics of the application of Deterrent measures is *"The limitation of human freedom"* by using measures such as: emergency arrest, detention, temporary detention, apply to an accused person, suspected of a drastic, exorbitant felonies or in case of having *"substantial evidences"* proving that the suspect may impose danger upon to society or negatively affect proper functioning of the criminal justice agencies, it is therefore necessary to isolate them from society for a period of time.

However, because *"Everyone has the right to personal freedom and safety. No one can be arrested or detained without reason. No one can be deprived of liberty unless the deprivation is due to a cause and accordance to the procedures prescribed by the law"*[9]. Therefore, under no circumstances is torture toratable, even if they are the subject of suspicion for committing the crimes.

4.2. Shortcomings in legal provisions on Deterrent measures related to preventing and combating torture

Article 109 of the 2015 Criminal Procedure Code regulates Deterrent measures as follow: *"Competent procedural authorities and persons within their powers can implement measures of emergency custody, arrest, temporary detainment, detention, bail, surety, residential confinement, exit restriction, to preclude crime, to prevent accused persons from evidently obstructing investigations, prosecution, adjudication or from committing other crimes, or to assure the enforcement of sentences..."*.

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[8] Hoang Tam Phi (2020), *Biện pháp ngăn chặn tạm giam trong luật tố tụng hình sự Việt Nam, Doctor of Law thesis*, School of Law - Vietnam National University, Hanoi.

[9] School of Law - Vietnam National University, Hanoi (2012), *Giới thiệu Công ước về các quyền dân sự và chính trị (ICCPR, 1966)*, Hong Duc Publishing House, Hanoi.

In general, in comparison with the previous Codes (1988 Criminal Procedure Code[10], 2003 Criminal Procedure Code[11]) the current Criminal Procedure Code has stricter provisions on the grounds and conditions for applying Deterrent measures, solving some difficulties and shortcomings in practice. It is more practical, highly feasible, and suitable for the real world context. Thereby ensuring better implementation of the Criminal Procedure Code's principles[12].

However, the overall study of Criminal Procedure Code's current provisions and its implementation shows that some provisions on Deterrent measures are still not suitable in reality, not strictly complying with the principles of Criminal Procedure, especially some principles such as Veneration and protection of human rights and individuals' legitimate rights and interests (Article 8); Sustainment of bodily integrity (Article 10); Protection of individuals' life, health, honour, dignity and belongings and juridical persons' reputation and property (Article 11). Leading to "opportunities" for violations to arise, masks as Deterrent measures.

4.2.1. Grounds for application and cancellation of Deterrent measures

Article 109 of the 2015 Criminal Procedure[13] provides 04 bases for application of Deterrent measures, including: to preclude crime, to prevent accused persons from evidently obstructing investigations, prosecution, adjudication or from committing other crimes, or to assure the enforcement of sentences. Looking into these grounds, some problems can be seen as follows: When there is evidence that the accused persons will make it difficult to investigate, prosecute, adjudicate, Authorities and persons given authority to institute proceedings within their jurisdiction can apply measures of emergency detainment, arrest, and temporary detention,…. However, the

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[10] **Article 61 in the 1988 Criminal Procedure Code on Deterrent measures**: In order to prevent crimes in time or when enough evidence show the accused will hinder investigation, prosecution, adjudication or continue to commit crimes as well as to guarantee the judgment enforcement, Investigation authorities can apply the following Deterrent measures: arrest, custody, temporary detention, ban from leaving residence, guarantee, deposit of money or valuable property as security;

[11] **Article 79 2003 Criminal Procedure Code on Deterrent measures**: In order to prevent crimes in time or when enough evidence show the accused will hinder investigation, prosecution, adjudication or continue to commit crimes as well as to guarantee the judgment enforcement, Investigation authorities, Procuracy, the Court within their jurisdiction or persons with jurisdiction according to thí Code could apply one of the following Deterrent measures: arrest, custody, temporary detention, ban from leaving residence, guarantee, deposit of money or valuable property as security.

[12] Hoàn thiện các quy định về các biện pháp ngăn chặn trong tố tụng hình sự theo yêu cầu của cải cách tư pháp, link: https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/40 accessed on 01/5/2021.

[13] **Article 109. Preventive measures**

1. Competent procedural authorities and persons within their powers can implement measures of emergency custody, arrest, temporary detainment, detention, bail, surety, residential confinement, exit restriction, in order to preclude crime, to prevent accused persons from evidently obstructing investigations, prosecution, adjudication or from committing other crimes, or to assure the enforcement of sentences.

2. The apprehension of persons refers to emergency custody, arrest of perpetrators of crimes in flagrante or wanted fugitives, capture of suspects and defendants for detention, and arrest of persons for extradition.

law does not specifically explain what those *"evidence"* are, thus causing problems such as:

(i). Authorities and persons given authority to institute proceedings "abuse" the application of Deterrent measures, turning it into a tool to discover evidence;

(ii). "Sluggishness" in the work of Authorities and persons given authority to institute proceedings[14], letting them to not actively perform legal proceedings but arbitrarily apply MD, even in cases where it is not necessary;

(iii). One of the causes for violation of human rights[15].

Article 113[16] is about the arrest of suspects and defendants for detention but it only provides provisions on who has the right to order and decide to arrest suspects and defendants (Clause 1); information required in the warrant, decision to approve the warrant/ arrest (Clause 2); and apprehension must not occur at night, except for criminals in flagrante or wanted persons (Clause 3). Grounds for the application of this measure are not mentions.

Up to Article 117[17], provisions on detention only rules on the subject to this measure (Clause 1) together with the authority to issue orders (Clause 2) and the time

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[14] Nguyen Ngoc Chi (2016), *Cơ sở hoàn thiện các qui định về thời hạn trong Luật Tố tụng hình sự Việt Nam*, VNU Journal of Science:Legal Study, Vol 32, No. 2 (2016) 34-43, pp.41.

[15] Le Cam (2007), *Bảo vệ an ninh quốc gia, an ninh quốc tế và các quyền con người bằng pháp luật hình sự trong giai đoạn xây dựng Nhà nước pháp quyền*, Judicial Publishing House, Hanoi, pp.342.

[16] **Article 113. Apprehension of suspects and defendants for detention**

1. The following individuals are entitled to order and decide the apprehension of suspects and defendants for detention:

a) Heads and vice heads of investigation authorities. In this event, the arrest warrant must be approved by the equivalent Procuracy prior to apprehension;

b) Head and vice heads of a People's Procuracy, and head and vice heads of a Military procuracy;

c) Court presidents, Vice court presidents of People's Courts, and Court presidents and Vice court presidents of Courts-martial; trial panel.

2. The arrest warrant and written approval of the arrest warrant must specify full name and address of the arrestee, reasons and other details as per Point 2, Article 132 of this Law.

Enforcers of an arrest warrant must read out the warrant, explain its content, arrestee's duties and rights, make written record of the arrest, and give the warrant to the arrestee.

The apprehension of a person at his place of residence must be witnessed by a representative of communal, ward or town authorities and other individuals. The apprehension of a person at his place of work or education must be witnessed by a representative of the place of work or education. The apprehension of a person at other places must be witnessed by a representative of communal, ward or town authorities.

3. Apprehension must not occur at night, except for criminals in flagrante or wanted persons.

[17] **Article 117. Temporary detainment**

1. Temporary detainment may apply to persons held in emergency custody or arrested against crimes in flagrante, malefactors confessing or surrendering or persons arrested as per wanted notices.

2. The individuals authorized to issue detainment orders as per Section 2 of Article 110 of this Law are entitled to decide temporary detainment.

A decision on temporary detainment must specify full name and address of the person on temporary detainment, reason, time, starting and final date of temporary detainment and details as per Point 2, Article 132 of this Law. The decision on temporary detainment must be given to the person on temporary detainment.

3. Enforcers of decisions on temporary detainment must inform persons on temporary detainment and explain their duties and rights as per Article 59 of this Law.

4. The individual issuing the decision on temporary detainment, in 12 hours upon making such decision, must send the decision and supporting documents to the equivalent Procuracy or a

limit to make a decision on Deterrent measures (Clause 3). In this law, there are also no grounds for application of detention, leading to the fact that even when it is not necessary to apply temporary detainment, the accused persons still have to be detent in a detention facility for a period of time before they are transferred to another Deterrent measures with less restriction.

With regard to the detention measure in Article 119[18], lawmakers stipulate that it can be applied to the accused, who *"perpetrating a horrific or extremely severe felony"* (Clause 1). It can be seen that the decision to temporarily detain the accused, can be applied freely by Authorities and persons given authority to institute proceedings because apart from the criminal classification basis in the 2015 Penal Code, the law has no other specification. Therefore, in reality, derived from the perception that Deterrent measures should be applied to facilitate the process of

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competent Procuracy. If the temporary detainment is found unjustified or unnecessary, the Procuracy issues a decision on annulling the decision on temporary detainment. The individual issuing the decision on temporary detainment must immediately discharge the person on temporary detainment.

[18] **Article 119. Detention**

1. Detention may apply to suspects and defendants perpetrating a horrific or extremely severe felony.
2. Detention may apply to suspects or defendants committing a felony or misdemeanor punishable with incarceration for more than 02 years as per the Criminal Code if grounds show that:
a) Such persons commit crimes despite of existing preventive measures against them;
b) No definite place of residence is known or a defendant's identity is unidentified;
c) Such persons have absconded and have been arrested as per wanted notices or are evidently going to vanish;
d) Such persons continue criminal acts or are evidently going to continue crimes;
đ) Such persons commit acts of bribing, coercing or inciting other individuals to give false statements or documents, destroying or forging case evidences, documents and item, shifting property related to the case away, threatening, repressing or avenging witness testifiers, crime victims, denouncers and their kin.
3. Detention may apply to suspects or defendants committing a misdemeanor punishable with maximum 02-year imprisonment as per the Criminal Code if they continue criminal acts or are fugitives arrested as per wanted notices.
4. If suspects or defendants have clear information of residence and identity and are gestating, raising a child less than 36 months of age, suffering from senility or serious diseases, detention shall be replaced by other preventive measures, except that:
a) They abscond and get arrested as per wanted notices;
b) They continue criminal acts;
c) They commit acts of bribing, coercing or inciting other individuals to give false statements or documents, destroying or forging case evidences, documents and item, shifting property related to the case away, threatening, repressing or avenging witness testifiers, crime victims, denouncers or their kin.
d) Suspects or defendants breach national security and detention evidently prevents them from transgressing national security.
5. Authorized individuals as defined in Section 1, Article 113 of this Law are entitled to issue orders and decisions on detention. Detention orders made by individuals as defined in Point a, Section 1, Article 113 of this Law must be approved by the equivalent Procuracy prior to the enforcement of such orders. The procuracy, in 03 days upon receiving a detention order, written request for approval and relevant documents, must approve or deny such request. The procuracy must return documents to investigation authorities upon the former's completion of the ratification process.
6. Investigation authorities must inspect identity papers of persons in detention and inform their family members, workplace, educational facility or local authorities in the commune, ward or town where they reside.

handling the case, most of the suspected offenders are categorized to be in detention. Furthermore, the criminal classification under the current provisions of the Penal Code used to apply Deterrent measures is also inappropriate from a Human Right-based Approach (HRBA), because in many cases, people are suspected of committing crimes due to a temporary outburst, completely unprepared, but causing serious consequences for social relations that are protected by criminal law (for example, a traffic accident causing death). Therefore, if the accused is a first time defendant, have a clear residential address, have no reason to flee or continue to commit crimes, it is not necessary to apply detention.

In addition to the application of Deterrent measures, the 2015 Criminal Procedure Code also provides the ground for cancellation of Deterrent measures[19] to fit with the real life practice, as well as resolving the situation in which the application of Deterrent measures is no longer required (the decision to not prosecute; suspending or terminating the investigation, terminating the case; suspend the investigation against the accused, terminate the case against the accused; The defendants are declared innocent by the Court, exempt from penal liability or from penalties or imprisonment but are entitled to suspended sentence or warning penalty, fine, non-custodial reform).

Accordingly, Clause 2 of Article 125, states: *"Investigation authorities, procuracies, and Courts shall terminate or replace preventive measures, if deemed superfluous, with other preventive measures"*. Here, the law does not specifically explain when Authorities and persons given authority to institute proceedings have to cancel the Deterrent measures but offer *"if deemed superfluous, with other preventive measures"*. So when can it be deemed is *"superfluous"?* When can *"other preventive measures"* take place? What are those *"other"* Deterrent measures?... The above provisions have made the cancellation of Deterrent measures for the accused inherently under the State's regulations, now even entirely depends on the subjective will of the Authorities and persons given authority to institute proceedings, meanwhile, the longer the period of application for Deterrent measures such as emergency custody, arrest, temporary detainment or detention the riskier it is for the accused to be victim of torture.

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[19] **Article 125. Termination or alteration of preventive measures**

1. Every preventive measure in effect must be terminated in one of the following events:
a) Decision not to institute criminal proceedings;
b) Terminate investigation and dismiss lawsuit;
c) Terminate investigation and lawsuit against suspects;
d) The Court declares a defendant not guilty, exempt from criminal liability, penalty or custodial sentence but imposes a suspended sentence or warning penalty, fine, non-custodial rehabilitation.
2. Investigation authorities, procuracies, and Courts shall terminate or replace preventive measures, if deemed superfluous, with other preventive measures.
The procuracy decides to terminate or replace preventive measures that it has approved during the stage of investigation. The authority requesting approval of a preventive measure excluding temporary detainment sanctioned by The procuracy, in 10 days prior to its loss of effect, must inform The procuracy of such expiration to have it terminated or replaced.

4.2.2. Authority to give out order to arrest and temporary detainment order

Clause 1, Article 113 provide that the following persons have the right to order and decide to arrest suspects and defendants for detention:

a) Heads and vice heads of investigation authorities. In this event, the arrest warrant must be approved by the equivalent Procuracy prior to apprehension;

b) Head and vice heads of a People's Procuracy, and head and vice heads of a Military procuracy;

c) Court presidents, Vice court presidents of People's Courts, and Court presidents and Vice court presidents of Courts-martial; trial panel.

Among the Deterrent measures, detention is the most severe measure as it affects one of the citizens' Constitutional rights, the right to liberty. The study on the authority to decide on the application of Deterrent measures in the Criminal Procedure Codes of many countries shows that most country assigns the power to arrest people to the police, except for Vietnam. In France, Japan, Korea, Russia..., the Court is the only agency authorized to decide on the detention of suspected offenders on the grounds of police's documents and the document from the prosecutor's office. The consideration and decision on detention are usually handled by a Judge. Some countries assign the Prosecutor's Office to decide the detention, but it must obtain the consent of the Court or after such a decision, it must be notified to the Court[20]. And most experts in the field agree that it is necessary to limit the power of Authorities and persons given authority to institute proceedings from deciding to apply this measure.

4.2.3. Duration of Deterrent measures

During the period of 2008 - 2018, which is the transition period between the implementation of the 2003 Criminal Procedure Code and 2015 Criminal Procedure Code, since the 2015 Criminal Procedure Code takes effect from January 1, 2018 up till the time of this paper, the number of people whose temporary detention time limits were exceeded has the tendency to decrease, though it is still relatively high. According to the statistics of the Department of Criminal justice Statistics and Information Technology of the Supreme People's Procuracy, as of 2018, there are still 140 people with overdue detention (**Table 1**).

[20] Về các biện pháp ngăn chặn trong tố tụng hình sự, link: http://vks.hagiang.gov.vn/vi/news/Huong-dan-nghiep-vu/Ve-cac-bien-phap-ngan-chan-trong-to-tung-hinh-su-137/ accessed on 03/5/2021.

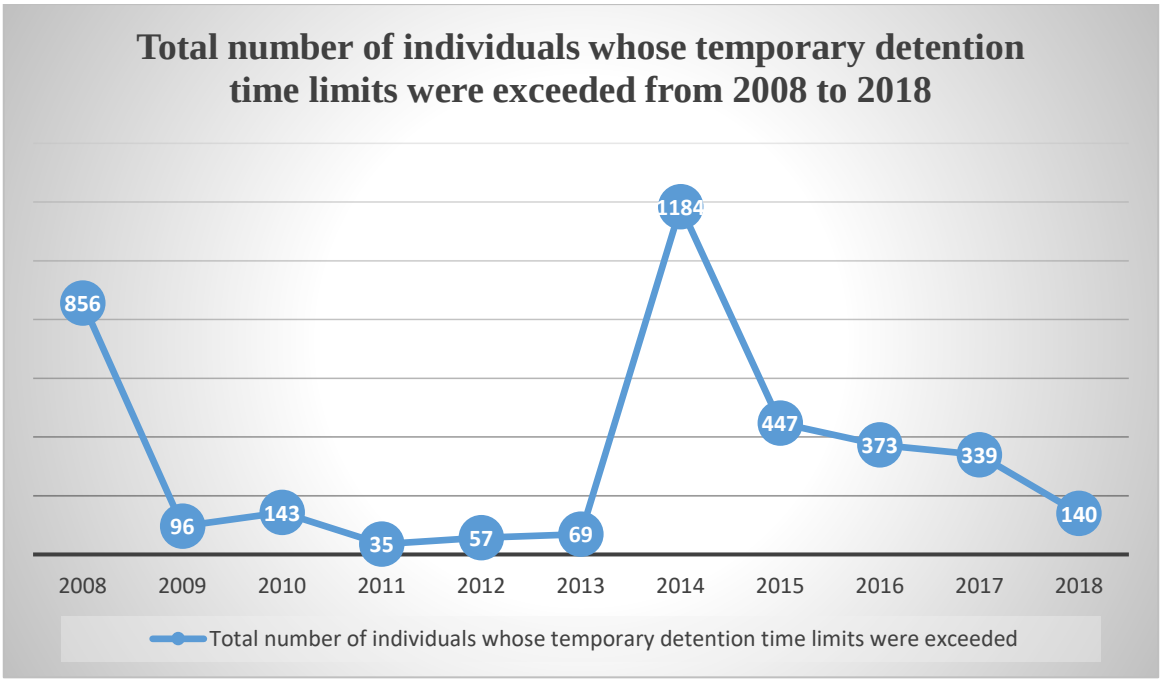

Table 1

When studying the duration of Deterrent measures, some problems can be found: The current Criminal Procedure Code does not mention the time limit for the implementation of the process: Court staff receiving documents from the Procuracy - Court staff transfer documents to the Court presidents (the person responsible for assigning the Judge) - The judge studies the case file - The judge studies and recommends the Court presidents to apply detention prevention measures. Because this process has not been specified in the law, it leads to a high proportion of overdue detention due to the responsibility of the Court[21]. Data from 2008 to 2018 provided by the Department of Criminal justice Statistics and Information Technology of the Supreme People's Procuracy shows the exceeded detention in 04 stages of a Criminal case: investigation - prosecution – adjudication - judgment enforcement, in which the number of exceeded time during the third stage: adjudication always accounted for the highest percentage and by 2018 this figure was 122/140 people (**Table 2**).
One of the many reasons leading to this situation is that the current number of Court staff does not met the requirements for judicial reform, there is no coordination between different agencies to conduct legal proceedings, causing the situation of the accused persons suffer from exceeding detention to continue.

[21] Nguyen Trong Phuc (2015), *Chế định các biện pháp ngăn chặn theo luật tố tụng hình sự Việt Nam. Những vấn đề lý luận và thực tiễn (Monograph)*, National Political Publishing House, Hanoi, pp. 173.

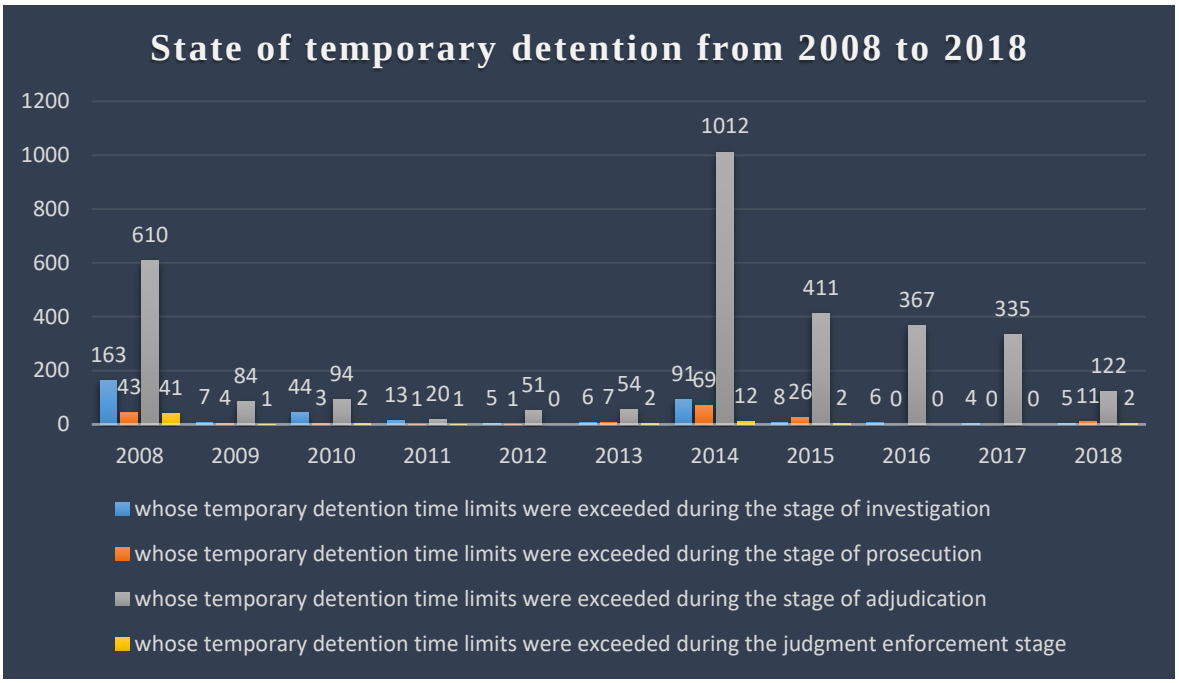

Table 2

In the regulations on emergency custody[22], arrested of perpetrators of crimes in flagrante[23], capture of suspects and defendants for detention[24], the current Criminal Procedure Code does not have any regulations on the time of termination for the

[22] **Article 110. Emergency custody**

4. Upon holding persons in emergency custody or taking in emergency detainees, investigation authorities and units assigned to investigate, within 12 hours, must take statements promptly, and individuals as stated in Point a and Point b, Section 2 of this Article must issue a temporary detainment order, arrest warrant and discharge order on the detainee. The emergency custody order and relevant documents must be delivered promptly to the equivalent Procuracy or competent ones for ratification.

Individuals as per Point c, Section 2 of this Article, after holding persons in emergency custody, must deliver by force detainees and bring emergency custody documents to investigation authorities adjacent to the first airport or sea port where the airplane or ship lands or docks, when returning. Upon taking in detainees, investigation authorities must take statements promptly within 12 hours, and individuals as per Point a, Section 2 of this Article must issue a temporary detainment order, arrest warrant or release order on the emergency detainee. The emergency custody order and relevant documents must be delivered to the equivalent Procuracy for approval.

The emergency custody order must specify full name and address of the detainee, reason and grounds for detainment according to Section 1 of this Article and Section 2, Article 132 of this Law.

[23] **Article 111. Arrest of perpetrators of crimes in flagrante delicto**

1. Everyone is permitted to arrest and delivery by force a person, who is caught in and immediately after the act of committing a crime and chased, to the nearest police station, Procuracy or People's committee. The said authorities, when taking in the detainee, must make written record of the incident and delivery by force the detainee or report to competent investigation authorities in prompt manner.

2. Everyone is permitted to disarm the detainee when capturing a person caught in the act of coming a crime.

3. If communal, ward or town police unit or police station detects, arrests and detains a perpetrator of a crime in flagrante, it shall temporarily seize weaponry, retain relevant documents and items, make written record of arrest, take initial statements, protect crime scene as per the laws, deliver by force the detainee or report to competent investigation authorities in prompt manner.

[24] **Artical 113** (quoted)

arrest or declaration of release (if Authorities and persons given authority to institute proceedings can not prove that they have committed the crimes).

The current Criminal Procedure Code prescribes the detention period for investigation not exceeding 02 months for less serious crimes, not exceeding 03 months for serious crimes, not exceeding 04 months for very serious and exceptionally serious crimes. In a case with many complications, considering that it is necessary to have a time extension for the investigation and there is no ground to change or cancel the detention Deterrent measures, Investigation authorities has to submit a written request to the Procuracy for an extension (the issue of extension of the detention period is specified in Clause 2, Article 173 of the 2015 Criminal Procedure Code[25]) within 10 days before the expiration date. In this regard, the author Tam Phi Hoang believes that the application of temporary detention should be based on the purpose of Deterrent measures, that is to promptly prevent crime, ensure the accused do not cause any difficulty during the resolution process and to ensure the enforcement of their sentences. So in the case of an accused person with none of the signs above, it is not necessary to apply for temporary detention.

5. Solutions for amending and supplementing to the Deterrent measures in the 2015 Criminal Procedure Code to eliminate tortuous acts against the accused

5.1. Better regulations on grounds for application, cancellation of Deterrent measures

First and foremost, Article 109 of the current Criminal Procedure Code only prescribes the ground of applying Deterrent measures, this is unreasonable because each Deterrent measures differs from one to another, so one regulation should not be governing them all. Therefore, it is necessary to separate the rationale for each of the Deterrent measures to avoid unfounded widespread application.

Second, the application of Deterrent measures without solid grounds not only will make it more difficult to solve the case but also facilitates a favourable environment for Authorities and persons given authority to institute proceedings, to abuse the given power. While Deterrent measures like bail, surety, residential confinement, which doesn't restrict as many rights of the people, are still not prioritized. On the other hand, as analyzed, the current provisions of the Criminal

[25] **Article 173. Time limit for detention for investigation**
2. If an investigation must be prolonged due to a variety of complex facts in the case and no grounds for change or termination of detention exist, the investigation authority shall, within 10 days prior to the expiration of the time limit, request The procuracy to extend the detention.
Detention is extended as follows:
a) Detention of offenders of misdemeanors may be extended once for 01 more month;
b) Detention of offenders of felonies may be extended once for 02 more month;
c) Detention of offenders of horrific felonies may be extended once for 03 more month;
d) Detention of offenders of extremely severe felonies may be extended twice, for 04 more months each time.

Procedure Code are to apply Deterrent measures to very serious and extremely serious crimes, but this is based on the danger level of the crime, not the risk posed by the accused. Therefore, in our opinion, the law should only stipulate that the purpose of Deterrent measures is to: Prevent crime.

Thirdly, legislators should add one more condition before using temporary detention. That this measure should only be applied after all other methods have failed. This supplementary is aimed to encourage Authorities and persons given authority to institute proceedings to use less restrictive Deterrent measures in their works and detention should only be viewed as a last resort.

Thus, the basis for applying Deterrent measures are documents and evidence that predict the possibility of the accused persons obstructing the investigation – prosecution - adjudication - judgment enforcement, continuing to commit crimes. When applying Deterrent measures, it must be based on one of the grounds mentioned above. Whether or not to apply Deterrent measures and which Deterrent measures depend on the nature and the severity of the offence, as well as the characters of the accused, as well as the condition and ability to manage them of the Authorities and persons given authority to institute proceedings[26].

Fourth, on the grounds for cancellation of the Deterrent measures, to avoid the arbitrary of the application, it is necessary to amend and supplement Clause 2 of Article 125 in the direction which more clearly defines the responsibilities of the Investigation authorities, the Procuracies and the Court in reviewing the decision. Accordingly, Clause 2 of Article 125 can be redesigned as follows: "Investigation agencies, Procuracies, Courts must cancel the deterrent measure or replace it with other less restrictive measures when there are not enough grounds to justify the use.… "; At the same time, specific cases that need to cancel Deterrent measures should also be clearly stated out[27].

5.2. Reducing the jurisdiction to order the arrest of suspects and defendants for detention

Resolution 49-NQ/TW of the Politburo has stressed on the necessity to apply multiple measures to raise adjudication quality through litigation, specifically: *"To reduce the number of persons authorized to decide on the application of custody measures"*. This goal is consistent with the spirit of the 2013 Constitution and the current trend of democratic expansion, and respecting human rights. To conclude, the right to order and decide on the application of custody measures should be:

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[26] Nguyen Ngoc Chi (2014*), Hiến pháp 2013 và việc hoàn thiện biện pháp ngăn chặn bắt, tạm giữ, tạm giam trong tố tụng hình sự*, VNU Journal of Science:Legal Study, Vol 30, No. 3 (2014), pp. 15-23;

[27] Bảo đảm quyền của người bị tạm giam theo quy định của Bộ luật Tố tụng hình sự năm 2015. http://lapphap.vn/Pages/TinTuc/210625/Bao-dam-quyen-cua-nguoi-bi-tam-giam-theo-quy-dinh-cua-Bo-luat-To-tung-hinh-su-nam-2015.html, accessed on May 6th, 2021.

(i). During the investigation phase, the warrant to arrest the accused for detention and the temporary detention order should only be given to the Prosecutor General, Instead of having the heads and deputies of investigation authorities at all levels to have jurisdiction over ordering detention as per the current provisions of the 2015 Criminal Procedure Code. They should only be obligated to collect and provide documents and evidence for the Deputy Prosecutor General. Since detention is a special Deterrent measure, it is not advisable to give the Deputy Prosecutor General the right to order the arrest of a defendant and to order detention. Only in the absence of the Prosecutor General can a Deputy Prosecutor General has the authority to order the arrest of the accused for detention and order of detention;
(ii). During the period when the case file is transferred to the court for preparation, only the Chief Justice should have the authority to detain the accused;
(iii). At trial, this authority rests with the trial panel.

5.3. Shorten the duration Deterrent measures

First, specify the duration for the implementation of the process: Court staff receiving documents from the Procuracy - Court staff transfer documents to the Court presidents (the person responsible for assigning the Judge) - The judge studies the case file - The judge studies and recommends the Court presidents to apply detention prevention measures - as mentioned in section 4.2.3 and place the Authorities and persons given authority to institute proceedings involved responsible for any exceed. Current practice demonstrated that in the trial preparation phase, only upon acceptanting the case did presiding judges decide on the application, change or cancellation of Deterrent measures.

Second, specifying the end of emergency custody; arrest of perpetrators of crimes in flagrante, capture of suspects and defendants for detention.

Finally, in order to further improve the provisions on the detention period, it is necessary to pay attention to the restriction on detention for some types of crimes, according to the view of Dr. Van Do Tran (Deputy Chief Justice of the Supreme People's Court, Chief Justice of the Central Military Court): in the context of Vietnam, it is possible to study in order to limit the detention of the accused and defendants for some the following types of crimes: crimes of infringing upon the economic management order; environmental crime; several crimes belonging to the group of property infringement (except for robbery, kidnapping to appropriate property, mugging, ...); a number of crimes belonging to the group of violating public safety, public order and administrative order; abuse of power; public justice offences. Combining measures such as guarantee, a deposit of money or valuable assets to replace Deterrent measures like arrest, and detention. At the same time, those who are under 18 years old should be considered for a shortening of the detention to ensure friendlier proceedings for this group.

6. Conclusion

The matter of preventing and combating torture by reconsidering several Deterrent measures in the 2015 Criminal Procedure Code, though contained certain shortcomings, still has potential and need further investment. To protect human rights in criminal justice and ensure the dignity of the law, in the coming time, Vietnamese legislators no doubt will continue to try to perfect the path toward international integration

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