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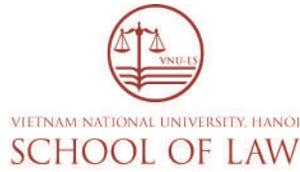
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COMBATING TORTURE IN ASIA: LAW AND PRACTICE

(International Conference Proceedings)



COMBATING TORTURE IN ASIA: LAW AND PRACTICE

(International Conference Proceedings)

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PHÁP LUẬT VÀ THỰC TIỄN**

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PREFACE

Torture, as well as cruel, inhuman or degrading treatment, can result in human rights violations and is therefore banned at all times, in all places, including in times of war. The prohibition against torture has been stipulated in the Universal Declaration of Human Rights 1948, as well as the United Nations Convention against Torture (CAT) and its Optional Protocol.¹

Although most Asian states have ratified the CAT, “torture is an ‘expanding scourge’ in Asia.”² In that context, an online conference titled “Combating Torture in Asia: Law and Practice” was hosted on 18 and 19 May 2021 by:

- Asian Law Centre, Melbourne Law School, The University of Melbourne
- School of Law, Vietnam National University Hanoi
- Anti-Death Penalty Asia Network (ADPAN)
- Graduate Academy of Social Sciences, Vietnam

The objectives of this conference were to provide an open forum for experts from Asian countries to discuss theoretical and practical aspects of combating torture in the Asia-Pacific region. This included a discussion of the approval and ratification of CAT in Asian countries that have not yet ratified it, such as Vietnam. Presentations centred around the following themes:

- the compatibility of Asian anti-torture legislation with CAT;
- political, social, and cultural characteristics of Asian countries affecting torture policy and legislative prevention; and
- challenges in preventing torture in Asian countries.

After rigorous peer-review, revision and editing processes, nineteen papers that were presented during the conference have been selected to be included in this book of conference proceedings. The School of Law, Vietnam National University (Hanoi)

¹ Preventing Torture: An Operational Guide for National Human Rights Institutions

© Copyright OHCHR, APT and APF May 2010. At https://www.ohchr.org/Documents/Countries/NHRI/Torture_Prevention_Guide.pdf

² HRW: Torture is an ‘expanding scourge’ in Asia, <https://www.hrw.org/news/2014/06/26/hrw-torture-expanding-scurge-asia>

decided to publish this book to disseminate foreign and domestic scholars' expert research on anti-torture and to share knowledge of comparison with other countries in Asia and in the world.

We acknowledge the contribution of the Asian Law Centre, Melbourne Law School, Anti-Death Penalty Asia Network (ADPAN) and Graduate Academy of Social Sciences, Vietnam. We would like to thank the Selection Committee, the Editorial Board, our distinguished colleagues for their fruitful contribution: Mr. Dobby Chew, Ms. Debbie Yu, Dr Sriprapha Petcharamesree, A/Prof. Bui Nguyen Khanh, Dr. Dinh Thi Mai, Dr. Mai Van Thang, Dr. Ngo Minh Huong, Mr. Nguyen Ngoc Toan, Mr. Nguyen Xuan Giang, Ms Nghiem Minh Giang, Ms Phi Huyen Trang as well as Mr. Vu Thanh Cu and other volunteers for their contributions in editing this book.

Hanoi, August 2021

The School of Law, Vietnam National University, Hanoi

CRIMINALIZATION OF TORTURE IN A FEDERAL NEPAL – COMBATING TORTURE THROUGH THE ESTABLISHMENT OF A FUNCTIONING CRIMINAL JUSTICE SYSTEM IN NEPAL

Prof. Dr. Robert Esser*, Anna-Lena Sümnick**

1. INTRODUCTION

To overcome the prevailing culture of ‘impunity’ for alleged torture and other forms of severe ill-treatment that has existed in Nepal at the police and prosecution level since the civil war (1996-2006), Nepal has introduced responsive legislation.³ However, even today, there are still considerable difficulties while enforcing the legal framework provided in the legislation in practice. As we will elaborate in this paper, these deficiencies range from the incompatibility of national law provisions with international (UN) human rights standards, through the interpretation of the laws, to their practical implementation by courts and police forces.

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³ For example: Constitution of Nepal (2015), Country Penal (Code) Act, 2074 (2017) and (Revised) National Criminal Procedure (Code) Act (2017).

Nepal has made concrete commitments against torture by introducing the Constitution of Nepal (2015), the Country Penal (Code) Act, 2074 (2017) and the (Revised) National Criminal Procedure (Code) Act (2017), as well as ratifying international instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), both ratified on the 14th of May 1991. However, the difficulties lie in translating the relevant commitments and guarantees into practice.

In addition to formulating standards for the appropriate criminalization of future human rights violations and for dealing with those that have already been committed, classic guarantees of criminal procedure under the rule of law have to be established. These include central defence standards (access to a defence counsel for the accused, right to information, the duty to instruct during arrest, freedom from self-incrimination and the right to silence) as well as victim protection guarantees, which must be substantially strengthened in Nepal and consistently expanded in practice.

The reprocessing of the existing deficiencies has been the objective of the project “Criminalization of Torture and Enforced Disappearance in a Federal Nepal” (April 2019 to December 2020), funded by the German Federal Foreign Office. In addition to the Research Center Human Rights in Criminal Proceedings (HRCP) of the University of Passau, the International Commission of Jurists (ICJ), the NGOs Advocacy Forum (AF) and Terai Human Rights Defenders Alliance (THRDA) were involved as partners in the project.

The present findings are the result of numerous background discussions with prosecutors, police officers, civil society, victims of human rights violations and other representatives of the legal profession during different events within the project, such as field missions to Province No. 2, a visit to the National Human Rights Commission, the local office of the United Nations (UN Mission to Nepal) and an ICJ high-level mission in December 2019.

2. THE NEED FOR CRIMINAL LIABILITY OF TORTURE

Nepal slowly breaks away from a long history of torture and strives to decrease its number of victims of torture. Nepal Police, Armed Police Force, Military and Forest Guards used torture on an excessive scale during the long-lasting civil war in Nepal, especially to systematically⁴ combat and suppress political uprisings.⁵ In particular,

⁴ Committee against Torture, Report on Nepal adopted by the Committee against Torture under Article 20 of the Convention at its 46th session, 9 May-3 June 2011, UN Doc. CAT/C/46/R.2/Add.1, paras. 97, 108; *Kathmandu School of Law, Torture & Improper Use of Force in Nepal 2017*, p. 41.

⁵ See: Human Rights Committee, Basnet/Nepal, Communication No. 2051/2011, 26.11.2014, UN Doc. CCPR/C/112/D/2051/2011, para. 8.3.

prisoners were physically and psychologically tortured in their barracks on an almost daily basis for several weeks and months, mainly during interrogations.⁶

The reports about the number of people tortured during the civil war vary. According to the Conflict Report of the United Nations Office of the High Commissioner for Human Rights, it is estimated that far beyond 2,500 people were subjected to a method of torture during this period.⁷ However, the *Centre for Victim of Torture, Nepal* (CVICT) specifies 1800 persons subjected to torture per year and 17000 cases in total.⁸ Pursuant to *Advocacy Forum*, the average rate of prisoners subjected to torture during the years of 2001-2006 was 40.1 %, where the highest peak was found in 2002 at 53.8 %; as a result to a study carried out by *Advocacy Forum* in 2019, 19.8 % out of 1.005 visited detainees complained about torture and ill-treatment (23.5 % in 2018).⁹

In 2011, Nepal declared to the international community that torture in any form is no longer acceptable.¹⁰ Despite that, the Office of the Attorney General confirmed international accusations regarding the continued use of the means of torture in respect of up to 15 % of prisoners in penal institutions (in 2012/2013).¹¹ Nevertheless, the numbers of people affected by torture have been steadily decreasing since the civil war.¹² However, for some years now, a new phenomenon of discrimination has been emerging within the torture issue; it appears that people from low castes (especially Dalit/untouchables) are increasingly victims of severe mistreatment.¹³

3. IMPACT OF THE NEW LEGISLATION

By enacting new legislation, such as the Nepal Constitution and the Penal Code, Nepal has taken a great step to address the prevailing culture of “impunity” for alleged torture crimes. The Comprehensive Peace Agreement (2006) concluded between

⁶ Human Rights Committee, *Giri/Nepal*, Communication No. 1761/2008, 27.4.2011, UN Doc. CCPR/C/101/D/1761/2008, para. 2.5; Human Rights Committee, *Sedhai/Nepal*, Communication No. 1865/2009, 28.10.2013, UN Doc. CCPR/C/108/D/1865/2009, paras. 2.5, 2.6.

⁷ Office of the High Commissioner for Human Rights, *Nepal Conflict Report*, 2012, p. 20.

⁸ *Khanal*, *Right against Torture in International Law: A case study of Nepal*, p. 105.

⁹ *Advocacy Forum*, *Torture in Nepal in 2019: The Need for new Policies and Legal Reform*, p. 1.

¹⁰ Human Rights Council, *Report of the Working Group on the Universal Periodic Review (Nepal)*, UN Doc. A/HRC/17/5, 8.3.2011, para. 101.

¹¹ *Kathmandu School of Law*, *Torture & Improper Use of Force in Nepal 2017*, p. 41.

¹² *Advocacy Forum*, *Asian Human Rights Commission, The Redress Trust*, World Organization against Torture, *Submission to the United Nations Universal Periodic Review of Nepal*, 23rd Session of the Working Group on the UPR Human Rights Council, 22.3.2015.

¹³ See: *Advocacy Forum*, *Rise of Torture in 2018 – Challenges Old & New Facing Nepal*, 26.6.2019, p. 23 ff.; *Advocacy Forum*, *Torture in Nepal in 2014 – More of the same*, 26.6.2015, p. 17 ff.; Office of the High Commissioner for Human Rights, *Press Release*, „Continued plight of the „untouchables“, *Press Release*, 24.5.2013.

the then Nepalese Government and the Maoist Party was the first to address the emerging demands for a comprehensive and absolute ban on torture to be enshrined in national law. Sections 7.1.3, 7.1.4 and 7.3.1 of the Comprehensive Peace Agreement refer directly to such a prohibition and its mutual observance.

Shortly afterwards, the Supreme Court of Nepal issued a directive order to the Government of Nepal to criminalize torture and provide appropriate redress to torture survivors.¹⁴ It referred to the international obligation to pass a law criminalizing torture in accordance with Articles 2 and 4 of the Convention against Torture.¹⁵

After years of effort and countless obstacles, Section 22(1) of the Nepal Constitution now explicitly states that no person deprived of liberty ('in detention') shall be subjected to physical or mental torture or treated in a cruel, inhuman or degrading manner (right against torture). According to subsection 2, any such act as defined in subsection 1 is punishable; a victim of such an act has the right to compensation by the state in accordance with national law. Due to the implementation of international legal requirements, the prohibition of torture must apply absolutely in Nepalese law, i.e. without exception, even during a political crisis (cf. Article 4 (2) International Covenant on Civil and Political Rights).

Section 22 (1) of the Nepal Constitution formally restricts the prohibition of torture to persons in custody but is supplemented by Section 39 (7) of the Nepal Constitution.¹⁶ Thus, the content of the prohibition of torture in the Nepalese Constitution does not fully reflect the larger definition of Article 1 (1) Convention against Torture. It is unclear whether the Constituent Assembly was guided by the wording of Article 1 Convention against Torture in its drafting of the legislation.

Moreover, The Compensation Relating to Torture Act 2053 (1996) explicitly prohibits in Section 3 (1) the use of torture in relation to any person who, during the criminal investigation, inquiry or judicial proceedings, or for any other reason, has been deprived of liberty. The "Explanation" to the Act explicitly includes (provisional) detention in this context. Torture is defined in Section 2 as "physical or mental torture inflicted upon a person in detention in the course of investigation, inquiry or trial or for any other reason and includes any cruel, inhuman or degrading treatment given to him/her". According to Section 11 of the Compensation Relating to Torture Act,

¹⁴ Supreme Court Nepal, Ghimire & Dahal/Government of Nepal, 17.12.2007, for excerpt of verdict see: *Advocacy Forum*, Criminalize Torture, June 2009, p. 79, Appendix B.

¹⁵ *Advocacy Forum*, Nepal – Is the Government Unable or Unwilling to Prevent and Investigate Torture?, 26.6.2013, p. 48.

¹⁶ Section 39 (7) of the Nepal Constitution provides that children may not be subjected to physical, mental or other torture, either at home, at school or in other places or situations.

torture does not include pain or suffering that typically results from detention in accordance with the applicable law, i.e. from the deprivation of liberty itself.

On 21.11.2014, the Torture and Cruel, Inhuman and Degrading Treatment (Control) Bill 2014 (Anti Torture Bill) was launched, which included the criminalization of acts of torture and other forms of cruel, inhuman or degrading treatment or punishment, but was never passed. Numerous international and national non-governmental organizations consider the content of this Bill to be insufficient in conveying the required guarantees and rights.¹⁷ They are particularly critical of the individual definitions, the low range of punishments and the shortened time limit for filing criminal charges, as well as the non-formally secured obligation to conduct effective investigations to clarify the corresponding accusations (see Section 13 Anti Torture Bill).

However, it should be noted that Section 7 of the Anti Torture Bill imposes a positive duty on police officers to inform their superiors if they become aware of the use of torture. It is the duty of the superior to immediately stop any continuation of torture or inhuman or degrading treatment (Section 6 (1) Anti Torture Bill). In the event of a violation of this duty, however, the possible sanction of the superior is limited to an internal disciplinary sanction (Section 6 (2) Anti Torture Bill).

4. EVALUATION OF THE EXISTING LEGISLATION ON THE PROHIBITION OF TORTURE

The long-awaited qualification of torture as a criminal offence under criminal law shows some shortcomings that need to be addressed in the future. In August 2018, the Country Penal (Code) Act, 2074 (2017) and the (Revised) National Criminal Procedure (Code) Act (2017) came into force. As a result, torture became a criminal offence. The actual criminal liability is determined by Section 167 of the Penal Code. This provides that no member of an authority responsible for investigating or prosecuting a criminal offence may implement a corresponding law, take someone into custody, or detain, subject or cause to be subjected a person to physical or mental torture or cruel, brutal, inhuman or degrading treatment.

It further clarifies that the intentional infliction of physical or mental pain or suffering on a person who is arrested, detained, imprisoned, or placed in preventive housing qualifies as torture if the treatment is for the purpose of obtaining information of any kind, extorting a confession, as punishment for the conduct, to induce fear, intimidation, or coercion, or to commit any other act contrary to the law in general. In contrast to Section 22 of the Nepal Constitution, Section 167 Penal Code closely follows the wording and definition of torture in Article 1 (1) Convention against Torture.

¹⁷ See: *International Commission of Jurists*, The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014, A Briefing Paper, June 2016.

However, many aspects are still left out by the new legislation. Redress has been limited with the maximum years of imprisonment prescribed at five years (Section 167 (2) Penal Code), which does not match with the gravity of torture crimes. Furthermore, the victims' ability to report violations of their rights is limited to a period of six months (Section 170 Penal Code). Moreover, there is still no prohibition on the use of evidence for statements made under torture (see Article 15 Convention against Torture), which is particularly important in light of the fact that most convictions in Nepal are based solely on confessions.¹⁸

5. THE WIDE DIVERGENCE OF LEGAL STANDARDS AND REALITY

In particular, when it comes to granting an effective remedy, the prescribed legal standards and the reality diverge widely. It is one of the fundamental guarantees of the Constitution of Nepal that an effective domestic remedy for an alleged violation of the prohibition of torture shall exist (Section 22 (1) Nepal Constitution). As soon as there is plausible evidence that a person taken into custody has been subjected to violence or torture, the court must order the police department concerned to grant the injured or tortured person provisional legal protection and disciplinary measures to be taken against the officer concerned (Section 22 (5) Criminal Procedure Code).

In practice, however, many victims have been denied legal recourse, particularly in dealing with human rights violations from the civil war.¹⁹ To investigate the conflict-era human rights violations, Nepal's two transitional justice bodies, the Truth and Reconciliation Commission (TRC) and the Commission for the Investigation of Enforced Disappeared Persons (CIEDP), were founded in 2015. However, until today, they have not been able to make much progress and are mired in controversy.²⁰

In order to ensure the effectiveness of the investigations and proceedings, an association of Victims, the Conflict Victims' Common Platform (CVCP), emerged and filed a complaint with the Supreme Court of Nepal.²¹ This judgement, as well

¹⁸ This fact emerges from the discussions held on site during the aforementioned project.

¹⁹ Human Rights Committee, Sharma/Nepal, Communication No. 2265/2013, 6.4.2018, UN Doc. CCPR/C/122/D/2265/2013, para. 10.11; Human Rights Committee, Giri/Nepal, Communication No. 1761/2008, 27.4.2011, UN Doc. CCPR/C/101/D/1761/2008, para. 7.10; Human Rights Committee, Tharu et al./Nepal, Communication No. 2038/2011, 3.7.2015, UN Doc. CCPR/C/114/D/2038/2011, para. 10.10; Human Rights Committee, Maya/Nepal, Communication No. 2245/2013, 23.6.2017, UN Doc. CCPR/C/119/D/2245/2013, paras. 12.3, 12.7.

²⁰ *International Commission of Jurists, Nepal's Transitional Justice Process: Challenges and Future Strategy – A Discussion Paper*, August 2017, p. 5.

²¹ *Human Rights Watch, Advocacy Forum, No Law, No Justice, No State for Victims – The Culture of Impunity in Post-Conflict Nepal*, November 2020, p. 6.

as similar judgements have so far been largely ignored.²² In the corresponding judgement on February 26, 2015, the Supreme Court consequently determined that the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act 2014 (the Act) violated international standards of transitional justice and had to be amended to close the loopholes that allow amnesty for those responsible for the most serious human rights violations. For this reason, the Court repeatedly declared the Act incompatible with both the Nepalese Constitution and international law, reaffirmed the importance of transitional justice and ordered the Act to be amended accordingly.²³ Until that happens, it cannot be expected that much progress can be achieved. Until now, the transitional bodies have not done much more than collect over 60,000 complaints and have not been able to close even one case they registered within this period. This inertia mostly leads back to the lack of political will and support from the Government. In order for the transitional bodies to be effective and victim-friendly, the amnesty provision must be removed.²⁴

Over the years, the Supreme Court has instructed the Government to enact legislation to criminalize serious crimes, like torture, and to treat the criminalization of human rights violations as a part of the guarantee of non-repetition.²⁵ In the case of torture, this has been crowned with success, at least to the extent that there are regulations that now need to be refined.

6. DIFFICULTIES IN GRANTING COMPENSATION TO VICTIMS OF TORTURE

The granting of compensation to victims of torture cannot be misused to refrain from punishing the perpetrators. All victims of judicially established acts of torture are entitled to compensation under Section 22 (2) of the Nepal Constitution, the nature and extent of which are determined by ordinary law.

According to Section 169 of the Penal Code, at the end of criminal proceedings where it has been proven that torture was inflicted on a victim, an order shall be made for the payment of adequate compensation for the injury or pain inflicted. The compensation to be paid directly to the victim is governed by the Compensation

²² *Advocacy Forum*, The State of Transitional Justice in Nepal, Briefing Paper, February 2019, p. 8.

²³ Supreme Court Nepal, Suman Adhikari and others/Government of Nepal, 26.2.2015, Writ. No.: 070-WS-0050.

²⁴ Human Rights Council, Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status, 7.2. 2018, UN Doc. A/HRC/37/NGO/83.

²⁵ For example: Supreme Court Nepal, Rajendra Prasad Dhakal and Others/Government of Nepal and Others, Nepal Kanoon Patrika 2064(BS), Issue 2, Decision No 7817; Supreme Court Nepal, Rajendra Ghimire/Office of the Prime Minister and others (case No 3219/2062), 17.12.2007.

Relating to Torture Act 2053 (1996), Section 4 of which entitles any victim who has been tortured by an agent of the state to compensation. A critical aspect of this is that it seems to indirectly “tolerate” the use of torture as long as the victim receives compensation. Especially questionable is the use of compensation for acts of torture as an alternative to criminal sanctions against the perpetrator.²⁶ In Section 7, the Compensation Relating to Torture Act determines that an official who used methods of torture is subject only to disciplinary proceedings. Meanwhile, Section 167 (2) of the Penal Code orders a maximum period of five years of imprisonment, which does not match with the gravity of torture crimes.

The Act standardizes an excessively short period of 35 days from the date of torture or release from detention (whichever is the latest) in which the victim must file the complaint with the District Court (Section 5 (1) Compensation Relating to Torture Act). It is unreasonable to allow for such a limited time period for a victim to prepare a complaint. If the victim is deceased or, for some other reason, unable to file a complaint, a family member has this right (Section 5 (2) Compensation Relating to Torture Act). The Human Rights Committee criticized that the statutory time limit of 35 days, especially in the case of severe persistent injuries caused by torture, could not be reconciled with the seriousness of the offence.²⁷

In their yearly publication *Advocacy Forum*²⁸ also analyses data on compensation to assess the effectiveness of the laws, policies and practices in place to provide compensation and reparation for victims of torture. In 2019, out of 152 cases, 46 victims were awarded compensation. However, the data also show the arbitrariness among judges in setting the amount of compensation and the relevant laws’ ineffectiveness to repair the harm victims suffer.

The maximum amount of compensation to be awarded by the District Court may not exceed 100,000 Nepalese rupees (approx. 828 US-Dollars) according to the law and is paid by the state (Section 6 (1) Compensation Relating to Torture Act). This is in contrast to General Comment No. 3 of the Committee against Torture²⁹, in which the Committee interprets Article 14 (1) United Nations Convention against Torture to the effect that the selection of reparation measures must take into account the particularities and circumstances of each individual case and the concrete needs of the respective victim. It explains that the amount of compensation

²⁶ *Redress, Torture in Asia: The law and practice*, October 2013, p. 110.

²⁷ Human Rights Committee, Pandey/Nepal, Communication No. 2413/2014, 29.11.2018, UN Doc. CCPR/C/124/D/2413/2014, para. 2.9.

²⁸ *Advocacy Forum, Torture in Nepal in 2019: The Need for new Policies and Legal Reform*, p. 1 ff.

²⁹ Committee against Torture, General comment No. 3 (2012), Implementation of Article 14 by States parties, 13.12.2012, UN Doc. CAT/C/GC/3.

must be in proportion to the gravity of the violations, which is not guaranteed by defining a maximum amount. Most victims were provided between 10,000 NRS (83 US-Dollars) and 25,000 NRS (207 US-Dollars).³⁰ In the case of *A.S. v. Nepal*, for example, the Committee stated that the 20,000 rupees received by the complainant as compensation for having been tortured did not constitute adequate reparation commensurate with the gravity of the violations inflicted.³¹ In addition to that, there is a lack of implementation of court decisions, as only 7 victims of torture (15.22 %) have actually received compensation.³²

7. LACK OF ENFORCEMENT OF SUPREME COURT DECISIONS

The many worthy innovations in legislation will not be successful if the enforcement of court decisions is not guaranteed. The mere existence of the criminalization of torture is not enough. In Nepal, there are also numerous other issues that prevent the implementation of laws.³³ The country is plagued by persistent impunity, which is historically based and, like the caste system, also persists. Despite the Comprehensive Peace Agreement (2006), new legislation and numerous Supreme Court rulings and orders, longstanding traditions remain largely intact. Different immunities are afforded to branches of the Government of Nepal, criminal charges are withdrawn, sentences are being suspended, and pardons are granted.³⁴

In addition to these efforts, the Supreme Court of Nepal, as previously stated, has developed a wide range of jurisprudence on victims' rights to remedies and reparation, which is not always respected or supported by the Government, but at least ensures that the issues are not forgotten.³⁵

8. RECOMMENDATIONS

- i. The prohibition of torture in Section 22 (1) Nepal Constitution should be adjusted to reflect the larger definition of Article 1 (1) Convention against Torture (“in detention”).

³⁰ *Advocacy Forum*, Torture in Nepal in 2019: The Need for new Policies and Legal Reform, p. 1 ff.

³¹ Human Rights Committee, *A.S./Nepal*, Communication No. 2077/2011, 6.11.2015, UN Doc. CCPR/C/115/D/2077/2011, para. 8.6.

³² *Advocacy Forum*, Torture in Nepal in 2019: The Need for new Policies and Legal Reform, p. 1 ff.

³³ *International Commission of Jurists and National Judicial Academy*, Study Report on Execution Status of Supreme Court and Appellate Court Orders, December 2016, p. 26 ff.

³⁴ *International Commission of Jurists*, Authority without accountability: The struggle for justice in Nepal, May 2013, p. 14 ff.

³⁵ *International Commission of Jurists*, Achieving Justice for Gross Human Rights Violations in Nepal, Baseline Study, October 2017, p. 19 f.

- ii. A positive duty on police officers to inform their superiors if they become aware of the use of torture should be established as well as a criminal liability in the event of a violation of the prohibition of torture in office.
- iii. Regulations for reparation and redress should be made which match the gravity of torture crimes.
- iv. Nepal's two transitional justice bodies must resolve the registered human rights violations, as required by the aforementioned landmark Supreme Court decision of February 26, 2015.
- v. The laws effectively exempting members of the security forces from criminal responsibility, such as the Nepalese Army and Police Acts, need to be revised.
- vi. The already existing classic guarantees of criminal proceedings under the rule of law, including the central defence standards and victim protection guarantees, must also be consistently expanded in practice.
- vii. The population must be further informed about the importance of the prohibition of torture and the possibilities of lodging a complaint.
- viii. The progress must be supported by a functioning parliament that implements the legislative reforms and guarantees greater political stability.
- ix. In order to ensure the impartial application of the law and effective investigations, the independence of the judiciary and the National Human Rights Commission must be guaranteed.
- x. The multiplicity of actors with powers to carry out investigations, arrests and interrogations should be limited to trained officers and clearly regulated in order to minimise the risk of violations.

Extracts of Legislation

Constitution of Nepal (2015)

Section 22 Right against torture: (1) No person in detention shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.

(2) Any such act pursuant to clause (1) shall be punishable by law and a victim of such an act shall have the right to compensation as provided for by law.

Country Penal (Code) Act, 2074 (2017)

Section 167 Prohibition of torture: (1) No authority who is competent under the laws in force to investigate or prosecute any offence, implement law, take any one into control, or hold any one in custody or detention in accordance with law shall subject, or cause to be subjected, any one to physical or mental torture or to cruel,

brutal, inhuman or degrading treatment.

Explanation: For the purposes of this Section, intentional inflicting of physical or mental pain or suffering on any person who is arrested, taken into control, held in custody, detention, imprisonment or under preventive detention or security or any other person interested in such person or subjecting such person to cruel, brutal, inhuman or degrading treatment or punishment for the following purpose shall be considered to constitute act of torture or cruel, brutal, inhuman or degrading treatment or punishment against/to such person:

- (a) to get information on any matter,
- (b) to extort confession of any offence,
- (c) to punish for any act,
- (d) to show fear/intimidation or coercion, or
- (e) to do any other act in contravention of law.

(2) A person who commits an offence under sub-section (1) shall be liable to a sentence of imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand rupees or the both sentences according to the gravity of the offence.

(3) A person who orders the commission of an offence under sub-section (1) or an accomplice who aids in the commission of an offence under this Section shall be liable to the same sentence as is imposable on the principal offender.

(4) No person who commits an offence under sub-section (1) shall be allowed to plea that he or she has committed the offence in pursuance of an order by the authority superior to him or her; and, on such ground, he or she shall not be exempted from the sentence imposable on him or her for the commission of such offence.

REFERENCES

Literature

1. *Advocacy Forum*, Criminalize Torture, June 2009.
2. *Advocacy Forum*, Nepal – Is the Government Unable or Unwilling to Prevent and Investigate Torture? 26.6.2013.
3. *Advocacy Forum*, Torture in Nepal in 2014 – More of the Same, 26.6.2015.
4. *Advocacy Forum*, Rise of Torture in 2018 – Challenges Old & New Facing Nepal, 26.6.2019.
5. *Advocacy Forum*, The State of Transitional Justice in Nepal, Briefing Paper, February 2019.
6. *Advocacy Forum*, Torture in Nepal in 2019 – The Need for New Policies and Legal Reforms, 26.6.2020.
7. *Advocacy Forum*, *Asian Human Rights Commission, The Redress Trust, World Organization against Torture*, Submission to the United Nations Universal Periodic Review of Nepal, 23rd Session

- of the Working Group on the UPR Human Rights Council, 22.3.2015.
8. *Human Rights Watch, Advocacy Forum, No Law, No Justice, No State for Victims – The Culture of Impunity in Post-Conflict Nepal*, November 2020.
 9. *International Commission of Jurists, Authority without Accountability: The Struggle for Justice in Nepal*, May 2013.
 10. *International Commission of Jurists, The Torture and Cruel, Inhuman or Degrading Treatment (Control) Bill, 2014, A Briefing Paper*, June 2016.
 11. *International Commission of Jurists and National Judicial Academy, Study Report on Execution Status of Supreme Court and Appellate Court Orders*, December 2016.
 12. *International Commission of Jurists, Nepal’s Transitional Justice Process: Challenges and Future Strategy – A Discussion Paper*, August 2017.
 13. *International Commission of Jurists, Achieving Justice for Gross Human Rights Violations in Nepal, Baseline Study*, October 2017.
 14. *Kathmandu School of Law, Torture & Improper Use of Force in Nepal*, 2017.
 15. *Khanal, Shambhu Prashad, Right against Torture in International Law: A Case Study of Nepal*, February 2012.
 16. *Redress, Torture in Asia: The law and Practice*, October 2013.
 17. *United Nations Office of the High Commissioner for Human Rights, Nepal Conflict Report*, 2012.
 18. *United Nations Office of the High Commissioner for Human Rights, Press Release, Continued Plight of the “Untouchables”*, Press Release, 24.5.2013.

United Nations Documents

19. *Committee against Torture Report on Nepal adopted by the Committee against Torture under Article 20 of the Convention at its 46th session, 9 May-3 June 2011, UN Doc. CAT/C/46/R.2/Add.1.*
20. *Committee against Torture General comment No. 3 (2012), Implementation of Article 14 by States parties, 13.12.2012, UN Doc. CAT/C/GC/3.*
21. *Human Rights Committee Giri/Nepal, Communication No. 1761/2008, 27.4.2011, UN Doc. CCPR/C/101/D/1761/2008.*
22. *Human Rights Committee Sedhai/Nepal, Communication No. 1865/2009, 28.10.2013, UN Doc. CCPR/C/108/D/1865/2009.*
23. *Human Rights Committee Basnet/Nepal, Communication No. 2051/2011, 26.11.2014, UN Doc. CCPR/C/112/D/2051/2011.*
24. *Human Rights Committee Tharu et al./Nepal, Communication No. 2038/2011, 3.7.2015, UN Doc. CCPR/C/114/D/2038/2011.*
25. *Human Rights Committee A.S./Nepal, Communication No. 2077/2011, 6.11.2015, UN Doc. CCPR/C/115/D/2077/2011.*
26. *Human Rights Committee Maya/Nepal, Communication No. 2245/2013, 23.6.2017, UN Doc.*

- CCPR/C/119/D/2245/2013.
27. Human Rights Committee Sharma/Nepal, Communication No. 2265/2013, 6.4.2018, UN Doc. CCPR/C/122/D/2265/2013.
 28. Human Rights Committee Pandey/Nepal, Communication No. 2413/2014, 29.11.2018, UN Doc. CCPR/C/124/D/2413/2014.
 29. Human Rights Council Report of the Working Group on the Universal Periodic Review (Nepal), UN Doc. A/HRC/17/5, 8.3.2011.
 30. Human Rights Council Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status, 07.2. 2018, UN Doc. A/HRC/37/NGO/83.

Jurisprudence

31. Supreme Court Nepal Rajendra Ghimire/Office of the Prime Minister and others (Case No. 3219/2062), 17 December 2007.
32. Supreme Court Nepal Suman Adhikari and others/Government of Nepal, 26.2.2015, Writ. No.: 070-WS-0050.
33. Supreme Court Nepal Rajendra Prasad Dhakal and Others/Government of Nepal and Others, Nepal Kanoon Patrika 2064(BS), Issue 2, Decision No 7817.

COMBATING TORTURE IN CHINESE CRIMINAL PROCEEDINGS: OPPORTUNITIES AND CHALLENGES

Prof. Zhiyuan Guo*

Abstract

Torture used to be prevalent in China's criminal investigations and detention facilities.³⁶ The People's Republic of China has made great efforts to prevent torture in criminal proceedings since it ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 1988. However, the anti-torture legislation did not make much progress until 2010, when the Exclusionary Rules of Illegally Obtained Evidence was enacted, and a systematic reform was conducted through the 2012 Criminal Procedure Law Amendment two years later. Since then, China has achieved enormous accomplishments in preventing torture in criminal proceedings. This paper overviews the legislative and judicial measures China has been taking to prevent torture in criminal proceedings in Part I. Part II is devoted to a comparison between China's preventive measures and the international standards on combating torture set out in the UNCAT and other treaties. Part III analyses opportunities and challenges China is facing to improve the prevention of police torture. The author argues that most of the Chinese legislative measures are indirect preventions, that is, preventing police torture through prosecution and sanction of the perpetrators or excluding the contaminated evidence. These measures are effective in avoiding the repetition of torturous conduct in criminal proceedings. However, it is more important to create an environment in China

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³⁶ Chinese Government acknowledged the pervasiveness of torture by the Supreme People's Procuratorate (SPP) publishing statistics on “刑讯逼供罪” (Xingxun bigong zui, The Crime of Tortured Confession) in late 1997. It reported an average of 364 cases per year between 1979 and 1989, and upward of 400 cases per year for most years in the 1990s, and included the admission that 241 persons had been tortured to death over the two-year period 1993-94. See Ira Belkin, 'China's Tortuous Path Toward Ending Torture in Criminal Investigations' Investigations' in Mike McConville and Eva Piles (eds), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing Limited, UK, 2013), Chapter 4.

where torture is not likely to occur. Direct preventions such as training, education and regular monitoring need to be enhanced to eradicate the root causes that lead to torture.

Keywords: torture, police interrogation, China, indirect prevention, direct prevention, UNCAT

INTRODUCTION

As the prohibition of torture is recognised as a peremptory norm of international law, a further obligation to prevent torture and other forms of ill-treatment has become a critical component of many international treaties. According to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), “[e]ach State Party shall take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction.”³⁷ The Republic of China (hereinafter as China) ratified the UNCAT in 1988 and the UNCAT prescribes a duty for the Chinese government to prevent torture and “other acts of cruel, inhuman or degrading treatment or punishment.”³⁸ This paper examines the legislative and judicial measures China has been taking to prevent police torture in Part I. Part II is devoted to a comparison between China’s preventive measures and the international standards on combating police torture set out in the UNCAT and other treaties. Part III analyses opportunities and challenges China is facing to improve the prevention of torture in criminal proceedings. The author argues that most of the Chinese legislative measures are indirect preventions, that is, preventing police torture through prosecution and sanction of the perpetrators or excluding the contaminated evidence. These measures are effective in avoiding the repetition of torturous conduct in criminal proceedings. However, it is more important to create an environment in China where torture is not likely to occur. Direct preventions such as training, education and regular monitoring need to be enhanced to eradicate the root causes that lead to torture.

I. LEGAL FRAMEWORK OF TORTURE PROHIBITION AND PREVENTION IN CHINESE CRIMINAL PROCEEDINGS

Torture is a prevalent and long-term problem in the criminal justice system in every jurisdiction, and China is no exception. The prohibition of torture has long been the focus of Chinese legislation; a comprehensive legal framework of torture prohibition and prevention has been developed in China over the past few decades.

³⁷ The United Nations Convention against Torture (1984), Article 2.1. available at OHCHR | Convention against Torture.

³⁸ The United Nations Convention against Torture (1984), Article 16. available at OHCHR | Convention against Torture.

Having ratified the UNCAT in 1988, China has taken legislative measures to integrate the international human rights standards into domestic laws. This section overviews the legal framework of torture prohibition and prevention in China, especially in criminal proceedings.

First, acts of torture and other forms of ill-treatment are criminal offences under Chinese criminal law. Two offences are regarded as being related to the prohibition and prevention of torture. One is extorting confession by torture,³⁹ the other is ill-treating detainees.⁴⁰ Both offences involve the use of torture or other ill-treatments by police officers, prosecutors, or detention facility⁴¹ personnel. Both offences impose criminal penalties to punish the perpetrators according to the severity of the crime. Although the normal penalty is up to three years in prison, the offenders could be punished more severely if the case has aggregating circumstances such as serious injuries causing the victims to be disabled or dead. It is noteworthy that only those acts of torture reaching a certain seriousness constitute the crime of torture and should be punished by the criminal law of China. However, acts of minor torture are similarly prohibited and should be prevented as well. They are governed by other laws than criminal law, such as criminal procedure law or civil law.

Secondly, the prohibition of torture has long been emphasized in Chinese criminal procedure law. The first Criminal Procedure Law (hereinafter CPL), enacted in 1979, contained a black letter rule against torture, which states: "The use of torture or extortion to obtain a confession and the use of threats, inducement, deception, or

³⁹ Criminal Law of PRC, Article 247. "Judicial personnel who extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses, are to be sentenced to three years or fewer in prison or put under criminal detention. Those causing injuries to others, physical disablement, or death, are to be convicted and severely punished according to articles 234 and 232 of this law."

⁴⁰ Criminal Law of PRC, Article 248. Supervisory and management personnel of prisons, detention centers, and other guard houses who beat or physically abuse their inmates, if the case is serious, are to be sentenced to three years or fewer in prison or put under criminal detention. If the case is especially serious, they are to be sentenced to three to 10 years in prison. Those causing injuries, physical disablement, or death, are to be convicted and severely punished according to article 234 and 232 of this law. Supervisory and management personnel who order inmates to beat or physically abuse other inmates are to be punished according to stipulations in the above paragraph.

⁴¹ There are two types of detention facilities in China, detention centers and prisons (including reformatory for juvenile delinquents). Detention centers held suspects and defendants awaiting trial or defendants who are in the process of trial. Once the verdict takes effective, the defendant must be delivered to another place of detention for imprisonment, which includes prison for adult prisoners and reformatory for juvenile delinquents.

other illegal means to collect evidence is strictly prohibited (...),” and this rule has been retained in Chinese CPL after three rounds of amendments. This suggests that the Chinese legislature holds a steady negative attitude towards torture. Any acts of torture or other forms of ill-treatment are strictly prohibited in Chinese criminal proceedings.

Thirdly, China has established the exclusionary rules of illegally obtained evidence since 2010, making the evidence obtained by torture and other forms of ill-treatment inadmissible. The establishment of the exclusionary rules is consistent with the requirement of the UNCAT, which states in its Article 15, “any evidence gathered as a result of torture must be deemed inadmissible in legal proceedings.” This provision is important because, by making such statements inadmissible in court proceedings, one of the primary goals of torture falls empty. After the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) adopted a principle of excluding illegally obtained oral evidence in their judicial interpretations implementing the 1996 CPL,⁴² China has spent over a decade to have the exclusionary rules of illegally obtained evidence enacted. The 2010 exclusionary rule merely contains 15 articles and cannot meet the practical needs when it was implemented. Therefore, a set of more detailed implementing guidelines were promulgated in 2017 (the 2017 guideline), having addressed many practical problems. A set of comprehensive exclusionary rules gradually took form in China. The 2010 exclusionary rule takes a strong stance against both the illegally obtained oral evidence and the illegally obtained physical evidence; it imposes the burden of proof on the prosecution and requires the prosecution to prove the legality of evidence collection procedure to the extent of proof beyond a reasonable doubt; it also creates a suppression hearing in which courts conduct investigations as to whether the evidence in question is obtained by illegal means, i.e., torture or other forms of ill-treatment. The 2017 guideline devotes quite a few articles to define the scope of the illegally obtained evidence and adopts the doctrine of “the fruit of poisonous tree” despite of keeping two exceptions.⁴³ It summarizes

⁴² Article 61 of the 1998 Supreme People’s Court Judicial Interpretation provides, ‘It shall be strictly forbidden to use unlawful methods to obtain evidence. Any testimony of a witness, victim or defendant obtained by coercion, enticement, deception or other illegal method cannot be the basis for conviction’. Article 265 of the 1999 Supreme People’s Procuratorate Judicial Interpretation provides, ‘It is strictly forbidden to use unlawful methods to collect evidence. Statements obtained from suspects, defendants or witnesses by coercion, threats, enticement or deception or other unlawful means cannot form the basis of an accusation of a criminal offense’.

⁴³ One exception to the fruit of poisonous tree doctrine in China is “Where, during the investigation period, the investigating organs confirm, or cannot rule out, that evidence was gathered by illegal means, and they therefore change investigators; and when other investigators again

the means of proof that the prosecution could rely on to satisfy the strict standard of proof; it also clarifies some procedural issues of the suppression hearing.⁴⁴ Under the 2018 Supervision Law of PRC, exclusionary rules of illegally obtained evidence also apply to the investigation of corruption cases by the supervisory commissions.⁴⁵ This suggests acts of torture and ill-treatment is also prohibited in investigative activities conducted by the supervisory commissions.

Fourthly, the 2012 CPL adopts a series of anti-torture mechanisms, including the privilege against self-incrimination,⁴⁶ audio or video recording of interrogations and some procedural requirements to reduce the possibility of torture and coercive confessions. The 2012 CPL makes audio or video recording mandatory for crimes punishable by death or life imprisonment or other major crimes, and optional in other cases,⁴⁷ depending mostly on the availability of recording devices. To prevent torture, the law requires a prompt transfer of criminal suspects to detention centres after arrest, because empirical data indicated that most incidents were carried out in a police station or an unauthorized place of detention. The law also requires interrogation to be conducted within a detention centre once the suspect has been formally detained, because clear rules and strict supervision over detention centres have made it more difficult to torture suspects in detention.

Fifthly, Chinese legislation establishes a universal jurisdiction for crimes of torture. The SPC interpretations state in its Article 12, *“For crimes governed by international treaties either concluded or acceded to by the People’s Republic of China, and over which the People’s Republic of China exercises jurisdiction within the scope of carrying out its obligations pursuant to such treaties, the people’s court where a defendant was apprehended, embarked or landed has jurisdiction.”* Chinese legislation also recognizes the principle of non-refoulement, which requires States not to expel, return or extradite a person to

conduct interrogation, give information on the procedural rights and on the legal consequences of admitting guilt, and the criminal suspect voluntarily confesses”, the other exception is “Where, during the periods of review for arrest, review for prosecution, and trial, prosecutors or adjudicators give information on procedural rights and the legal consequences of admitting guilt when conducting interrogations, and the criminal suspect or defendant voluntary confesses”. See Article 5 of the 2017 guideline.

⁴⁴ For detailed discussions, see Zhiyuan Guo (2019), *Torture and Exclusion of Evidence in China, China Perspective*, Vol.1.

⁴⁵ Art.33, the 2018 Supervision Law of PRC, provides, ...The supervisory organ shall collect, fix, examine and use evidence in compliance with the requirements and standards for evidence in criminal trials. Evidence collected by illegal means shall be excluded in accordance with the law and shall not be taken as the basis for the disposition of cases.

⁴⁶ Art.50, 2012 CPL.

⁴⁷ Art. 121 2012 CPL; Art. 123 2018 CPL.

another State if there are “substantial grounds” for believing that the person would be in danger of being subjected to torture. The Article 8 of Extradition Law of PRC states, “*the request for extradition made by a foreign state to the People’s Republic of China shall be rejected if: ... 7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State...*”

II. CHINA’S TORTURE PREVENTION STRATEGIES IN RELATION TO THE INTERNATIONAL STANDARDS

Although China has made a great effort to build a comprehensive legal framework of torture prevention, there is still a huge gap between China’s torture prevention strategies and the international standards formulated in international treaties such as the UNCAT. This Part examines what strategies are missing from China compared to the international standards.

The Universal Declaration of Human Rights (UDHR) states in its Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” It also says that people have the right to “an effective remedy” if their rights are violated. Because the UDHR is proclaimed as a common standard of achievements for all peoples and all nations, China must follow the corresponding obligations as a member state of the United Nations. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that no person “shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 10 states: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The Covenant provides that anyone claiming that their rights have been violated shall have an effective legal remedy. The Covenant establishes the Human Rights Committee, which not only monitors the implementation of the rights set out in the treaty by examining the reports of States parties, as well as individual communications/complaints received under the treaty’s Optional Protocol, but also provide important interpretive guidance on the obligations and rights set out in the Covenant through its jurisprudence, general comments and concluding. China has signed the ICCPR with the intention of joining it in 1998 but has not yet ratified the Covenant. However, the standards set out in the ICCPR has had a significant influence on China’s criminal procedure law reforms over the past two decades.

The UNCAT is the most comprehensive international treaty dealing with torture. China ratified the UNCAT in 1988 and has been trying to integrate the standards set out in the treaty into the domestic laws. China has also ratified several other international human rights treaties containing similar prohibitions of torture and other forms of ill-treatment, such as the Convention on the Rights of the Child (Art.37) and the Convention on the Rights of Persons with Disabilities (Art.15).

However, China made reservations for Article 20 and Article 30(1) of UNCAT, trying to avoid various monitoring mechanisms. On the other hand, there are still some institutions required by the UNCAT that China has not adopted, not to mention the soft laws in relation to the prohibition of torture and deprivation of liberty. For those institutions China has already adopted, some are not strictly implemented in practice due to various problems. China has taken torture seriously over the past few years but has not paid due attention to other forms of ill-treatment. The exclusionary rule of illegally obtained evidence has started to include other illegal means except for torture, but the exclusion of evidence obtained by “other illegal means” is discretionary rather than mandatory. Empirical data shows that the focus of exclusion of illegally obtained evidence is still on coercive confession. The implementation of China’s exclusionary rules of illegally obtained evidence is primarily targeted at classic torture, ill-treatment in other forms has not gained due attention yet.

First, according to the UNCAT and other international treaties, “no exceptional circumstances whatsoever” can justify torture. These include war or the threat of war, political instability, combating terrorism or any other emergency. Orders from a superior officer are also not a justification for torture. However, providing the prohibition against torture in criminal procedure law rather than in constitutional law, China has not made it clear that no exceptional circumstance, including an order from a superior, may be invoked to justify torture. In other words, China does not emphasize that no derogation is allowed regarding the right not to be subjected to torture and other forms of ill-treatment.

Secondly, there are insufficient legal safeguards for persons deprived of their liberty in China. When persons are deprived of their liberty, the risk of torture or other forms of ill-treatment usually increases.⁴⁸ For this reason, thorough protection of legal rights for persons at the initial period of arrest and during police custody, in particular incommunicado detention, is extremely important. Under Chinese criminal procedure law, suspects have the right to have family members, or a third party (such as an affiliated institution) informed of their whereabouts following their arrest, but the police can exempt the notification duty in exceptional circumstances.⁴⁹

⁴⁸ This is empirical finding from the surveys the author was involved. It’s understandable because police has no opportunity to torture the accused if the latter enjoy the freedom to leave.

⁴⁹ Art.85, 2018 CPL, when detaining a person, a public security authority must produce a detention warrant. After a person is detained, the detainee shall be immediately transferred to a jail for custody, no later than 24 hours thereafter. The family of a detainee shall be notified within 24 hours after detention, unless such notification is impossible, or such notification may obstruct criminal investigation in a case regarding compromising national security or terrorist activities. However, once such a situation that obstructs criminal investigation disappears, the family of the detainee shall be immediately notified.

Although the legal interpretations have listed what the exceptional circumstances are,⁵⁰ it is still at the discretion of the police to fulfil the notification obligation or not.

Criminal suspects in China are entitled to retain a defence lawyer from the day they are arrested or detained under other compulsory measures.⁵¹ However, they are not entitled to have the lawyer present during interrogation.⁵² As a monitoring mechanism, the audio or video recording of interrogations is considered an alternative to an on-site lawyer during interrogation.

While the privilege against self-incrimination is accepted as part of the Chinese criminal procedure law, suspects continue to be denied the right to remain silent during police interrogation. Chinese legal academics and, to a lesser degree, legal reformers have advocated for the right to remain silent while in detention, but the police strongly object to this reform due to concerns that the right to silence will make clear confession impossible, leading to a significant weakening of police effectiveness in criminal investigation and crime prevention. For the same reason, the Chinese criminal procedure law obliges suspects to answer questions truthfully,⁵³ which obviously contradicts the privilege against self-incrimination.

It is a widely recognized right for a detainee to be brought before a magistrate or judge within a reasonable period of time.⁵⁴ Under Chinese CPL, however, when a suspect is arrested, the police can keep him/her in custody for up to 37 days before the procuratorates examine and approve the formal detention.⁵⁵ As many Chinese

⁵⁰ Provisions on the Procedures for Handling Criminal Cases by Public Security Organs (An administrative interpretation issued by the Ministry of Public Security on implementing the 2018 CPL) make detailed provision on circumstances where “such notification is possible” (Art.113) and circumstances where “such notification may obstruct criminal investigation” (Art.127).

⁵¹ Art.34, 2018 CPL.

⁵² Pilot projects on lawyer presence during interrogation have been conducted by some Chinese scholars in the first decade of new millennia, but this institution was not adopted due to resistance from the police.

⁵³ Art.120, 2018 CPL, ...The criminal suspect shall truthfully answer the questions of the investigators but have the right to refuse to answer questions irrelevant to the case....

⁵⁴ International Covenant on Civil and Political Rights, Article 9 (3) provides, Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

⁵⁵ Article 91, the 2018 CPL, when a detainee needs to be arrested, a public security authority shall, within three days after detention, file an arrest request with the people’s procuratorate for examination and approval. Under special circumstances, the time limit for filing such a request may be extended for one to four days.

academics have criticized, even the minimum time limit, three days, cannot be regarded as “a reasonable period of time”, not to mention seven days as the regular time limit and 37 days as the exceptional time limit. Practically, it is not difficult to expand the thirty-seven-day time limit to regular cases if the police cannot decide within the seven-day period whether to file an application for formal detention with the procuratorates given the ambiguous criterion of the 37-day provision. There has been considerable criticism on the aforesaid problem in the Chinese legal community, especially among the academic circle and the defence bar.⁵⁶

Chinese suspects have the right to challenge the legality of their detention. According to Article 97 of the 2018 CPL, “A criminal suspect or defendant or his or her legal representative, close relative, or defender shall have the right to apply for modifying a compulsory measure. A people’s court, people’s procuratorate, or public security authority shall make a decision within three days after receiving such an application; and, if a disapproval decision is made, the applicant shall be informed of the decision and reasons for disapproval.” However, many suspects do not have access to the assistance of defence lawyers and consequently cannot exercise this right effectively.

Chinese suspects do have access to a medical doctor during detention, but not of their own choosing. Compared to western jurisdictions, China’s detention facilities particularly lack psychiatric and psychological professionals, of whom detainees are often in great need. When detainees have a mental illness or develop symptoms during detention, detention facilities usually invite psychiatrists or psychologists from external hospitals to assess the detainees. However, regular mental health professionals are usually not available in most Chinese detention facilities. Detainees with severe mental illness must be removed from regular detention facilities and transferred to specialized mental hospitals for treatment.

Thirdly, most legal institutions China have already adopted are not implemented well in practice. Take the exclusionary rules as an example. It is critical for the practitioners to have a clearly defined scope of illegally obtained evidence for the purpose of implementation. However, neither the 2010 exclusionary rule nor the 2012

For a person strongly suspected of committing crimes from place to place, repeatedly, or in a gang, the time limit for filing an arrest request for examination and approval may be extended to 30 days.

A people’s procuratorate shall make a decision to approve or disapprove an arrest within seven days after receiving a written request for approval of arrest from a public security authority.....

⁵⁶ This is also an empirical finding. Relevant criticism was often heard in workshops, and the author has encountered regular cases in which 37-day time limit applied.

CPL⁵⁷ provide an operational definition. Article 54 of the 2012 CPL merely provides “Confessions by a suspect or a defendant extorted through torture and other illegal means should be excluded”, but it is open to interpretation what ‘torture and other illegal means’ incorporates. Judicial interpretations by the SPC and SPP have tried to give clearer guidance on “torture and other illegal means” by referring to the definition of “torture” in the UNCAT.⁵⁸ For example, the SPC interpretations provide, “[T]he use of corporal punishment or disguised corporal punishment, or any other methods inflicting severe pain or suffering, physically or mentally, on the defendant so as to force him/her to make confessions against his or her will, shall be deemed “illegal means such as extortion of confessions by torture” as set out in Article 54 of the CPL”. However, without a clear definition, it is hard for practitioners to understand what “disguised corporal punishment” refers to, not to mention the obscure and subjective standards for “other methods inflicting severe pain or suffering” on defendants.

The 2017 guideline incorporates a couple of articles trying to clarify what illegally obtained confessions are. According to these clarifications, confessions obtained through violence or disguised corporal punishments such as threats should be suppressed if the illegal means cause unbearable suffering and cause suspects or defendants to confess against their own will. These provisions set up three criteria for illegally obtained confessions:

1) The use of illegal means, i.e., violent methods and disguised corporal punishment: violent methods include hitting and the unlawful use of restraints.⁵⁹ Disguised corporal punishment should refer to the threat of using violence, or of seriously harming the lawful rights and interests of the person or their families.⁶⁰

2) Unbearable suffering: although it is a subjective test and difficult to measure in practice, this is a threshold for the use of violence or disguised corporal punishment and will help practitioners distinguish illegal means from merely improper practice.

3) Voluntariness: both Articles 2 and 3 mention “against their own will,” and this seems to adopt voluntariness as a criterion to determine whether a certain confession should be excluded. Article 4 makes it clear that any illegal restriction of physical liberty, especially unlawful confinement, constitutes illegal means deserving suppression. Unlawful restriction of physical liberty constitutes illegal means because the accused may not confess voluntarily when his/her liberty is illegally restricted,

⁵⁷ The primary contents of the 2010 exclusionary rule were incorporated into the CPL when it was amended in 2012.

⁵⁸ Art. 95 SPC Judicial Interpretation; Art. 65 SPP Judicial Interpretation.

⁵⁹ Art.2, the 2017 Guideline.

⁶⁰ Art.3, the 2017 Guideline.

and he is under tremendous psychological pressure. Confessions obtained in such cases should also be excluded because that violates relating procedural rules.

The 2017 guideline also adopts a restricted version of the “fruit of the poisonous tree” doctrine to solve the problem of admissibility of multiple confessions. Article 5 states, *“Where extortion of confessions by torture is used to make criminal suspects or defendants confess, and the criminal suspect makes subsequent repeat confessions similar to that confession because of the influence of that [prior] use of torture to extract confessions, they shall all be excluded together, with the following exceptions: (1) Where, during the investigation period, the investigating organs confirm, or cannot rule out, that evidence was gathered by illegal means, and they therefore change investigators; and when other investigators again conduct interrogation, give information on the procedural rights and on the legal consequences of admitting guilt, and the criminal suspect voluntarily confesses. (2) Where, during the periods of review for arrest, review for prosecution, and trial, prosecutors or adjudicators give information on procedural rights and the legal consequences of admitting guilt when conducting interrogations, and the criminal suspect or defendant voluntary confesses.”* It is a great leap to adopt the “fruit of the poisonous tree” doctrine, but there is a lot of concern about the first exception. Many worry that the influence will still exist even after the replacement of interrogators.⁶¹

III. STRENGTHENING TORTURE PREVENTION STRATEGIES IN CHINA: CHALLENGES AND OPPORTUNITIES

According to when the intervention occurs and what approach is employed, torture prevention can be divided into two categories: direct prevention and indirect prevention. Direct prevention are measures taken before torture occurs to avoid it happening by reducing the risk factors and eliminating possible causes. Direct prevention measures include training, education, and regular monitoring of places of detention. Indirect prevention is measures taken after torture has occurred to avoid its repetition. Through investigation and documentation of past cases, denunciation, litigation, prosecution, and sanction of the perpetrators, as well as reparation for victims, indirect prevention aims to convince potential torturers that the “costs” of torturing are greater than any possible “benefits”. Direct prevention measures are proactive, and indirect prevention measures are reactive.

It can be seen from the aforesaid introduction to the Chinese legal framework of torture prohibition and prevention, most mechanisms are reactive and intervene only after torture or other forms of ill-treatment have occurred. These measures are effective in avoiding the repetition of torturous conduct in criminal proceedings.

⁶¹ For example, see Jeremy Daum, “Exclusive focus: Why China’s exclusionary rules won’t stop police torture, available at <https://www.chinalawtranslate.com/en/exclusion-china>

However, it is more important to create an environment in China where torture is not likely to occur. Direct preventions such as training, education and regular monitoring need to be enhanced to eradicate the root causes that lead to torture. This section explores challenges and opportunities China is facing in improving both indirect prevention and direct prevention measures.

A. Improving the indirect torture prevention measures in Chinese criminal proceedings

China has made torture a crime under criminal law, made evidence obtained by torture and other forms of ill-treatment inadmissible, provided universal jurisdiction over torturers and respected the principle of non-refoulement.⁶² However, there is still room for improvement in the detention procedures. As torture nearly always takes place in secret, promoting greater transparency of places of detention is a substantial step towards prevention because it removes many of the opportunities for torture to occur. In addition, there are several other procedures that can provide important safeguards and help reduce the risk of ill-treatment of persons deprived of their liberty.

Firstly, China should adopt some measures to build up a transparent detention procedure. Persons deprived of liberty should not be held in unauthorized places of detention, because unauthorized places of detention have no procedures or records and provide no institutional protection to detainees. After the 2012 CPL amendment, all suspects should be held in detention centres once they are arrested. It is not permissible to hold them in any other locations anymore. Keeping detainees in unauthorized places could lead to the exclusion of confessions obtained thereof or constitute a criminal offence, illegal detention, if it is serious enough. The problem is, again, that these provisions cannot be strictly followed.

In practice, there is still concern about the neutrality of detention centres because they are affiliated with the police force in China. According to international standards, interrogation and custody should be separated, i.e., undertaken by different bodies, because the involvement of different agencies can help protect detainees from the possibility that the conditions of their detention will be used to influence their behaviour during interrogation. Some academics proposed separating the detention centres from the police and making detention facilities an independent and neutral organization. This reform initiative needs to be put into reality.

Police officers often try to take the detained suspects out of the detention centres in various pretexts, such as taking the suspects to identify the crime scene, while the

⁶² The Article 8 of Extradition Law of PRC states, “the request for extradition made by a foreign state to the People’s Republic of China shall be rejected if: ... 7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State...”

real purpose is to circumvent the requirement of interrogating suspects within the detention centre.⁶³ Torture or other forms of ill-treatment cannot be avoided if the interrogation is conducted in a place without monitoring.

Maintaining official registers provides a crucial safeguard for detainees. China adopted the registry requirement in the 2017 guideline, requiring detention centres to keep records of the location of detainees once they are detained.⁶⁴ The prosecution can use a detention facility registry as proof that proper procedure has been followed when police officers remove detainees for investigation and no torture or other forms of ill-treatment are involved during the process. When there is alleged torture or other forms of ill-treatment, the detainee should have access to a medical examination to ascertain whether their claim is founded. The 2017 guideline grants all detainees the right to be physically inspected by a medical examination at the detention centre, with the supervision of prosecutors.⁶⁵ To keep the detention procedure transparent, a detainee must have access to both a lawyer and his family. There used to be obstacles for a defence lawyer to meet with a suspect in custody in China, but the obstacles have been removed by the 2012 CPL amendment.

Secondly, the interrogation should be further regulated to prevent torture. Most torture or other forms of ill-treatment occur during interrogation. The CPL adopted an audio or video recording system to prevent torture and coercive confession during interrogation. However, the recording mechanism is poorly implemented. Although the 2017 guideline has reiterated the requirement for recording,⁶⁶ selective recording or non-recording are still prevalent in practice. In addition to supervision over the

⁶³ This is an empirical finding from a survey the author conducted from 2013-2015 across China. See Zhiyuan Guo (2017): *The first step of the long march: implementing the exclusionary rules in China*, *Asia Pacific Law Review*.

⁶⁴ Art.13, section 1, the 2017 guideline, "Detention centers shall make a registry of persons being taken to interrogation, specifying the unit, personnel, matter, and start and stop times, as well as the criminal suspects' name and other such information."

⁶⁵ Art.13, section 2, the 2017 guideline, "Detention centers receiving criminal suspects into custody shall conduct physical inspections. When making inspections, the people's procuratorate's procurators who are based in the detention centers may be present. Where the inspection discover that the criminal suspect has injuries or physical abnormalities, the detention centers shall take photographs or recordings, and have the personnel bringing them for detainment, and the criminal suspect, explain the reasons separately, have this clearly written in the physical inspection record and have the personnel delivering detainees, the person receiving them into custody, and the criminal suspects, sign and verify."

⁶⁶ Art. 11, the 2017 guideline, "Where an audiovisual recording is made of the interrogation process, it shall be without interruptions and with its integrity preserved, it must not be selectively recorded and must not be spliced or edited."

interrogation, there should be some detailed and specific standards for the conduct of police interviews. The standards should address issues such as the permissible length of the interview, rest periods, the location and identity of persons to be present during the interview and interviewing a person under the influence of drugs. The interrogation standards can encourage police officials to consider what practices are appropriate and effective for their work. Except for the location of interrogation, Chinese law lacks explicit direction on many of the above-mentioned aspects of police interrogations.

Article 11 of the UNCAT provides, “States parties are required to keep under systematic review interrogation rules, instructions, methods and practices, as well as custody procedures.” China should reform its interrogation rules and detention procedures by reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Thirdly, China’s indirect prevention measures focus more on the punishment of torturers than on the reparation for victims. The UNCAT provides that victims of torture have the right to complain and to have their case investigated promptly and impartially (article 13), as well as to receive redress and adequate compensation (article 14). This also includes the right to rehabilitation to the fullest extent possible. China should take measures to provide full and effective reparation with victims of torture and other forms of ill-treatment, including financial compensation, rehabilitation, and satisfaction such as a public apology, an official declaration to restore the dignity of the victim, or commemoration and tribute to victims.

Last but not least, as mentioned above, although China’s anti-torture campaign has started to include a broader scope of ill-treatment, except the classic form of torture, the practice is still struggling to prevent torture instead of other forms of ill-treatment. The scope of other forms of ill-treatment is not clear enough for implementation. According to the Committee against Torture communication, “Any act that falls short of the definition of torture because it lacks one or more of the criteria may still be covered under the prohibition outlined in article 16 of the Convention against Torture.”⁶⁷ Chinese legislature should clarify the clear scope or even make a detailed list of such ill-treatment in the future.

B. Adopting direct torture prevention measures in China.

Direct prevention measures include training, education, and regular inspection of places of detention. These measures are taken to prevent torture from occurring by

⁶⁷ See *Kostadin Nikolov Keremedchiv v. Bulgaria*, Committee against Torture, Communication 257/2004, views adopted on 11 November 2008.

reducing the risk of torture or eradicating the root cause of torture and other ill-treatment. They are proactive measures and thus more effective for the purpose of torture prevention. However, China has not paid due attention to developing direct prevention measures. In addition to improvement and strict implementation of indirect prevention measures, China should consider adopting direct prevention measures step by step.

Firstly, the Chinese government should provide professional training programs for public officials. According to the UNCAT, States parties have a duty to ensure that information on the prohibition and prevention of torture is included in training programs for law enforcement and other public officials. All personnel involved in the arrest, interrogation and detention of persons should receive training on human rights and, in particular, on the absolute prohibition of torture. Training public officials is a critical strategy to help prevent torture and ill-treatment of persons deprived of their liberty.

Secondly, China should enhance public awareness of the anti-torture campaign. Educating the general public about the prohibition and prevention of torture is also an important preventive action. The social and cultural environment is an equally important factor as a political environment to prevent torture. Where there is a culture of violence, or high public support to “get tough” on crime, the risk of torture occurring is also increased. Therefore, education of the public can help create a social context with less tolerance of torture and help prevent torture in the long run.

Thirdly, China should adopt the regular visits mechanism to places of detention. The Optional Protocol to the UNCAT, adopted by the United Nations General Assembly in December 2002 and effective in June 2006, establishes a system of regular visits to all places of detention. It means independent bodies can enter places of detention at any time to analyse the overall functioning of places of detention and provide constructive recommendations aiming at improving the treatment and conditions of detained persons. Although China has not ratified this optional protocol, it should adopt the mechanism because compared to internal administrative control mechanisms, regular inspection of places of detention is a type of external control mechanism, and it helps prevent a culture of secrecy from developing and provides an important safeguard for persons deprived of their liberty. Some Chinese academics have conducted a pilot project on adopting the regular and unannounced visits to all places of detention by independent monitoring bodies from 2006 through 2009. The project has produced some positive outcomes.⁶⁸ Unfortunately, it failed to make into the legislation. To strengthen the torture prevention strategies, China should adopt this mechanism in the not-too-distant future.

⁶⁸ Chen Weidong(陈卫东) (2009), *Jiya changsuo xunshi zhidu yanjiu baogao* (羁押场所巡视制度研究报告) [Research Report on Regular Visits to Places of Detention], *Chinese Journal of Law*, Vol.6, pp.3-36.

REFERENCES

- Chen Weidong(陈卫东) (2009), Jiya changsuo xunshi zhidu yanjiu baogao (羁押场所巡视制度研究报告) [Research Report on Regular Visits to Places of Detention], Chinese Journal of Law, Vol.6, pp.3-36.
- Ira Belkin, 'China's Tortuous Path Toward Ending Torture in Criminal Investigations' Investigations' in Mike McConville and Eva Piles (eds), Comparative Perspectives on Criminal Justice in China (Edward Elgar Publishing Limited, UK, 2013).
- Jeremy Daum, "Exclusive focus: Why China's exclusionary rules won't stop police torture, available at <https://www.chinalawtranslate.com/en/exclusion-china>.
- Zhiyuan Guo (2019), Torture and Exclusion of Evidence in China, China Perspective, Vol.1.
- The United Nations Convention against Torture (1984), available at OHCHR | Convention against Torture International Covenant on Civil and Political Rights (1966), available at CORRIGENDUM (ohchr.org)
- Kostadin Nikolov Keremedchiv v. Bulgaria, Committee against Torture, Communication 257/2004, views adopted on 11 November 2008.
- Criminal Procedure Law of People's Republic of China (2018)
- Criminal Procedure Law of People's Republic of China (2012)
- Criminal Law of People's Republic of China (1997)
- Extradition Law of People's Republic of China (2000)
- SPC Judicial Interpretations
- SPP Judicial Interpretations
- Provisions on the Procedures for Handling Criminal Cases by Public Security Organs
- Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases (2010)
- Provisions on Several Issues Regarding the Strict Exclusion of Illegal Evidence in Handling Criminal Cases (2017)

INSTITUTIONAL LIMITATIONS, NON-STATE ACTORS AND FREEDOM FROM TORTURE IN VIETNAM AND CHINA

Dr. La Khanh Tung*

There have been many scholarly debates on the impact of international norms and the domestic implementation of human rights. They share different attitudes, ranging from pessimism to extreme optimism, about the possible effect of international treaties on human rights and freedom. Though a majority of authors appear to be sceptical about the possibility of improving civil and political rights in regimes such as Vietnam and China, the reality of each is very troublesome to address. This paper focuses on 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 constitutional freedoms (freedom of expression and information...) 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 the domestic practice of human rights in general. The cases of Vietnam and China concerning international standards against torture, and the progress of implementing practices are discussed in Part 2. Part 3 considers the role of non-state actors in advocating against torture, in addition to the need for 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.⁶⁹ However, torture is still growing as a very controversial and complex issue.

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⁶⁹ The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984; the Inter-American Convention to Prevent and Punish Torture was adopted in 1985; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted in 1987.

In all continents, there are states failing to criminalize torture as a specific offence under their national laws, and more severely torturing people.⁷⁰

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 relating to legal, economic, social, cultural dimensions.⁷¹ 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 members of CAT, their obligations include “taking effective legislative, administrative, judicial or other measures to prevent the acts of torture and similar violation in any territory under their jurisdiction”, and “ensuring that all acts of torture are classified as offences under their criminal law” (CAT at articles 2 (1) and 4). While the international human rights treaty against torture is creating a 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 is still believed to be “deeply entrenched in the criminal justice system” in China,⁷² and there are “allegations of the widespread use” in Vietnam.⁷³

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 Koh⁷⁴, Thomas Risse and Stephen C. Ropp⁷⁵, Linda Camp Keith⁷⁶,

⁷⁰ For examples, World Organisation Against Torture (Organisation Mondiale Contre la Torture, OMCT)'s annual report 2020: < <https://www.omct.org/en/annual-report-2020> > accessed 16 July 2021, and the International Rehabilitation Council for Torture Victims (IRCT)'s thematic reports: < <https://irct.org/media-and-resources/publications#thematic-reports> > accessed 16 July 2021.

⁷¹ 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).

⁷² 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.

⁷³ 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.

⁷⁴ Harold Hongju Koh, 'Why Do Nations Obey International Law?' [1997] 106, issue 8 Yale Law Journal 2599.

⁷⁵ 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.

⁷⁶ 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.

Oona A. Hathaway⁷⁷, and Beth A. Simmons.⁷⁸ Authors are varied in their views, from very optimistic to very pessimistic about the possible effects of human rights treaties in national practices. Oona A. Hathaway 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”.⁷⁹ 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.”⁸⁰

Thomas Risse (Risse) and Beth A. Simmons (Simmons) seem to be more optimistic, sharing the view that non-state actors should have played an important role. Risse put forward a five-phase “spiral model” shifting the emphasis 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”.⁸¹ Simmons takes a more neutral approach and advocates 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.”⁸² 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.⁸³

Alternatively, non-state actors, including human rights NGOs and activists, have been viewed as having a crucial role to protect and promote human rights, at both international and national levels.⁸⁴ The contributions of NGOs have been considered as resting on two premises - their expertise and representation.⁸⁵ The experiences of East Asian countries witness the active and critical roles of NGOs in enhancing human

⁷⁷ Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ [2002] 111, issue 8 Yale Law Journal 1935.

⁷⁸ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

⁷⁹ Hathaway (n 7), at 1940.

⁸⁰ Hathaway (n 7), at 1988. *Ibid?*

⁸¹ 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.

⁸² Simmons (n 8), at 284.

⁸³ Koh (n 4), at 2599-2660.

⁸⁴ 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.

⁸⁵ Baehr (n 4), at 7.

rights practices, both prior to and after their democratic transitions.⁸⁶ 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 sceptical 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.”⁸⁷

Looking at torture from three dimensions - international law, constitutional rights and separation of power, we accept the important role of the 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 allegations and independent monitoring of detention facilities. Moreover, without constitutional guarantee of basic freedoms, civil society cannot make a 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 a weak constitutional guarantee, be regarded as an entry point to push forward the fight against torture?

2. INTERNATIONAL ENGAGEMENT, CURRENT SITUATION AND INSTITUTIONAL LIMITATIONS

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

⁸⁶ 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.

⁸⁷ Mark Sidel, ‘Civil Society and Civil Liberties’ in Michael Edwards (eds), *The Oxford Handbook of Civil Society* (Oxford University Press 2011), at 298.

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.⁸⁸ While transitioning to a free market, the state-party apparatus still remains doubtful of any kind of reform.

China became a member of the United Nations (UN) in 1971, seven years before the beginning of its “reform and open up” policy. It has been a 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 the Tiananmen Square incident, after its ratification in 1988, and the latest one (the fifth report) was made in 2015. The two special administrative regions Hongkong and Macao, submitted their separate reports to CAT. In 2005, China is confident enough to allow Manfred Nowak, the UN Special Rapporteur on Torture, to visit the country. After his two-week visit to China, the Special Rapporteur confirmed allegations that “the practice of torture, though on the decline - particularly in urban areas - remains widespread in China.”⁸⁹ China 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, after the reunion after 30 years of war (1945-1975). A decade later, the country began to open its economy, adopting the market driven economy in 1986. To date, Vietnam is a 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. In the process, state agencies attempt to prove their transparency by inviting selective members of NGOs to join domestic consultations and publishing the national report on the Ministry of Public Security’s website.

⁸⁸ Darius Rejali, *Torture and Democracy* (Princeton University Press 2007), at 83-87.

⁸⁹ The Congressional-Executive Commission on China, *UN Special Rapporteur on Torture Concludes Two-Week Visit to China*, 22/5/2006 < <https://www.cecc.gov/publications/commission-analysis/un-special-rapporteur-on-torture-concludes-two-week-visit-to-china> > accessed 19 May 2021.

2.2. Current situation and institutional limitations

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 the 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 the National Assembly abolished the reform labour (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 the 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 feature 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 choking 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 aims 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,⁹⁰ the abuse of prolonged and widespread use of pretrial detention,⁹¹ many allegations of torture and ill-treatment by public security officers, the conditions of detention do not meet the minimum standards,⁹² disproportionate

⁹⁰ 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.

⁹¹ The CAT COB on China 2015, at para. 10, and the CAT COB on Vietnam 2018, at para. 24.

⁹² 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).

detention of members of religious and ethnic groups, etc.⁹³

Alternatively, there are specific issues facing each country. Due to its enormous territory, a 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, a duplex system of the Communist Party, coercive measures related to population policy, victims of the massacre at Tiananmen Square in 1989...⁹⁴ 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...⁹⁵

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 an independent monitoring mechanisms 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 a poor number of investigations and prosecutions of torture and ill-treatment cases.⁹⁶ 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.

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

⁹³ The CAT COB on China 2015, at para. 40, the CAT COB on Vietnam 2018, at para. 22.

⁹⁴ The CAT COB on China 2015, at para. 18, 30, 42, 44, 51 and 53.

⁹⁵ The CAT COB on Vietnam 2018, at para. 20 and 36.

⁹⁶ 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)

Many torture allegations, in China and Vietnam, are investigated by the prosecutors. The prosecution 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 problems, 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”.⁹⁷

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”.⁹⁸

Secondly, there is a lack of effective and independent monitoring mechanisms for detention facilities and complaints processing in China and Vietnam.⁹⁹ 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 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.¹⁰⁰ However, the system is still limited regarding openness. Moreover, the prosecution and oversight function of the Chinese procuratorate system are causing anxiety about the possibility of compromising the “independence of functions”.¹⁰¹ In addition, the effectiveness of other supervisory agencies, such as specialized inspectors or National Assembly deputies, is still questionable.¹⁰²

Vietnam adopted a new Law on Temporary Detainment, Pretrial Detention in 2015. While the temporary and pretrial detentions, which are commonly called “pre-

⁹⁷ The CAT COB on China 2015, at para. 22.

⁹⁸ The CAT COB on China 2015, at para. 22.

⁹⁹ The CAT COB on Vietnam 2018, at para. 34.

¹⁰⁰ Yue Ma, ‘The Chinese Police’ in M.R. Harberfeld, Ibrahim Cerrah (eds), *Comparative Policing: the Struggle for Democratization* (Sage Publication 2008), at 22.

¹⁰¹ The CAT COB on China 2015, at para. 22.

¹⁰² The CAT COB on China 2015, at para. 28.

ventive measures”, are usually applied in most of 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 comparison to prison conditions. On the other hand, there are also concerns from the advocates and NGOs about the situation of prisons.¹⁰³ 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.¹⁰⁴ In this Law, as well as in the Criminal Code, and Law on Temporary Detainment, Pretrial Detention, there are specific regulations on dealing with complaints and denouncement, including the duties of procuracies in governing the settlement of those subjects. However, the trustworthiness 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 2016) appear to not accompany any concrete institutional improvements toward transparency and openness. Unlike many expectations, 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. The 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 defence and security, foreign relations, economy, science and technology and other fields as prescribed by a law” (Article 6).

The debates on national human rights institutions (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 the 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.¹⁰⁵ However, they do not fully accept the

¹⁰³ 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.

¹⁰⁴ 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.

¹⁰⁵ 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

recommendation, just a part of 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 to be out of control.

Those problems, which are closely related to the constitutional institutions, require 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 achieving some positive development in recent decades, have never been easy for human rights defenders. In a current world of "serious restrictions in civic space on every continent", and "institutions of governance failed the people",¹⁰⁶ there is likely no breakthrough in the 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 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 the freedom of speech, of the press, of assembly, of association, of procession, and of demonstration." Meanwhile, freedom of association is claimed to be protected in Vietnam's 1946, 1959, 1980, 1992 and 2013 Constitutions. Article 25 of the 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."

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).

¹⁰⁶ 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.

In China, the control on civil society has been loosened under Deng Xiaoping regime (1978-1992).¹⁰⁷ 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 Jinping 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 to freedom of association. Perhaps, some may say that freedom of association has been “increasingly expanded” in the past three decades, and there are various types of organizations in Vietnam contributing to “liberalize the society”.¹⁰⁸ 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 torture in 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).¹⁰⁹ The domestic organizations are mostly lawyers’ organizations providing legal aid, and academic institutions conducting research and training.

¹⁰⁷ 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.

¹⁰⁸ Le Quang Binh, *Associational Life from Citizens’ Perspectives* (Tri Thuc Press 2016), at 35.

¹⁰⁹ The Network of Chinese Human Rights Defenders (CHRD): <https://www.nchr.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.

In Vietnam, there are several small groups, in the form of foundations, and individuals working to support prisoners and their families. Besides 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 unregistered, and even considered to be “reactionary” by the government. Another loose 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.

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.¹¹⁰

The participation of NGOs from Vietnam in reporting to CAT process in 2018 was not as visible as China in its recent cycles. Except for 5 independent reports of international NGOs network working in Vietnam and some abroad based NGOs, there are only one joint report by local Vietnamese groups in collaboration with an US-based NGO, which was sent to the Committee against Torture.¹¹¹ All of the local groups are unregistered and unrecognized by the government. On the other hand, there is no report from academia or state-supported NGO. The participation of civil society has become better in the ICCPR third reporting cycle since 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.¹¹² Besides, some other domestic reg-

¹¹⁰ 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).

¹¹¹ 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.

¹¹² They are: Human Rights Space (HRS) and the Cooperation Group for Governance and Public Administration Reform (GPAR), Vietnamese Women for Human Rights (VNWHR).

istered groups also send reports, but to introduce themselves rather than express concerns about the implementation of civil and political rights.¹¹³

The position of individual lawyers in Vietnam and China has been an interesting topic for discussion. The promising role of Chinese human rights protection (*wei-quan*) lawyers observed in the previous years has been broken by the recent crackdown pointing toward them and other activists.¹¹⁴ However, owing to the rising number of lawyers, some of them are still ready to shoulder politically sensitive cases, including 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 public affairs.¹¹⁵

Meanwhile, Vietnamese lawyers are encountering various kinds of danger in their work, too. For instance, an outspoken lawyer from the central province of Phu Yen was 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 the home of a 17-year-old boy who died after falling into a coma while in 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.¹¹⁶ Among the excuses for the arrest is the female blogger’s compilation “Stop police killing civilians” and a list of 31 citizens or victims who 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”.¹¹⁷

¹¹³ Such as Viet Nam Women’s Union (VWU), Vietnam Peace and Development Foundation and Ho Chi Minh City Muslim Representative Committee.

¹¹⁴ 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.

¹¹⁵ Fu and Cullen [2008] (n 43), at 111 – 127.

¹¹⁶ 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.

¹¹⁷ 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.

The lack of judicial review and a 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 to a less extent in Vietnam.¹¹⁸ The concept of constitutionalism is understood very limited by the Vietnamese people, just in the academic and scholarly discussions¹¹⁹, while lawyers, judges and the public are almost unfamiliar with it.

In the process of discussion on amending 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, Article 119 of Vietnam's 2013 Constitution regulates that "all violations of the Constitution shall be dealt with", all agencies of the state 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 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 ongoing. The international human rights law and national constitutions are playing different important roles in this battle. International law is creating a 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-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.

¹¹⁸ Stéphanie Balme, Michael W. Dowdle (Eds.), *Building Constitutionalism in China* (Palgrave Macmillan 2009), at 1-20.

¹¹⁹ 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".

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 Sikink, 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

TORTURE ON DALIT WOMEN IN INDIA: CASE OF “DOUBLE JEOPARDY”

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Abstract: *The paper attempts to explain the aspects of torture that characterises the lives of Dalit women in India from an intersectional standpoint. It looks into the background of the caste system and elucidates the notion of systematic discrimination perpetrated on them in the backdrop of the ‘double jeopardy thesis’. It further gives an exhaustive account of the laws against such discrimination and their efficacy in praxis that reveals a pattern of impunity. Overall this paper helps unpack the invisibility of the plight of Dalit women and proposes that an intersectional analysis becomes imperative in understanding the multi-fold torture faced by them.*

Keywords: *Caste, Dalit women, Gender, Intersectionality, Torture.*

INTRODUCTION

The definition of “torture” remains exceedingly varied, as many acts, conducts or events may be viewed as torture in certain circumstances while they may not be viewed as such in others. Since the paper deploys the notion of “torture” as a conceptual tool to understand and analyse the nature of violence and discrimination experienced by Dalit women, it would be pertinent to confer about the term in a broader sense.

The internationally agreed legal definition of torture as under Article 1 of the United Nations Convention against Torture and Other Cruel, Inhumane Treatment or Punishment reads, “ 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 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 sanctions¹²⁰.” Nevertheless, the conception remains

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¹²⁰ UNGA Res 39/46 (10 December 1984) UN Doc A/RES/39/46.

increasingly relative and dynamic, and is most often associated with the notion of powerlessness, discrimination and violence, and can arise when people are isolated, insecure and defenceless in the face of certain risks.

In India, the phenomenon of discrimination and violence needs to be understood as deeply rooted in the caste system, which entails the stratification and hierarchical ordering of people into various groups termed as 'castes'. Whereby the hierarchically lower groups bear perpetual torture on the pretext of their social ordering. The lowest in the hierarchy, traditionally referred to as 'untouchables' are now collectively known as Dalits. This paper, therefore, uses the framework of torture to address Dalit women's experiences of discrimination, violence and humiliation. The precarity of Dalit women becomes evident from the fact they live under deplorable conditions with little or no access to basic health care, education and sanitation facilities as they are singularly positioned at the bottom of the caste hierarchy. Further, their socio-economic vulnerability and lack of political voice increase their exposure to potentially violent situations while simultaneously reducing their ability to escape.

The reason why this paper essentially highlights the plight of Dalit women when the Dalit people as a whole are so clearly discriminated against is for the fact that torture inflicted upon Dalit women find its way through different allies simultaneously, that do not fit neatly within categories. Hence leads to the non-recognition of multiple oppression suffered by them as a synthesised experience, which works together in producing systematic torture. This intersectional experience thus makes it imperative to understand the analysis of gender and caste oppression against the backdrop of the notion of "torture".

CASTE-SYSTEM AND WOMEN IN INDIA

What is caste?

Caste in simple terms is a form of social stratification wherein people are graded as superior and inferior based on their occupation. There are thousands of castes (or sub-castes) all hierarchically ranked and linked in complex ways that stretch across regions. However, caste as a phenomenon is inherently associated with the Indian social apparatus. It has existed throughout history and even the most ancient civilisations of Africa, Greece, Rome and China endorsed some form of the caste system.¹²¹ However, what distinguishes India's history of caste from other countries is that it is sanctioned by religion, as a corollary, the process of

¹²¹ Mary C Grey, *A Cry for Dignity: Religion, Violence and the Struggle of Dalit Women in India* (Routledge, 2014) 6.

industrialisation, development and democratisation could not contribute much in redressing this endemic.¹²²

The word Dalit comes from the Hindi word *dalan*, meaning oppressed or broken. Mary C. Grey in her work *A Cry for Dignity: Religion, Violence and the Struggle of Dalit Women in India* elucidates that the word 'Dalit' means 'broken' or 'crushed', like Dal—a universally popular dish made from lentils—where lentils are crushed to produce the sauce; likewise the Dalits see themselves as broken people, deliberately crushed by the caste system.¹²³ Alternatively, they are also known as the Schedule Castes, a term used for the first time by the British in the Government of India Act 1935 and referred to them as 'depressed classes'. However, a major contention surges while pronouncing Dalits as Schedule castes because significant community members do not identify with the term and argue that an increased emphasis on the term will rather give rise to a sense of alienation which might elevate animosity between the so-called lower and upper castes.

Gangadhar Pantawane, a Dalit writer from Maharashtra defines Dalit as a notion of change and revolution.¹²⁴ He vocalised that Dalit is not a caste but a symbol of revolution as they believe in humanism than any sacred text of divine origin that makes them slaves to other castes. It is in *Rigveda*¹²⁵, we find the archaic references to the divine origin of the caste system. It illuminates that each part of human society was formed out of the body of the creator god, the Brahma. As reads a hymn of the Rigveda, "The Brahman (priests) was his mouth, of his arms was the Rajanya (Kshatriya or warriors). His thighs became the Vishya (merchants), from his feet the Sudra (serving castes) was produced."¹²⁶ It refers to the *chaturvarnya system* (the division of society along the lines of the four *varnas*¹²⁷) as eternal and therefore, unassailable.¹²⁸

Jyotiba Phule, a social activist, thinker and writer, and a pioneer anti-caste reformer from Maharashtra, who established the first school of *shudratishudra* (Dalit) girls in 1848, did not relate his opposition to the caste only to the *varna system* (caste system) but to everything within the Hindu system.¹²⁹ He emphasised that the

¹²² Valerie Mason-John, *Broken Voices: Untouchable Women Speak Out* (India Research Press, 2008) 1.

¹²³ Grey (n 3) 1.

¹²⁴ Gangadhar Pantawane, *Evolving a New Identity: The Development of the Dalit Culture* (ed), *Untouchable! Voices of Dalit Liberation Movement* (Zed Books Ltd 1986) 79.

¹²⁵ One of the four sacred canonical texts.

¹²⁶ Ralph T.H. Griffith, *The Hymns of the Rigveda* (2nd edn [reprinted]) 603.

¹²⁷ A Sanskrit word with several meanings including type, order, colour, or class, used to refer to social classes in Hindu texts like the Manusmriti.

¹²⁸ *Ibidi*.

¹²⁹ G P Deshpande, *Selected Writings of Jotirao Phule* (LeftWord Books 2002).

proclamation of the organic essence of the caste system is nothing but an attempt to cajole people into believing it as a sacrosanct feature of Hinduism and to further rationalise their dominance and perpetuate violence. He referred to this pernicious social order as a corollary of Brahmanism. As such, Hindu religion or Hinduism is the edifice of the *brahman* superiority and their divine origin.¹³⁰

Caste and Women

The ideological framework of Brahminism is equally tantalising for women as it produces a form of institutionalised inequality that relegates them as passive spectators. Dr B.R Ambedkar, an astute of anti-caste struggle in India defined caste as an endogamous unit.¹³¹ He affirmed that caste as an enclosed unit display multiple characteristics, but when rightly understood - prohibition of intermarriage flare as an essence of Caste.¹³² It can be interpreted in a way that endogamy serves as the mainspring to the social organisation through which caste is reproduced. A total restriction on marrying outside of one's caste leaves no room to breathe out of the punitive system that reasserts its brahman dominance.

As a consequence of endogamy, marriage becomes a defining feature of caste that ritualises female sexuality in hierarchical ordering. In her book *Gendering Caste through a Feminist Lens*, Uma Chakravarti ably explores the relationship between caste and marriage. She points out that in a historical context, endogamy has not often been a feature of primitive societies. Thus, its invincibility in certain societies was purely to preserve the separation and boundedness of a group through general reproduction. In India, it was done to concentrate the social and economic privileges within a particular group, namely the upper castes, to maintain the qualitative attribute of *jati* (caste).¹³³

The idea of preserving the purity of lineage weighs heavily on women as the very notion of marriage relates to birth and descent. Thus, the centrality of marriage to the structure of power makes women docile to their male counterparts, locating them at the bottom of the institutionalised framework of caste that is deeply entrenched in inequality. Therefore, reaffirming Dr Ambedkar's acumen rightfully true that the caste system is "an ascending scale of reverence and a descending scale of contempt".¹³⁴

¹³⁰ ibidi

¹³¹ B R Ambedkar, *Writings and Speeches* (Vol. 1. Education Department, Government of Maharashtra 1979) 3-22.

¹³² ibidi

¹³³ Uma Chakravarti, *Gendering Caste Through a Feminist Lens* (Stree Publications 2003)

¹³⁴ Ambedkar (n13)

THE DOUBLE JEOPARDY THESIS AND DALIT WOMEN

The dual and systematic discrimination of casteism and sexism is a pervasive feature of social organisation in India. The status of Dalit women, therefore, can be understood through the intersectionality approach, which is not an abstract but a descriptive notion of the multiple oppressions experienced in a society. Kimberle Crenshaw, a Black legal scholar in her famous and insightful essay *Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Anti-Race Politics.*, coined the term 'intersectionality'¹³⁵. She argues that the widely used approach of the race-sex analogy, which draws parallels between the systems and experiences of domination for blacks and women, has done little to explicitly state the experiences of Black women different from that of Black men or White women. It has rather presumed it to be synonymous with either racial or sex-based oppression.

Crenshaw asserts that Black women are discriminated against in more than one way, and those patterns of discrimination rarely fit neatly into categories. She explicates it using an analogy referring to a traffic intersection that reads "Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars travelling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in an intersection, her injury could result from sex discrimination or race discrimination. . . . But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm."¹³⁶

Her demonstration of such parallels clearly echoes that manifold oppressions are not each suffered separately, rather as a synthesised experience. She further sought to highlight that the obfuscation of the profound substantive differences often leads to a deficient analysis of oppression experienced by a community in particular. An American race, class and gender theorist, Patricia Collins also emphasises the importance of the concept 'intersectionality' to understand how 'oppressions work together in producing injustice'.¹³⁷

¹³⁵ Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989) 1 University of Chicago Legal Forum 139.

¹³⁶ *Ibidi.*

¹³⁷ Patricia Hill Collins, 'Intersectionality's Definitional Dilemmas' (2015) 41 *The Annual Review of Sociology* 1-20.

In a similar vein, while comprehending the discriminatory episodes of Dalit women in India, one finds it to be synonymous with Black women's experiences. Correspondingly, the ordeal of overlapping experiences of discrimination permeates the lives of Dalit women, who often are the victims of double-discrimination or 'double jeopardy'. They are oppressed as women and are relegated to the bottom of the social hierarchy for their identity as Dalit. Therefore, the notion of 'Brahmanical patriarchy' and 'Dalit patriarchy' could be crucial in understanding this 'double jeopardy thesis'.

Brahmanical Patriarchy

Caste relations in Indian society are sustained through the classical literature of the Hindu religion that eternalises the purity-pollution aspect. These literature (*Vedas*) are a mouthpiece of the upper castes, put forth as a systematic exposition to deftly appropriate its sacrosanctity. Such prerogative demonstrations not only vindicate caste as legitimate but also establishes patriarchy as an institution. Greda Lerner in her one notable work of 1986 *The Creation of Patriarchy*, explores the relationship between patriarchy and other structures within a historical context. She argues that 'images, metaphors and myths' lead to the widespread existence of patriarchal and misogynistic practices, and it is not due to the biological or psychological differences between male and female bodies rather has historical explanations.¹³⁸ On the lines of it, we can understand that patriarchy in Indian Hindu society was a ramification of such historical processes, which were ideologically constructed within the Brahmanical texts.

Brahmanical patriarchy as a phrase was coined by Uma Chakravarti, does not refer to patriarchy within the Brahman Castes.¹³⁹ Rather to a particular form of patriarchy is organised on the basis of caste prescribed in the Brahmanical texts. It links caste hierarchy and gender inequality in ways that valorise notions of chaste wives and sacrificial mothers to stymie women's behaviour to preserve boundaries of caste. The control over women's sexuality was approbated as a tool of endogamy through the dehumanising practices of *sati* (enforced widowhood) and girl marriage (child marriage). Women's only claim to social being premised upon a self-willed subordination that amounted to a surrender to self. This institutionalised control within marriage resulted in the denial of social and economic resources to women, which subsequently led to the affliction of torture and gross violations of their liberty.

¹³⁸ Greda Lerner, *The Creation of Patriarchy* (OUP 1986).

¹³⁹ Chakravarti (n 16).

Uma Chakravarti argues that maintaining necessary distance and control over lower castes was as crucial as differential forms of control over women's bodies.¹⁴⁰ The most sacred of Hindu texts, *Manusmriti*¹⁴¹ make abhorrent references to women and their heterosexuality as essentially sinful. According to Manu woman's insatiable sexual desire must be instructed through her dependence on her husband, for the preservation of family and the lineage. Thus, informing woman to only follow the path of *pativarta* (virtue) and *Stridharma* (perform her duties).

However, the authorisation of this certain kind of feminine behaviour is a complex affair as it is not independent of the attributes of the caste system. The differential aspect renders specific social relations across castes. Kumkum Sangari, suggests that one should think of these intricacies through the notion of 'multiple patriarchies'.¹⁴² The emphasis on women's sexual purity alongside the social hierarchies establishes an institution whereby, upper-caste men can have unrestricted access to lower castes women; howbeit, the opposite is not true for lower castes men. She points out that this is done not merely to uphold the caste system but to further appropriate the social and economic vulnerabilities of the lower castes.

In a similar vein, Kumkum Roy demonstrates how caste and gender stratification develop as an inter-linked process through the control over production and reproduction parallel to the purity and pollution aspect, established by upper-caste-ruling men to legitimise the Brahmanical notion of patriarchy.¹⁴³ It is often affirmed that upper caste women are thoroughly subordinated, more than any other group as their lives remain severely guarded and monitored by their male kin as part of their upper-caste privilege. That lower caste women in such a system have more leeway, as they are less secluded and are often engaged in labour outside of their homes, also in some cases have the freedom to remarry¹⁴⁴ is a rather superficial and a romanticised picture. As scant attention is given to the fact that Dalit women are overtly exploited (both sexually and economically) by upper caste men and are frequently in a position where they are paid far fewer wages than their male folks and spend more than they

¹⁴⁰ ibidi

¹⁴¹ An ancient legal and constitutional text of Hinduism.

¹⁴² Kumkum Sangari, 'Politics of Diversity: Religious Communities and Multiple Patriarchies' (1995) EPW.

¹⁴³ Kumkum Roy, Goddess in Rigveda: An Enquiry (ed), *Invoking Goddess: Gender Politics in Indian Religion* (Shakti Books 2002).

¹⁴⁴ Rama Mehta, *Inside the Haveli* (Penguin, 1994).

Here a young couple fall in love at the University of Bombay (Mumbai).

The young bride is brought home to a haveli in the ancient city of Udaipur, where she is forced to live in purdah – extreme seclusion - and scarcely ever leaves the family household.

earn as are under constant prey of some money-lender. Their social vulnerability further endures a range of sexual harassment by both upper and lower caste men. The latter is reflective of another form of patriarchy that contributes to Dalit women's double jeopardy.

Dalit Patriarchy

A renowned Dalit activist and author, Kancha Ilaiah, in his book *Why I am not a Hindu!* made an assertion that the social organisation within the lower castes group entails greater equality between men and women. He emphasises that notion of purity and lineage is only a feature of the upper castes, created by the upper castes.¹⁴⁵ Accordingly, relationships between Dalit men and women are determined by their labouring roles, in which both men and women are equally integrated. Therefore, affirming that patriarchy as an institution find little space in the Dalit social apparatus, as it is a consequence of only Brahmanical ordering to which they stand in protest.

Feminists speak highly unappreciative of this stance, for they point out that this is far from reality and conceals the real picture of Dalit women's precarity. The institutionalisation of patriarchy has become a deep-seated problem of Indian society. This has many expressions and different levels of severity, which render Dalit women as 'The Dalits of the Dalits' or 'The least among the Dalit' or 'Thrice Dalits' as pronounced by Ruth Manorama¹⁴⁶, a prominent Dalit woman activist. The specificity of their discrimination is more damaging than that of Dalit men. Manorama, on the lines of Kimbrelle Crenshaw's analogy of intersectionality, points out that Dalit women stand at the crossroads and thus, suffer a synthesised experience of multiple oppressions. They are discriminated against for being a Dalit by both upper castes men and women and are also oppressed for being a female both by upper castes and lower castes men. Under the impression of Dalit patriarchy, they bear discrimination and torture in their household within family and marriage. Their husbands who already suffer the endemic of caste discrimination adopt substance abuse as an escape, and often beat their wives out of anger and humiliation. Due to persistent chronic poverty, they are forced into drudgery occupations of manual scavenging, cleaners and even forced prostitution. Further, the ignorance of their male counterparts besides the endemic of poverty is reflective of their grim health indicators

¹⁴⁵ Kancha Ilaiah, *Why I am not a Hindu! A Sudra Critique of Hindutva Philosophy, Culture and Political Economy* (Samya 1996).

¹⁴⁶ Ruth Manorama, 'Acceptance Speech' (The Right Livelihood Foundation 31st December 2006) < <https://www.rightlivelihoodaward.org/speech/acceptance-speech-ruth-manorama/>> accessed on 28th April 2021.

A noted Indian sociologist and social anthropologist, M.N Srinivas, identified that 'sanskritisation' as a process emulates these norms that are naturalised while seeking upward mobility (the experience of moving into a more privileged socioeconomic position).¹⁴⁷ The middle and lower castes often adhere to these practices as part of associating themselves with the notion of meritocracy and equality. Feminists point out that the desire to seek upward mobility has meant the downward percolation of upper caste ideals of femininity, as such, the differential roles and responsibilities of upper and lower castes women are now getting blurred.¹⁴⁸ Dalit women as per the superficial notion of *Brahmanical* patriarchy enjoyed more freedom than upper-caste women, such as some form of liberty to marry outside of caste, to remarry and to work outside of household-cores, were now restricted because of the process of 'sanskritisation'.

Therefore, Vimal Thorat's accusation stands true that Dalit women are disadvantaged of all. They are doubly disadvantaged for being a female and for being Dalit, with the poorest education, health and welfare indicators alongside daily struggles of sheer survival.¹⁴⁹

TORTURE ON DALIT WOMEN: LAW AND PRACTICE

The widely accepted definition of torture by the UN refers to it as an "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...for any reason based on discrimination of any kind.." In a similar vein, it becomes imperative to highlight the plight of Dalit women, which is exacerbated by the double jeopardy suffered by them, as theorised in the sections above.¹⁵⁰ Their doubly discriminated position makes them vulnerable to potentially exploitative situations making 'torture' a tool to inflict intentional physical and mental suffering for transgressing caste-hierarchies.

It is pointed out that in India, one in twenty-five people suffer some form of caste-based discrimination based on their work or bloodline.¹⁵¹ The overall situation of the Dalits (Schedule Castes) in the country remains grim, which adds to the augment of women who are persistently subjected to the worst forms of exclusion, stigma and torture based on their caste identity. According to the recent data by National Crime

¹⁴⁷ M N Srinivas, 'A Note on Sanskritisation and Westernisation' (1956) 15(4) *The Far Eastern Quarterly* 481-496.

¹⁴⁸ Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press 2009).

¹⁴⁹ Vimal Thorat, 'Dalit Women Today' *Communalism Combat* (May 2001).

¹⁵⁰ UNGA (n1).

¹⁵¹ John (n 4).

Records Bureau (2019), that crime against Dalits have risen 37% over the last decade, at least 10 Dalit women are raped each day and their vulnerability to rape and torture has increased 44% in the past ten years.

These grave acts of torture are indeed against the natural law and the human spirit. However, India's past and the present is no meagre of such gruesome practices, the ban on which became a reality only with astute efforts and acumen of anti-caste social revolutionaries like Jyotiba Phule and the chief architect of the Indian Constitution, Dr Bhimrao Ramji Ambedkar.

Caste, Untouchability, Women and Indian Law

The untamed endeavours of anti-caste social reformers in the early nineteenth century led for the first time the passing of The Caste Disabilities Removal Act XXI of 1850, to end caste-based disabilities faced by people from the lower castes. Reformists like Jyotiba Phule, Savitri Bai Phule and Periyar E.V. Ramasamy incessantly worked to uplift all the vulnerable sections of the society from the scourge of systematic and structural caste-based discrimination. It was the reverberation of their efforts that the colonial power rouse to sense to delegitimise caste-based disabilities under the 1850 Act. Later, on the basis of the 1931 census that the British government had conducted, the Government of India Act 1935 was promulgated, the reservation for 'depressed classes' was incorporated in this act, which came into force in 1937. The 'depressed classes' later came to be known as the 'Schedule Castes'. Following which in 1938, Madars Removal of Disabilities Act 1938 (Madars Act of XXI 1938) came into operation. Between the years 1943 to 1950 around seventeen such laws were enacted at provincial levels. However, it was only after the enactment of the Indian constitution and the significant contribution put in by Dr Ambedkar as the vanguard of Dalit rights, that such laws were introduced at a national level. On 26th January 1950, the Indian Constitution came into force which proclaimed India as a sovereign, secular socialist democracy committed to secure all its citizens' liberty, equality and fraternity. This unequivocal necessity reflected in the preamble culminated in the promulgation of the Untouchability (Offenses) Act, 1955. It abolished untouchability under Article-17 of the constitution, which was a part of the fundamental rights of Indian citizens. This act was subsequently amended in 1976 and renamed as Protection of Civil Rights Act, 1955 (PCR Act), it was majorly done to make the provisions more stringent and to add an array of practices that could be deemed as discriminatory. In 1989 yet another crucial law, The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 was passed, which came into force in 1990 and the rule for the same came into effect in 1995.

Besides the caste specific laws, legislation prohibiting certain misconducts that affect people in general and Dalits, in particular, were also put in place. These laws

included, The Employment of Manual scavengers and Construction of Dry Latrines (Prohibition) Act 1993, which made manual scavenging a cognisable criminal offence by imprisonment up to one year and a fine of Rs.2000 subject to increase Rs.100 each day for continuing violations. The Immoral Traffic (Prevention) Act, 1956 (ITPA) was introduced for the prevention of trafficking and commercial sexual exploitation. The Child Labour (Prohibition and Regulation) Act, 1986 to prohibit the engagement of children in certain employments and regulate the conditions of working. Protection of Children from Sexual Offences Act, 2012 for preventing children from sexual abuse and other such laws.

In addition to these laws, the Indian constitution provides for certain fundamental rights under Article 14, 15(1), 16(1) and 16(2) which reads- "State shall not deny to any person equality before the law", "State shall not discriminate against any citizen on the grounds of religion, race, caste, gender, sex or place of birth, or any of them", "State shall provide equal opportunity to every citizen in matters relating to employment" and "prohibition of gender discrimination in matters of employment" respectively. Article 15(3) state that the state is free to make any special provision for women and children.

Further, Part IV of the constitution lists Directive Principles of the State Policy which under Article 39, Section a, b and c provides that the state shall, in particular, direct its policy towards that all citizen, men and women, have the right to an adequate means of livelihood, ensure equal pay for equal work to men and women, and the state shall secure the health workers, men and women and that children are not abused, and are not forced to entre vocations due to economic necessity that unsuited for their age and strength.

Penal and criminal codes

A variety of legal protections are afforded to women through the amendments to India Penal Code and Criminal Procedure Code. For instance, the Indian Penal Code under Section 376 states that the crime of rape, when committed by a private actor, is punishable by a minimum of seven to ten years and a maximum of life imprisonment. The subsection (2) of 376 reads, that the rape is punishable by 'rigorous imprisonment' for a term of ten years to life if it is committed by a police officer against a woman in his custody (or in the custody of a police officer subordinate to him), or on the premises of police station a station house.

Other such laws include that if a woman is searched upon arrest, it must be done by the female officer with 'strict regard to decency and modesty'. That a police officer has no power to compel women or children below the age of fifteen to appear

in the police station to obtain information, instead should visit informants residence. Another crucial protection states that when searching a place occupied by a woman who sought to be arrested, she must be sent notice before entering that she has the liberty to withdraw.

Convention on the Elimination of All Forms of Racial Discrimination 1963

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 as substantiated by India, under its Article -1 states that discrimination based on descent falls under the ambit of 'racial discrimination'. Hence, it applies to matters of caste discrimination also. Article 5(a) and (b) of the Convention reads that victims should receive equal treatment before the organs administrating justice and must receive protection against violence, respectively. Article 2, para 2 of the CERD obligates state parties to take measures for prevention and enjoyment of human rights and Article 4 state shall not discriminate against the victim and condemn any sort of propaganda based on superiority of the class or race.¹⁵²

Convention on the Elimination of All Forms of Discrimination against Women, 1979

India has ratified that Convention on the elimination of discrimination against women, which states under Article 2, that parties to the convention are required to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. To refrain from engaging in any act or practise of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.¹⁵³

In addition to these national and international laws, there are several commissions at national and state levels, like National Human Rights Commission and State Human Rights Commissions. Special commission for Schedule Castes, Schedule Tribes and Women, to monitor the working and implementation of the special laws. However, in cases of violence and torture against Dalits, Dalit women more specifically continue to haste, giving rise to ignominy, yet are reflected upon evasively by those in power, which reveals a pattern of impunity provided by the state to the perpetrators inflicting torture.

152 UNGA Res 2106/xx (21 December 1965) UN Doc A/RES/39/46.

153 UNGA Res 34/180 (18 December 1979) UN Doc A/RES/34/180.

ASPECTS OF TORTURE CHARACTERISING DALIT WOMEN'S LIFE

The lives of Dalit women are characterised by an affliction of perpetual torture, both physical and mental, that make way through vexed channels of social organisation wherein they stand at the crossroads of caste-gender hierarchies, which leads to an interplay of overlapping aspects of torture.

Caste-based atrocities

Dalit women often fall victim to caste-based torture used as a tool to inflict political lessons, crush dissent and labour movements within Dalit communities. Data suggest that multidimensional poverty is 65.8% for Schedule Castes while the general poverty level is 33.3%.¹⁵⁴ Women in these communities, for the most part, endure widespread poverty and form a majority of the landless labourers. They work on the agricultural farms of upper castes men. These settings of work are marked by perpetual and exploitative experiences of torture on account of their caste.

The Khairlanji massacre of 2006, to date, remains one of the most adverse cases of caste-based atrocities in India. Surekha Bhotmange, a forty-year-old Dalit woman of the Khairlanji village in Maharashtra had committed several crimes- she was a woman and an educated Dalit who worked resolutely towards changing her family's circumstances. Surekha belonged to the Mahar caste and, along with her husband, had bought a small plot of land in the areas surrounded by the farms of upper castes men. This diminutive act of buying land raised furore amongst the majority of the upper castes villagers, who sought to teach Bhotmange's a lesson by brutally torturing and killing, Surekha and her three children.¹⁵⁵

In a more recent case of a village in the Hathras district of Uttar Pradesh, a 19-year-old Dalit woman was gang-raped by upper castes men in September 2020, and a month later succumbed to her injuries in a hospital in Delhi.¹⁵⁶

A report by the Human Rights Watch 1999, highlight some gruesome cases of caste-based torture in the late 20th century. In 1997, in Laxmanpur-Bathe, Bihar, Dalit women were raped, mutilated and massacred by the Ranvir Sena (a group led by upper-caste men). In the same year, in a horrid case of violence in the southern district of Tamil Nadu, M. Meena a twelve-year-old Dalit girl, was raped by a twenty-

¹⁵⁴ Asia Dalit Rights Forum, *Progress towards Inclusive Sustainable Development in India A study of Dalits and Adivasis in 2030 Agenda* (2017).

¹⁵⁵ 'Khairlanji: The Crime and Punishment' *The Hindu* (India, August 2010, Updated November 2016).

¹⁵⁶ Rohini Dahiya, 'The Hathras Case, Caste Discrimination in India and International Law' (*Modern Diplomacy* 1st May 2021) < <https://moderndiplomacy.eu/2021/05/01/the-hathras-case-caste-discrimination-in-india-and-international-law/> > Accessed 12th May 2021.

one-year-old upper-caste man. The girl was continually blamed for Dalit identity and subsequently prevented from receiving justice through the legal course of action.¹⁵⁷

Over these years, the situation has become even grim. Recent data by National Crime Records Bureau on the crime against Dalit women in 2019, makes evident the severity of the perpetual torture suffered by them pertaining to their Dalit identity.

Crime against Dalit women	
Crime	2019
Rape IPC 376	3514
Attempt to Rape IPC 376, 511	1252
Outrage modesty IPC 354	3471
Sexual Harassment IPC 354A	687
Assault with intention to disrobe IPC 354B	269
Voyeurism IPC 354C	18
Stalking IPC 354D	198
Insult to modesty IPC 509	147
Kidnap and abduction for marriage IPC 366	363
Total	9,919

Source: NCRB 2019

Scourge of manual scavenging

Dalits in general and Dalit women, in particular, suffer a violation of their basic human rights as they are forced into the drudgery of manual scavenging. The International Dalit Solidarity Network in one of its recent reports reveal that after twenty-eight years to law against Manual scavenging India still has more than 1.2 million manual scavengers.¹⁵⁸ Yet, the government has no official database citing the same. Owing to this non-veracity on the part of the state and to the imposition of the 'occupation' based hierarchical caste system, the lives of Dalit women are tantalised.

Data suggest that 95% to 98% of those shackled by this practice are women.¹⁵⁹ They are pushed into menial and decadent work of cleaning dry latrines, carrying loads of excrement in baskets, cleaning sewage, discarding placenta post-delivery and work for India-railways, which has the largest number of dry latrines and employees umpteen manual scavengers and is the world's biggest open toilets without any safe or hygienic methods of cleaning.

¹⁵⁷ Human Rights Watch, *Broken People: Caste Violence Against India's "Untouchables"* (1999).

¹⁵⁸ 'Manual Scavenging' (Dalit Solidarity Network) < <https://idsn.org/key-issues/manual-scavenging/> > Accessed on 12th May 2021.

¹⁵⁹ ibidi

Along with the caste effects, the job of manual scavenging comes with its gendered effects too. Women engaged in the practice face multiple forms of discrimination burdened with the responsibilities of taking care of the family and providing financial help altogether. They become vulnerable due to their gender and their Dalit. They have families involved in this work for centuries, which they term as *jagir*, a family asset on which the coming generations has to hold on, especially women. Further, in accordance with the Feudal caste and gender-based customs, women who clean toilets in the private households generally 'inherit' the practice after they get married, termed as the *jajmani system*, for which they have little choice as it serves as the only source of livelihood to them because they come from the poorest and most marginalised communities, where food and financial security raises a serious concern.

Victims of human trafficking

Dalit women consist of the majority of the sex workers in India, who are deceitfully and forcefully trafficked into prostitution. Their socio-economic vulnerabilities make young girls and women fall prey to pimps who cajole them for providing respectable work in cities.

The caste and gendered relations thrive on the work that these women do. Their availability is appropriated as economic gains by men involved in the running of the racket of prostitution and are physically exploited by those who serve as their customers. The discourse of sexual purity and caste hierarchy is also deftly realised through this practice. As more than 90% of women trafficked into prostitution come from lower castes.

The internalisation of the casteist spur through cultural traditions that involve commodification and sexual exploitation more significantly contribute to the plight of these women. In the historical context under the '*devdasi* system' young girls from lower castes were made to serve as *devdasis* in the Hindu Temples to meet the physical desires of upper-castes men.¹⁶⁰ The tradition of *Lavani* dance, a form of erotic entertainment performed by lower castes women for the upper castes male patrons, serves as another case in point. These performances and songs present Dalit women as submissive subjects and therefore legitimising upper castes men sexual access to lower castes women by portraying them as a display of insatiable sexual desires. In present times, the representation of issues of caste and women in films and media makes apparent the internalisation of the casteist and misogynistic cultural traditions.

¹⁶⁰ Ankur Shingal, 'The Devdasi System: Temple Prostitution in India' (2015) 22(1) UCLA Women's Law Journal.

For instance, in mainstream Indian cinema, the forceful sexual submission of a Dalit woman by an upper-caste man is construed as heroic. The creators involved in such pieces are generally upper-castes men and women, and play a major role in sustaining the caste hierarchies and exploitation of lower caste women through culture and art.¹⁶¹

Institutional practices of torture and social vulnerability

Institutional practices of humiliation and torture is one of the many caste-based atrocities endured by Dalit men and women who attempt to break through the caste hierarchies to claim dignity and equal respect.

The suicide case of Payal Tadvi is a case in point. She was a medical-post graduate student who was mentally tortured and discriminated against by three upper castes doctors, forced to push herself to death in May 2020. Thus, any attempt to valorously stand against caste discrimination often weighs heavily on Dalits, more particularly women. Such incidents not only reflect the apathetic and callous attitude of the state and its institutions towards a community, but also adds to complex negotiation and internalisation of the vulnerability of Dalits as inevitable and inescapable.¹⁶²

This embedded character of torture is even worse for those in rural areas. For instance, The 73rd amendment to the Indian Constitution provides 33% reservation to women in local bodies and equal representation of Dalit women. This policy as a tool for political empowerment of women rather presents intricate caste and gender dynamics, whereby in the first stance, lower castes women are prevented from claiming their space in the local government institution, and even if they do, they are constantly bestrode by upper caste men and women.

Therefore, their caste location in the social apparatus make them susceptible to various forms of physical and mental torture, wherein they have a minimum claim to 'social safeguarding'.

Patterns of impunity to the perpetrator

The cases of caste-based torture on Dalit women not only contravenes and puts into question the efficacy of the existing laws but also reveal the patterns of impunity by the state to the perpetrators of violence.

The recent case of Hathras gang rape in Uttar Pradesh is one of such adversities that divulges a perilous side of the Indian social apparatus and insidious efforts of impunity by the police and the government. For instance, the police did not take

¹⁶¹ Abhinaya Ramesh, 'Dalit Women, Vulnerabilities and Feminist Consciousness' (2020) 12 EPW 31-38.

¹⁶² *Ibidi*.

cognisance of rape for eight days after the incident and was reluctant to help when the victim was taken to the police station in the first place. The family was also exhorted by the district magistrate to change their statement. Further, the police allegedly cremated the victim without the involvement of her family members. The case was also wrought by state-sponsored propaganda as the police adamantly declined to accept if the rape was committed simply based on the fact that the forensic report revealed the absence of semen in the body of the deceased. This was approbated despite the fact that forensic evidence can only be found up to 96 hours after the incident and that sample for the case was collected after eleven days. Thus, such impunity to 'upper caste men' by the state violates Indian obligations under national as well as international law.¹⁶³

The failure of prosecution against such reprehensible crimes begins from the denial of the lodge at an FIR in almost all the cases involving caste-based violence. In the Khairlanji massacre case of 2006, Surekha Bhotmange reached the police station who paid no heed to her requests for complaint. A few months later, one of her relatives was attacked and left for dead. This fever-pitched her agony and she filed another complaint. The police this time registered her case and made some arrests, however, the accused were realised a few hours after their arrest. On the same, that is the 29th of September 2006, more than fifty villagers both upper castes men and women. They raided Surekha, her daughter Priyanka and her two sons out of their house, order the sons to rape their mother and sister; failing to do so genitals of the boys were mutilated and they were lynched to death. Surekha and Priyanka were gang rape in the bright daylight in front of the villagers that succumbed to death.¹⁶⁴

Following this massacre, Surekha was accused of having an extramarital affair with her relative that upset the villagers whilst the killers of the Dalit woman and her family roamed free. After mass protests by Dalits lower court took up the case and pronounced the judgement that the crime was committed purely out of the desire for 'revenge', and the judge also explicitly stated that no rape was committed and, therefore, adamantly rejected to invoke SC/ST atrocities act.

This is a rather not so uncommon practice in India. In more than 80% of the cases either the police or the court airbrush, the angle of caste aside and continue to unequivocally espouse caste prejudice.

A study by Human Rights Watch on Dalits in India highlights that women face daunting obstacles in lodging an FIR, and the situation becomes grave if you are a poor

¹⁶³ Dahiya (n 41).

¹⁶⁴ *The Hindu* (n 40).

woman living from a rural area and a Dalit by caste. The report illustrated two cases of rape to demonstrate how perpetrators enjoy impunity against such punitive actions.¹⁶⁵

Bhanwari Devi case is a striking example of caste and gender bias in the Indian administrative and legal system. Bhanwari Devi in the year 1985 joined the Rajasthan Government's Women's Development Programme, (WDP), called Sathin, as a grassroots worker. In, September 1992 Bhanwari was brutally gang-raped in the presence of her husband as in April the same year she reported a case to WDP against an upper-caste man in the village who attempted to child marry her one-year-old daughter. On moving to police state, she was remarked with innuendo that she was too old and ugly to draw attention for someone to rape her. The court acquitted the accused, reasoning that 'an upper-castes could not have defiled himself by raping a lower-caste.'¹⁶⁶

The report also points out the famous Suman Rani custodial rape case of 1989, wherein the highest court of appeal, the Supreme Court of India failed to charge the accused police officers with a ten-year sentence on account of the victim's questionable character. The court stated that as testified by the medical officer that the victim was used to frequent intercourse and since the girl did not report the committed crime within five days of the incident and that the version of the victim was not worthy of acceptance, therefore reduced the sentence to half number of years.¹⁶⁷

The situation today is no different from that of decades ago, as the recent data by the National Crime Records Bureau explicitly elucidates so.

Court Disposal of Crime against Scheduled Caste(s) - 2019					
Crime	Cases Convicted Out of Cases from Previous Year	Cases Convicted Out of Cases during the Year	Cases Convicted	Cases Discharged	Cases Acquitted
Rape IPC 376	313	26	339	100	613
Attempt to Rape IPC 376, 511	9	1	10	6	9
Outrage modesty IPC 354	260	36	296	99	612
Sexual Harassment IPC 354A	72	4	76	19	195
Assault with intention to disrobe IPC 354B	7	1	8	4	19
Voyeurism IPC 354C	0	0	0	0	2
Stalking IPC 354D	10	0	10	4	31
Insult to modesty IPC 509	4	0	4	0	22
Kidnap and abduction for marriage IPC 366	38	3	41	13	31

Source: NCRB 2019.

¹⁶⁵ Human Rights Watch (n 42).

¹⁶⁶ *Ibidi*.

¹⁶⁷ *Ibidi*.

INTERSECTIONAL ANALYSIS

Torture on Dalits in general and Dalit women, in particular, continue to spur despite special laws and institutional mechanisms. The data presented in the section above clearly demonstrate that caste discrimination and consequent torture arising from it has risen over the year. The lives of Dalit women are under constant fear of potential torture that could be inflicted on them through multiple channels simultaneously. Therefore, I propose in this section that law and policy framework as a tool against caste-based torture in India must entail an intersectional analysis.

Intersectionality in law

While the existing laws recognise the differences, it struggles to encapsulate the manifestations of those differences as lived experiences. There are laws that explicate prohibition against discrimination; however, the lacuna in its implementation exists because discrimination can be aggravated in more than one form simultaneously, which renders an individual or a community particular at the margins. As discussed in one of the sections above that Kimberle Crenshaw, an American legal scholar, coined the term 'intersectionality' to highlight the non-comprehensive anti-discrimination laws in the United States. Through her analogy of traffic intersection, she illuminates that discrimination can be perpetrated simultaneously through multiple channels of oppression that might not fit into categories. Similarly, Dalit women in India are discriminated against in more than one way. While describing various aspects of torture that characterises Dalit women's lives, one might observe that torture, both physical and mental, is inflicted upon them at the same time through multiple overlapping experiences.

Hence, for a law to suffice prevention of discrimination, requires the eradication of the systematic socio-economic inequalities perpetuated by casteism and patriarchy. Since structural inequalities and discrimination remain profoundly embedded in social structures and behaviours, the law must substantively redress these conditions that lie in the constitution. It must reflect on discrimination and torture through an intersectional approach that looks beyond the superficial patterns of torture- either just as caste-based or gender-based, towards a synthesised experience and, imagine and draw frameworks that are responsive to the complexities of the society. As the ability of the law to do justice depends on its understanding of the society to which it speaks and responds.

Women's Movement and Dalit Movement

Scholars and activists advocating intersectional analysis affirm that the experiences of those at the crossroads of marginalised identities have not only been

neglected by the state but also by the social movements. With regards to Indian social movements, Dr Vimal Thorat claims that Dalit women have been left behind by both Women's Movement and the Dalit Movements. The intersectional analysis not just requires the law and policy frameworks to be more inclusive, but also seek to change the way social movements have long perceived discrimination.¹⁶⁸

The women's movement in India proposed a category of 'woman' conceived as oppressed by the experiences of womanhood. This analysis ignored all other patterns of oppression vexed in caste, race and class relations. Also, these women representing a collective struggle for equal rights were a coterie who had the privilege of receiving education, which clearly was not the case for Dalit women who majorly lived in rural areas and were denied access to basic rights to education. Tension with the Women's movement as a whole is that it might pronounce as speaking for everyone, but it gives the least importance to 'difference' as a factor.

The major phase of social movements activism in the post-independence periods was during the early 1970s. Women's call for gender equality was at the forefront of these movements, which led to the establishment of numerous feminist organisations, *Samanta Manch* (Equality Forum), *Stree Sangharsh Samiti* (Women's Struggle Committee), *Stree Mukti SAnghathan* (Women's Freedom Organisation), *Feminist Collective Network*, *The Forum against Oppression of Women*, *Progressive Organisation for Women*, *Salehi and Manushi*. However, none of them took into cognisance that the stigma attached to caste made Dalit women suffer in a uniquely distinctive way. The primary concerns of these organisations included domestic violence, dowry, rape with no reference to multi-facet torture suffered by those intersectional marginalised. These feminist movements put less effort into caste-class analysis while ruminating on the notion of gender inequality. It was only through the formation of the *National Federation for Dalit Women* in 1995 that 'Dalit feminist stand point' brought to light that Dalit women are not a homogenous entity in themselves; therefore feminist movements must consider individual testimonies of marginalised women's experiences within the larger social structure.¹⁶⁹

These affirmations also presented an equal critique to Dalit Movements, to which Dalit feminist point out, that these movements though made space for Dalit women in articulating their voices, they less often demonstrated these interests as specific to Dalit women. Both as social and political movements, Dalit women has never been the face of such exposition. Perhaps, a threat to Dalit male leadership could serve as an explanation for this phenomenon.

¹⁶⁸ Thorat (n 32).

¹⁶⁹ Amrita Basu, 'Gender and Politics' (ed) *Oxford Companion to Politics in India* (1st edn 2010).

CONCLUSION

The moment in time demands a comprehensive intersectional analysis of law and policy framework, which as an alternative explanation to the notion of torture and discrimination understand the constitutive nature of different structures of power and norms and address better cases of aggravated marginalization of Dalit women in India. However, the intersectional outlook would long stand on the margins if the state and the civil society continued to view discrimination and torture through the lens of an exclusive approach, which albeit understand differences but fail to take into consideration its multifaceted nature constructed through vexed power relations in the society.

REFERENCES

Literature

1. Abhinaya Ramesh, 'Dalit Women, Vulnerabilities and Feminist Consciousness' (2020) 12 EPW 31-38.
2. Amrita Basu, 'Gender and Politics' (ed) *Oxford Companion to Politics in India* (1st edn 2010).
3. Ankur Shingal, 'The Devdasi System: Temple Prostitution in India' (2015) 22(1) UCLA Women's Law Journal.
4. Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press 2009).
5. Asia Dalit Rights Forum, *Progress towards Inclusive Sustainable Development in India A study of Dalits and Adivasis in 2030 Agenda* (2017).
6. B R Ambedkar, *Writings and Speeches* (Vol. 1. Education Department, Government of Maharashtra 1979) 3-22.
7. G P Deshpande, *Selected Writings of Jotirao Phule* (LeftWord Books 2002).
8. Gangadhar Pantawane, *Evolving a New Identity: The Development of the Dalit Culture* (ed), *Untouchable! Voices of Dalit Liberation Movement* (Zed Books Ltd 1986) 79.
9. Greda Lerner, *The Creation of Patriarchy* (OUP 1986).
10. Human Rights Watch, *Broken People: Caste Violence Against India's "Untouchables"* (1999).
11. Kancha Ilaiah, *Why I am not a Hindu! A Sudra Critique of Hindutva Philosophy, Culture and Political Economy* (Samya 1996).
12. Khairlanji: The Crime and Punishment *The Hindu* (India, August 2010, Updated November 2016).
13. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* (1989) 1 University of Chicago Legal Forum 139.
14. Kumkum Roy, *Goddess in Rigveda: An Enquiry* (ed), *Invoking Goddess: Gender Politics in Indian Religion* (Shakti Books 2002).

15. Kumkum Sangari, 'Politics of Diversity: Religious Communities and Multiple Patriarchies' (1995) EPW.
16. M N Srinivas, 'A Note on Sanskritisation and Westernisation' (1956) 15(4) The Far Eastern Quarterly 481-496.
17. Manual Scavenging (Dalit Solidarity Network) < <https://idsn.org/key-issues/manual-scavenging/>> Accessed on 12th May 2021.
18. Mary C Grey, *A Cry for Dignity: Religion, Violence and the Struggle of Dalit Women in India* (Routledge, 2014) 6.
19. National Crime Records Bureau (2019)
20. Patricia Hill Collins, 'Intersectionality's Definitional Dilemmas' (2015) 41 The Annual Review of Sociology 1-20.
21. Ralph T.H. Griffith, *The Hymns of the Rigveda* (2nd edn [reprinted]) 603.
22. Rama Mehta, *Inside the Haveli* (Penguin, 1994).
23. Rohini Dahiya, 'The Hathras Case, Caste Discrimination in India and International Law' (*Modern Diplomacy* 1st May 2021) < <https://modern diplomacy.eu/2021/05/01/the-hathras-case-caste-discrimination-in-india-and-international-law/>> Accessed 12th May 2021.
24. Uma Chakravarti, *Gendering Caste Through a Feminist Lens* (Stree Publications 2003)
25. Valerie Mason-John, *Broken Voices: Untouchable Women Speak Out* (India Research Press, 2008) 1.
26. Vimal Thorat, 'Dalit Women Today' *Communalism Combat* (May 2001).

Statutes

1. Convention on the Elimination of All Forms of Discrimination against Women, 1979
2. Convention on the Elimination of All Forms of Racial Discrimination 1963
3. Employment of Manual scavengers and Construction of Dry Latrines (Prohibition) Act 1993
4. Government of India Act 1935
5. Madars Removal of Disabilities Act 1938 (Madars Act of XX1 1938)
6. Protection of Civil Rights Act, 1955 (PCR Act)
7. The Caste Disabilities Removal Act XXI of 1850
8. The Immoral Traffic (Prevention)Act, 1956 (ITPA)
9. The Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989
10. The United Nations Convention against Torture and Other Cruel, Inhumane Treatment or Punishment, 1985
11. Untouchability (Offenses) Act, 1955

POSSIBILITIES OF JUSTICE: TORTURE AT THE INDO-BANGLADESH BORDER

Prachi Lohia*

INTRODUCTION

This paper attempts to provide an overview of the nature of torture inflicted on people living near the Indo-Bangladesh border. India has expressed its commitment to adhere to international human rights standards and is a party to the International Covenant on Civil and Political Rights, which explicitly prohibits torture in any form. The Constitution of India and its Judiciary have also acknowledged the rights of all persons to equality, justice and dignity. By exploring the magnitude of torture, arbitrary restrictions and other degrading treatment at the border, this paper argues that Indian laws have consistently failed in fulfilling Indian obligations to prevent torture in the country. The objective of the paper is to examine the loopholes in India's domestic laws that allow for torture to be perpetrated with impunity and to reiterate the need for specific legislation to prevent torture in India.

Historical Overview

India shares a border of approximately 4,096 kilometers with Bangladesh. The border was conceived in 1947, decades before Bangladesh was to become an independent nation-state. After the Second World War, the British decided to grant independence to the subcontinent. This came at a high cost, however, the subcontinent was to be divided along religious lines into two separate nations, Hindu majority India and Muslim majority Pakistan. The task of drawing a border through an incredibly diverse region with a population of over 400 million was given to British lawyer Sir Cyril Radcliffe. Radcliffe was visiting the subcontinent for the first time and had no knowledge of its geography, diversity and communal tensions. The boundary that divided India and Pakistan was drawn merely in five weeks and cut through rivers, fields, police stations on some occasions, even through people's homes. In August 1947, while festivities were observed for the long-awaited freedom,

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over 12 million people were forced to migrate across the border, in the face of extraordinary communal violence.¹⁷⁰

Due to the haphazard manner in which the border was drawn between India and Pakistan, many territorial disputes and irregularities emerged on both the western, and eastern ends of the border. When Bangladesh (formerly East Pakistan) became an independent nation-state in 1971, it inherited these disputes. However, given India's instrumental role in its independence, Bangladesh did not hold on to the rivalry between India and Pakistan, paving a new path for diplomacy in South Asia. The governments of India and Bangladesh made several attempts to resolve the border disputes. The Land Boundary Agreement (LBA)¹⁷¹, which was signed between former Indian Prime Minister Indira Gandhi and former Bangladeshi Prime Minister Sheikh Mujibur Rahman in 1974 was implemented on 31st July 2015, after decades of negotiations. The LBA resolved three main disputes along the border—an undemarcated boundary of approximately 6.1 kilometers, exchange of enclaves, and adverse possessions.¹⁷²

In spite of this, the Indo-Bangladesh border continues to face various challenges such as cross border smuggling, immigration, human trafficking and other trans-border crimes.¹⁷³ The border is heavily militarized and guarded by the Border Security Force (BSF), a paramilitary force under the administrative control of India's Ministry of Home Affairs. In order to keep smuggling and illegal immigration in check, the BSF have constructed the border fence several kilometers inside the zero point of the border. This means that a stretch of Indian territory, along with the lands and houses of Indian citizens, has been drawn out of the border fence. Since the BSF are placed inside villages, they interfere in the quotidian affairs of citizens and monitor essential freedoms of movement and securing livelihood. This leads to tensions between the BSF and the residents of border areas, in turn disturbing the peace and tranquility of the region.

Banglar Manabdhikar Suraksha Mancha (MASUM), a non-governmental organization based in the state of West Bengal, has been documenting incidents of torture, extrajudicial executions, custodial deaths, illegal detention and arbitrary restrictions at the Indo-Bangladesh border since 1997. The Indian state of West Bengal shares a

¹⁷⁰ Dr Andrew Whitehead, 'Partition 70 years on: The turmoil, trauma - and legacy' BBC News (27 July 2017)

¹⁷¹ Land Boundary Agreement 2015, Retrieved online: https://www.mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf

¹⁷² *ibid*, 2

¹⁷³ Zahoor A Rather, 'India-Bangladesh Border Issues: Challenges and Opportunities.' *International Studies*, vol. 50, no. 1-2, Jan. 2013, pp. 130-144

border of 2,217 kilometers with Bangladesh. Eight out of twenty-three districts in the state share a border with Bangladesh.¹⁷⁴ According to the national census conducted in 2011, these districts account for 55.98% of Muslims, 43.7% of Scheduled Castes (SCs) and 37.19% of Scheduled Tribes (STs) of West Bengal.¹⁷⁵ This data is significant because Muslims, SCs and STs are among the most marginalized communities in India and face various forms of discrimination based on their religious and caste identities.¹⁷⁶ A lack of opportunities, poor economic conditions and socio-political discrimination make these communities especially vulnerable to violence. Between January 2010 and April 2021, MASUM has documented 851 incidents of torture and deaths in custody, involving 567 Muslim victims and 257 victims from the Scheduled Caste community.

INDIA'S STANCE ON TORTURE AND INTERNATIONAL HUMAN RIGHTS LAW

The Universal Declaration of Human Rights (UDHR), which was adopted in the aftermath of the Second World War, recognized the right of an individual to be free from torture.¹⁷⁷ Subsequently, international human rights law has evolved to recognize the acute suffering caused by torture, especially in times of war and conflict. It has also been noted that torture is often used against vulnerable populations who face discrimination on the basis of their race, religion, ethnicity, nationality, sex, class and/or caste. The absolute prohibition of torture is a peremptory norm or *jus cogens* under international law. This means that torture in any form and under any circumstances cannot be justified, and it is the duty of every state to prevent, prohibit and punish torture and other forms of cruel, inhuman and degrading treatment, while also ensuring adequate protection and remedies for victims and survivors.

This does not imply, however that torture is an obsolete practice that does not require immediate intervention. In spite of the fact that torture is explicitly forbidden under various international and regional legal instruments, it remains rampant across the world.

At India's third cycle of the Universal Periodic Review (UPR) in 2017, ex-Attorney General Mukul Rohatgi had claimed that "torture is alien to the culture of India".¹⁷⁸

¹⁷⁴ Eight districts of West Bengal-Cooch Behar, North 24 Parganas, North Dinajpur, South Dinajpur, Nadia, Murshidabad, Malda and Jalpaiguri share their borders with Bangladesh.

¹⁷⁵ Census of India 2011. Retrieved online: <https://censusindia.gov.in/2011Census/pes/Pesreport.pdf>

¹⁷⁶ See for example, Prime Minister's High level Committee, *Social, Economic and Educational Status of the Muslim Community of India: A Report* (2006) for the status of Muslims in India; and Government of India, Planning Commission, *Report of the Task Group on Development of Scheduled Castes and Scheduled Tribes* (2005) for the status of SCs and STs in India.

¹⁷⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Art. 5

¹⁷⁸ Gaurav Vivek Bhatnagar, "Testimonies of Torture Victims Lay Bare India's Claim of It 'Being Alien to Our Culture'", *The Wire* (29 October 2018)

At the same cycle, 34 states had made recommendations to India to ratify the United Nations Convention Against Torture (CAT).¹⁷⁹ Various submissions from India's civil society, including the National Human Rights Commission (NHRC) countered the statement made by the ex-Attorney General.¹⁸⁰

Article 51 of the Constitution of India states that the state shall endeavour to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another".¹⁸¹ This article is a component of the Directive Principles of State Policy which are not enforceable in Indian courts but are "nevertheless fundamental in the governance of the country and [it is] the duty of the State to apply these principles in making laws".¹⁸² Even so, India has shown reluctance in adhering to international laws in the past, especially with regard to civil and political liberties.

India's stance was apparent during the debates in the Third Committee of the United Nations General Assembly on a draft of the International Covenant on Civil and Political Rights (ICCPR) produced by the Commission on Human Rights. Under that draft, it would have been mandatory for a state party to accept the intervention of the Human Rights Committee if another state party filed a complaint against it for the violation of the provisions of the covenant. The draft that was later adopted made this procedure voluntary, meaning that states could accede to the ICCPR without recognizing the authority of the Human Rights Committee to intervene in complaints brought against one state party by another. India greatly welcomed this amendment in 1966.¹⁸³ India's representative explained that the state felt that "the time had not yet come to set up an international legal system for the enforcement of human rights throughout the world."¹⁸⁴

While this statement was made by India several decades ago, it would not be wrong to assume that the Indian state continues to maintain this position because it is yet to ratify the First Optional Protocol to the ICCPR, which "recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."¹⁸⁵ In fact, India has not

¹⁷⁹ UPR info, India: Third Review, *India's responses to recommendations* (15 December 2017)

¹⁸⁰ UN General Assembly, Working Group on the Universal Periodic Review, *Summary of Stakeholders' submissions on India*, (27 February 2017) A/HRC/WG.6/27/IND/3

¹⁸¹ Constitution of India, Part IV, *Directive Principles of State Policy*, Art. 51(c)

¹⁸² *ibid*, Art. 37

¹⁸³ A. Mark Weisburd, 'Customary International Law and Torture: the Case of India' [2001]

¹⁸⁴ *ibid*

¹⁸⁵ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966

recognized the competence of a single treaty body for intervening in complaints brought against India by individuals or other state parties. India has also expressed reservations against Articles 20, 21 and 22 of CAT, all of which deal with inquiries into allegations of torture by the Committee against Torture.¹⁸⁶

On 14 June 2018, the Office of the High Commissioner for Human Rights (OHCHR) published a report titled, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan*.¹⁸⁷ The report called for a probe into serious allegations of human rights abuses in the Kashmir valley and made recommendations to the governments of India and Pakistan to adequately address this issue. India, however, dismissed the report and claimed that the report violates India's sovereignty and territorial integrity.¹⁸⁸ On 23 April 2019, India shut down any further engagement with the UN or any other mandate holders on the issue of torture in Kashmir. India stated:

India rejects any reference whether implicit or explicit or any quote by any human rights mechanisms or bodies from the remote report published by the OHCHR on the situation of human rights in Kashmir in June 2018. India rejects the remote report and doubts on its credibility and objectivity. The report begets the questions whether individual prejudices should be allowed to undermine the dignity and standing of the high office.¹⁸⁹

India does not have specific legislation to prevent torture in the country. However, the Constitution of India recognizes the right of every individual to be equal before the law and to be treated with dignity. On a number of occasions, the Supreme Court of India has acknowledged the prevalence of torture in the country and has strongly condemned the practice. For instance, the Court in *DK Basu v State of West Bengal*¹⁹⁰ said:

If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man

¹⁸⁶ Law Commission of India, Report No. 273, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (October 2017) ch 1, para 1.11

¹⁸⁷ Office of the High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (14 June 2018)

¹⁸⁸ Meenakshi Ganguly, 'India should not reject UN Report on Kashmir' (14 June 2018)

¹⁸⁹ Permanent Mission of India to the United Nations Offices at Geneva, NV. GEN/PMI/353/05/2019. Retrieved Online: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34631>

¹⁹⁰ *DK Basu v State of West Bengal* [1997] SC 610

would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'.

The Supreme Court of India has also cited international human rights standards on several occasions to support its arguments. While ordering a probe into allegations of extrajudicial executions by armed forces in the state of Manipur,¹⁹¹ the Supreme Court of India stated:

The Human Rights Committee has urged a State party to the International Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were. It is necessary to know the truth so that the law is tempered with justice. The exercise for knowing the truth mandates ascertaining whether fake encounters or extrajudicial executions have taken place and if so, who are the perpetrators of the human rights violations and how can the next of kin be commiserated with and what further steps ought to be taken, if any.

While India has not ratified CAT, it has an obligation to adequately prohibit torture as a state party to the UDHR, ICCPR and Convention on the Rights of the Child (CRC). Since the prohibition of torture is a norm of *jus cogens*, even a state that is not a party to any international human rights treaties has an obligation to prohibit torture. A study of torture at the Indo-Bangladesh border indicates that India has consistently violated its international obligations to protect its citizens from torture. The residents of border areas face various challenges due to dense militarization. Legal safeguards against torture in India are either completely absent or are not properly implemented at the border because of the immunity granted to members of armed forces through various legislations. It is imperative that human rights abuses at the border receive adequate attention so that necessary legal and administrative reforms can be undertaken and justice can finally be ensured for the victims of torture and other human rights violations.

INDO-BANGLADESH BORDER: ARBITRARY RESTRICTIONS

MASUM's findings indicate that the people who have been left outside the border fence face grave challenges in their day-to-day activities.¹⁹² There is a complete

¹⁹¹ *EEVFAM v Union of India* [2016]

¹⁹² Sukanya Roy, 'No man's land is no woman's land either: The fraught relationship between

absence of public health infrastructure, educational institutions, clean drinking water, sanitation, electricity and proper roads in these areas. The government's social security schemes related to livelihood opportunities, pensions, childcare and so on, often do not reach the people who live outside the border fence. The BSF personnel monitor the movement of people through gates constructed on the border fence. In most villages, these gates are opened only three times a day for an hour each. In rural India, agriculture is the main source of livelihood. The people who own land outside the border fence are required to submit their identity documents with the BSF while passing through the gate. Identity documents such as Aadhaar and Voter ID cards¹⁹³ are not accepted as valid proofs of identity for the border areas; instead, the people are required to produce a particular identity card issued by the BSF for this purpose. This differential treatment creates a feeling of being an outsider in one's own country and violates the Constitution of India, which guarantees equality before the law to all of its citizens.

Moreover, the BSF does not allow people to take household essentials and agricultural equipment across the border fence on the suspicion that they would be smuggled to Bangladesh. Farmers are not allowed to use fertilizers, cattle, pesticides, tractors and such, to cultivate crops. Under the Government of India's Integrated Child Development Services (ICDS) Scheme, the people are provided cooked meals for their children.¹⁹⁴ When people attempt to take these meals back to their families, the BSF stir the food with a dirty stick to check if anything that can be smuggled is hidden inside, making the food inedible.

Satish Burman¹⁹⁵, a 47-year-old Dalit¹⁹⁶ man and resident of Satgram Manabari village in Cooch Behar district, owns a piece of farming land ahead of the border fence. Every morning, he crosses the gate with his wife after seeking permission

residents and the Border Security Force at the Indo-Bangladesh Border' (*The Polis Project*, 11 February 2021) <<https://www.thepolisproject.com/no-mans-land-is-no-womans-land-either/#.YJjokLUzY2z>> accessed 10 May 2021

¹⁹³ Aadhaar Cards contain a verifiable 12-digit identification number issued by the Unique Identification Authority of India to the residents of India and are recognized as valid proof of identity pan India. Voter identity cards are issued by the Election Commission of India and provide Indian citizens the right to cast their votes during elections.

¹⁹⁴ Ministry of Women and Child Development, *Integrated Child Development Services (ICDS) Scheme* (1975)

¹⁹⁵ Names of the victims of torture have been changed to protect their identities

¹⁹⁶ 'Dalit' is essentially the name of a caste in India, included under the category of Scheduled Castes in the Constitution of India. It has also become a symbol of struggle against upper-caste oppression in India.

from the BSF to cultivate crops on his land. On 15 March 2015 when he arrived at the gate, a BSF officer asked him to catch a calf that had run off into the fields. Worried that the gate would be closed before he managed to return, he declined to do so. The BSF officials, however, closed the gate and verbally abused Satish and his wife. They assaulted him brutally till he was bleeding from several places, and also molested his wife. Satish had to be hospitalized for three days in order to receive treatment for his injuries. The BSF also filed a complaint against Satish under Section 353 of the Indian Penal Code 1860 (IPC), which prescribes punishment for using “criminal force to deter a public servant from discharge of his duty”. The National Human Rights Commission (NHRC) did not intervene in the case since the matter was sub-judice. Satish’s case is pending before a sessions court in Cooch Behar district.

MASUM had filed applications under the Right to Information (RTI) Act 2005 to the eight districts of West Bengal that share a border with Bangladesh¹⁹⁷, seeking information regarding the imposition of Section 144 of the Criminal Procedure Code 1973 (CrPC)¹⁹⁸ in the border areas. While they did not receive a response from Murshidabad, Nadia and North Dinajpur, the responses from the others were quite telling. In South Dinajpur, Section 144 CrPC has been imposed consistently from 2015-2017, and again from 2019-2020. The order, signed by the District Magistrate, prohibits the movement of certain commodities¹⁹⁹ within a radius of 8 kilometers of the Indo-Bangladesh border from 6 pm to 6 am every day. The reasons for imposing Section 144 CrPC have been provided as: “On prayer of BSF to prevent movement of all commodities mentioned in Schedule ‘A’²⁰⁰ of the issued orders, 144 CrPC is being promulgated.” Similar answers have been received from the districts of Jalpaiguri, Cooch Behar, Malda and North 24 Parganas.

¹⁹⁷ Eight districts of West Bengal-Cooch Behar, North 24 Parganas, North Dinajpur, South Dinajpur, Nadia, Murshidabad, Malda and Jalpaiguri share their borders with Bangladesh.

¹⁹⁸ Apurva Vishwanath, Shruti Dhapola, ‘Explained: How Section 144 CrPC works’ *The Indian Express* (New Delhi, 20 December 2019)

¹⁹⁹ The movement of the following commodities near the border has been restricted through Section 144 CrPC. These commodities have been listed under Schedule ‘A’ of the order. Rice, Wheat products, kerosene, mustard oil, sugar, coconut, textile goods including yarn, cement, iron & steel materials, bidi leaves, tyre, tubes, wax, bleaching powder, baby food, machine parts, stationery articles, grocery, cattle, milk powder, gunny bags, goat-skin, soaps, betelnut, chili, cloves, fruits, electric goods, cycle and parts, cinnamon, glass, tile making materials, motor tyre, rickshaw tyre, cigarettes, flour grinding stone, photo materials, copper, salt, chira, charcoal, cycle-rickshaw, coal tar, glass panel, cardamom, torchlight, iron rail, soybean, tea, medicine, fertilizer, cosmetics, black paper, plastic, utensils, fish, brass, mats, timber, camphor, razor blades, goat, pulses, wrist watch, aluminium, silver, potatoes, gas light, eggs, molasses, gold

²⁰⁰ *ibid*

In *Anuradha Bhasin v Union of India*, the Supreme Court of India stated²⁰¹:

The power under Section 144 CrPC cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights. [...] Repetitive orders under Section 144 CrPC would be an abuse of power.

The continuous imposition of Section 144 CrPC in border areas limits essential freedoms of citizens. The authorities have restricted the movement of essential items such as rice, kerosene oil, mustard oil, sugar, salt, baby food, medicine and gas light, which can be required in times of emergency. Even in cases of medical emergencies, people are often unable to convince BSF officials to allow them to take medicines across the border. Moreover, the BSF personnel rarely allow the passage of commodities through the border fence, even during day hours, when the restrictions under Section 144 CrPC are relaxed.

INDO-BANGLADESH BORDER: THE LINK BETWEEN CROSS BORDER SMUGGLING AND TORTURE

Sarita Halder²⁰², a widow and mother of two girls lives in a village named Mahakhola in Nadia District of West Bengal. She belongs to the Scheduled Caste community and makes a meagre living by selling groceries and fertilizers. On 12 March 2021, while returning home after a medical checkup, she was stopped by two male personnel of the BSF. They conducted a search on her person and found two mobile chargers in her bag. Even when she showed them a receipt of her purchase and said that they were for her personal use, they accused her of trying to smuggle the chargers to Bangladesh. They detained her in a public washroom for two hours, after which she was taken to the BSF camp for interrogation. At the camp, she was brutally beaten by the BSF personnel till she was unconscious. When she finally came to her senses, she found that she had been disrobed. In the middle of the night, the BSF personnel took her to the Bhimpur police station, but the police refused to take a seriously injured woman in their custody and advised them to escort her home. Instead, the BSF personnel took her back to their camp, beat her again and forced her to sign a document stating that she had not been tortured by the BSF during interrogation. Sarita's case is pending with the Bhimpur police and the NHRC.

A number of incidents of torture and extrajudicial executions at the Indo-Bangladesh border occur under the pretext of controlling the smuggling of goods, mainly cattle, across the border. According to a report by Human Rights Watch titled, *"Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border*, the BSF had

²⁰¹ *Anuradha Bhasin v Union of India* [2020]

²⁰² Names of the victims of torture have been changed to protect their identities

received orders to shoot suspected smugglers by higher authorities.²⁰³ The report also says that the BSF justify the killings by their personnel on the grounds that the accused were evading arrest or that firing was done in self-defence. These claims cannot be substantiated because in every case documented by MASUM, the victims of extrajudicial executions were found to be unarmed or armed with non-lethal weapons. In one of MASUM's interviews with a BSF Company Commander, the deaths of civilians at the border while controlling smuggling were referred to as "collateral damage"²⁰⁴. Therefore, violence inflicted even over the mere suspicion of smuggling is often overlooked by Indian authorities.

Amir Pramanik²⁰⁵ died in the custody of the police on 21 January 2020. He was a daily wage labourer, Muslim and a resident of Cooch Behar district. On the day of the incident, he was arrested by the BSF personnel on suspicion of being involved in smuggling. He was detained and brutally tortured by them for several hours before he was brought to the Sitai Police station in the middle of the night. Eye witness accounts had alleged that he found it difficult to even stand on his feet and had to be supported by the BSF when he was brought in. In spite of this, he was put into jail custody without being provided with any medical assistance.²⁰⁶ It was only when Amir started bleeding out of his genitalia that he was taken to the hospital. He died within a few hours of reaching the hospital. Later, the police personnel of Sitai Police station tried to bribe his family in order to coerce them into not filing a complaint against the police and BSF. The Inspector-in-charge also threatened the human rights activists of MASUM and refused to lodge the First Information Report²⁰⁷. The inquest was performed by the executive magistrate in violation of Section 176 (1A) of the Criminal Procedure Code 1973, which mandates inquest by a judicial magistrate in cases of deaths in custody. The NHRC had sent notices to the District Magistrate and Superintendent of Police of Cooch Behar asking for their reports on the incident as far back as 30 January 2020, but no updates have been received so far. Amir's mother, who was suffering from cancer, passed away during this time, awaiting justice for her son.

The presence of cross border smuggling at the border has become a tool in the hands of the BSF to threaten, intimidate and arbitrarily torture citizens. There have

²⁰³ Human Rights Watch, *"Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border* 9 December 2010

²⁰⁴ Interview conducted by MASUM in December 2019, details withheld.

²⁰⁵ Names of the victims of torture have been changed to protect their identities

²⁰⁶ Section 54 of CrPC mandates medical checkup of an arrested person if such a request is made by him at any time during custody.

²⁰⁷ Section 154 of CrPC mandates the registration of the First Information Report wherein a cognizable offence is reported by any individual.

also been incidents where the BSF have implicated people under false charges of smuggling narcotics across the border, in order to threaten them against or punish them for filing complaints against the atrocities committed by the BSF. The case of Tahira Begum²⁰⁸ is one such incident. In 2013, Tahira and her family were brutally tortured by BSF personnel. While the police had refused to lodge a complaint against the BSF, the NHRC recommended interim monetary compensation of 25,000 INR, which Tahira received in 2017. However, Tahira and her daughter were repeatedly harassed by BSF personnel because she spoke up against the atrocities committed by them. On 5 September 2019, the Company Commander of the BSF ordered his troops to detain the women in order to interrogate them regarding an incident of smuggling in the area. In the camp, the BSF planted fifty bottles of Phensedyl²⁰⁹ on the women and accused them of being engaged in cross border smuggling. A complaint was lodged against them under the Narcotics Drugs and Psychotropic Substances Act, 1985. While Tahira's daughter received bail from the court, Tahira continues to languish in jail to this day, her only crime being speaking up against injustice!

These incidents would suggest that cross border smuggling has a direct link to the violence inflicted at the border and that the government of India would use any means necessary to keep it under check. But this is not quite the complete picture. On 17 November 2020, Satish Kumar, ex-BSF Commandant of 36 Battalion in Malda District of West Bengal, was arrested by the Central Bureau of Investigation for being involved in illegal trade and smuggling of cattle. Kumar has been charged under Section 120 B of IPC and Sections 7, 11, and 12 of the Prevention of Corruption Act, 1988.

The Parliamentary Standing Committee on Home Affairs published a report titled, *Border Security: Capacity Building and Institutions* in April 2017 that addressed the problem of cattle smuggling at the Indo-Bangladesh border. The Committee published data received from the Ministry of Home Affairs wherein more than 100,000 cows were seized by the BSF annually from 2012-2016.²¹⁰ The Committee stated:

[...] Police forces of various States have failed to stop this mass movement of cattle to border States and West Bengal Police has failed to intercept or stop the movement of the cattle. The Committee feels that there is a wide and deeply entrenched nexus due to which this menace has proliferated and the

²⁰⁸ Names of the victims of torture have been changed to protect their identities

²⁰⁹ Phensedyl is a cough syrup which is banned in India. Since alcohol is banned in Bangladesh, phensedyl has become an alternative source of addiction.

²¹⁰ Parliamentary Standing Committee on Home Affairs, *Border Security: Capacity Building and Institutions* (April 2017)

Government needs to strike at the roots of this nexus if it has to completely curb this problem.

The Committee, responding to the information provided by the Ministry of Home Affairs, noted that the problem of cattle smuggling had been allowed to proliferate due to the complicity and negligence of public officials and the inaction of the government. In addition, the Committee stated that the West Bengal government has consistently violated its own order dated 1 September 2003, which outlaws the existence of any cattle *haats*²¹¹ within eight kilometers of the border. At present, there are fifteen cattle haats within eight kilometres of the border, and the West Bengal state administration has taken no measures to shut them down.

FOUR ASPECTS OF REMEDY: INDIA'S OBLIGATION TO THE VICTIMS OF TORTURE

In a report titled, *The Due Diligence Standard as a tool for the Elimination of Violence against Women*²¹², former Special Rapporteur on Violence Against Women Yakin Ertürk, identified four essential aspects for adequately addressing violence against and ensuring redressal for victims. These were: prevention, protection, punishment and reparation. These aspects also resonate with the spirit of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly on 16 December 2005.²¹³ Therefore, it would be helpful to explore the possibilities of justice for the victims of torture in India in relation to these aspects.

PREVENTION

In its National Report to the UPR 2017²¹⁴ India said:

India remains committed to ratifying the Convention. The Law Commission of India is examining the changes required to domestic law prior to ratification. The Government has requested the Law Commission to examine and give a comprehensive report covering all aspects of criminal law so that comprehensive amendments can be made in Indian Penal Code (IPC), Code

²¹¹ Cattle haats are weekly markets where cattle are sold.

²¹² UN Economic and Social Council, *The Due Diligence Standard as a tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61

²¹³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005 60/147

²¹⁴ UN General Assembly, Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, (23 February 2017) A/HRC/WG.6/27/IND/1

of Criminal Procedures (CrPC) and Indian Evidence Act, etc. In the meantime, acts of torture remain punishable under various provisions of the Indian Penal Code. The higher judiciary also serves as a bulwark against such violations.

The Law Commission of India published its report titled, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment through Legislation*, in October 2017²¹⁵. The report reiterated India's need to enact domestic legislation preventing torture and also provided a proposed draft of anti-torture legislation in India.²¹⁶ However, the Bill has still not been passed by the Parliament of India. Former Union Law Minister Ashwani Kumar had filed an application to the Supreme Court of India seeking directions to the government for enacting domestic legislation against torture without delay. In response, the government of India said that due deliberation was required to act upon the legislation. Ultimately, the Court refused to issue directions to the government, and the application was dismissed.²¹⁷

The mid-term report for the UPR 2022 submitted by the NHRC²¹⁸ gives the following update on the issue of torture legislation:

As the GoI has accepted the recommendations to ratify the Convention against Torture, in the present as well as previous UPR cycles, it remains committed to ratifying the said Convention. Towards this end, the GoI has requested the Law Commission of India to examine and give a comprehensive report covering all aspects of criminal law so that necessary amendments can be made to the India Penal Code, Code of Criminal Procedures and Indian Evidence Act.

The submission makes no mention of the unwarranted delay in the implementation of the bill, or of the fact that the Law commission of India made its submission to the government of India in 2017.

The Human Rights Committee's (HRC) General Comment no. 20 on Article 7 of the ICCPR says²¹⁹:

²¹⁵ Law Commission of India, Report No. 273, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (October 2017)

²¹⁶ *ibid*, Annexure

²¹⁷ The Wire Staff, 'SC Refuses to Direct Parliament To Enact Stand-Alone Law Against Custodial Torture', *The Wire* (5 September 2019)

²¹⁸ National Human Rights Commission, *Mid-Term Report of India* (May 2020). Retrieved Online: https://www.upr-info.org/sites/default/files/document/india/session_36_-_may_2020/nhrc_india_mid-term_report_on_upr-iii.pdf

²¹⁹ HRC, General Comment No. 20, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992

The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

The committee warns against the mendacious stance that India has consistently taken on the issue of torture in the country, implying that merely the pronouncement that torture is forbidden is not nearly enough to fulfil the obligations to eradicate torture from society. India has failed to date, to take legislative, administrative or any other measures to prevent and punish acts of torture.

PROTECTION

The HRC General Comment no. 20 states:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

The Indian state has no legislation for providing adequate protection to victims of torture. As mentioned previously in the paper, many victims of torture, their families and human rights defenders face repeated threats from the perpetrators for withdrawing complaints against them. MASUM documented the case of Sayed Ali Gazi²²⁰, a Muslim resident of North 24 Parganas District who has faced continuous torture and harassment at the hands of the BSF. Sayed was tortured by the BSF in 2013 due to the mere suspicion of being involved in smuggling. Since Sayed reported this incident of torture, the BSF personnel repeatedly obstructed his movements and threatened him with false charges under the NDPS Act. On one occasion, the BSF trespassed into Sayed’s house, beat up his family members, sexually harassed his wife and warned him against associating with the human rights defenders of MASUM. Fearing contestations with the BSF, Sayed stopped stepping out of the house. But now, his son Sabuddin Gazi, faces the brunt of the BSF’s brutality. In 2020, Sabuddin was accused of smuggling Phensedyl by a BSF constable and beaten mercilessly. In spite of lodging several complaints with the police and NHRC, the perpetrators have faced no consequences for their actions.

²²⁰ Names of the victims of torture have been changed to protect their identities

This incident showcases the imperative need for adequate protection for survivors of torture. The government introduced a Witness Protection Scheme in 2018²²¹, which was approved by the Supreme Court of India in *Mahendra Chawla v Union of India*²²². However, there is little to no information on the proper implementation of the scheme as of now. The scheme also does not address the urgency of witness protection, especially in cases of torture. It can only be hoped that domestic legislation on torture shall provide adequate protection to victims and their families.

PUNISHMENT

The HRC General Comment no. 20 states:

States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

Section 197 of the CrPC protects all public officials from prosecution under criminal charges unless it is authorised by the government. An RTI application was filed to know the number of instances where the government has granted sanction for prosecution of security forces operating in Jammu and Kashmir between 1989 to 2011. The response to the RTI revealed that out of the 44 applications made during this period, sanction was granted to none of them.²²³ A statement recently issued by Human Rights Watch on the human rights violations committed by the BSF on the Indo-Bangladesh border also mentioned that the organization was not aware of any cases in which Indian authorities have held BSF soldiers accountable for abuses committed along the Indo-Bangladesh border.²²⁴

Under Section 125 of the Army Act 1950, if any member of the armed forces is accused of committing a criminal offence, their commanding officer has the authority to decide whether the official would be tried through a criminal court or through court-martial proceedings. Court-martial proceedings are generally never open to

²²¹ Ministry of Home Affairs, *Witness Protection Scheme* (2018)

²²² *Mahendra Chawla v Union of India* [2018]

²²³ Working Group on Human Rights, 'Factsheet - UPR 2017 - India 3rd Cycle Universal Periodic Review' (2017) 9

²²⁴ Human Rights Watch, 'India: Investigate Alleged Border Force Killings' 9 February 2021

the public, and there are few ways to ensure that the trial is conducted in a fair and impartial manner.

The NHRC does not have the authority to investigate allegations of violation of human rights by members of armed forces under the Protection of Human Rights Act 1993. It can merely request reports on the incident from the central government and give its recommendations on the basis of the report. This is in violation of the Principles relating to the Status of the National Institutions, which states that a national institution should be given as broad a mandate as possible.²²⁵ Even in cases involving police and other public officials, the NHRC has been found to not initiate proceedings for prosecution. In the 851 incidents of torture that MASUM has reported to the NHRC, it has not recommended prosecution of officials in any incident and has only recommended departmental action against erring officers and monetary compensation for victims in a select few cases.

The protection granted to armed forces in India under the Army Act 1950, Protection of Human Rights Act 1993 and the Criminal Procedure Code 1973, sets a dangerous precedent. In Kashmir and the Northeast, the Armed Forces Special Powers Act 1958 (AFSPA) is in force, which goes a step further in granting immunity to members of armed forces. International and domestic civil society organizations have repeatedly urged the government to repeal AFSPA and to initiate a probe into the countless allegations of abuses by the army in these regions. However, India has maintained that special powers for the armed forces is necessary to control cross border terrorism and insurgency.

REPARATION

The case of Felani Khatun, a 15-year-old girl whose body was found hanging from the barbed wire fences between India and Bangladesh after being allegedly shot by the BSF personnel in 2011, was met with widespread criticism. Two trials were conducted in special BSF courts in 2013 and 2015 that acquitted the BSF constable accused of shooting the girl. A plea for a new investigation is still pending before the Supreme Court of India.²²⁶ The NHRC recommended a monetary compensation of 500,000 INR for Felani's family, but the government of India refused to grant the amount.

The NHRC has recommended monetary compensation in only 24 of the 851 cases of torture and custodial deaths documented by MASUM in the last decade. Other measures for the proper rehabilitation for the survivors of torture, including

²²⁵ UN General Assembly, *Principles relating to the Status of the National Institutions (The Paris Principles)* 20 December 1993

²²⁶ *ibid*

medical and psychological assistance, support groups, counselling and opportunities for livelihood, are also not in place.

Section 357 A of the CrPC provides for a Victim Compensation Scheme. Under this scheme, the victims who have suffered loss or injury due to a crime committed against them can file an application with the State or District Legal Services Authority for an award of compensation. The State or District Legal Services Authority is required to complete inquiries within two months of an application being filed. However, it is often difficult to conduct inquiries into incidents where human rights abuses are alleged to have been committed by public officials due to the lack of evidence and witnesses against them. Even when compensation is awarded under this scheme, it amounts to interim relief without any assurance of punishment for the perpetrators.

CONCLUSION

India's reluctance to acknowledge the magnitude of torture inflicted on its citizens by its public officials has led to a grave humanitarian crisis in the country. The poorest and most vulnerable populations of India face harsh struggles in accessing the right to remedy and justice. The lack of specific legislation against torture in the country and the existence of legal immunity for public officials make it extremely difficult to adequately address torture. While the Supreme Court of India has set a good precedent of condemning torture in any form, it has failed to direct the government to undertake legal, administrative and other reforms to prevent torture. India's commitment to international human rights law has, however, given citizens the tools to explore possibilities of justice in relation to torture. Therefore, it is the responsibility of both the Indian state, and the international community to ensure the absolute prohibition of torture in the country.

REFERENCES

Legal Instruments

International

- [1] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948
- [2] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966
- [3] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984
- [4] UN General Assembly, Working Group on the Universal Periodic Review, *Summary of Stakeholders' submissions on India*, (27 February 2017)
- [5] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966

- [6] UN Economic and Social Council, *The Due Diligence Standard as a tool for the Elimination of Violence against Women*, (20 January 2006)
- [7] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005
- [8] UN General Assembly, Working Group on the Universal Periodic Review, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, (23 February 2017)
- [9] HRC, General Comment No. 20, *Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 10 March 1992
- [10] UN General Assembly, *Principles relating to the Status of the National Institutions (The Paris Principles)* 20 December 1993

India

- [11] Land Boundary Agreement 2015
- [12] Constitution of India, Part IV, *Directive Principles of State Policy*
- [13] Ministry of Women and Child Development, *Integrated Child Development Services (ICDS) Scheme* (1975)
- [14] Ministry of Home Affairs, *Witness Protection Scheme* (2018)
- [15] Criminal Procedure Code 1973
- [16] Indian Penal Code 1860
- [17] Protection of Human Rights Act 1993
- [18] Right to Information Act 2005
- [19] Narcotics Drugs and Psychotropic Substances Act 1985
- [20] Prevention of Corruption Act 1988
- [21] Army Act 1950
- [22] Armed Forces Special Powers Act 1958

Literature

- [23] Dr Andrew Whitehead, 'Partition 70 years on: The turmoil, trauma - and legacy' BBC News (27 July 2017)
- [24] Zahoor A Rather, 'India–Bangladesh Border Issues: Challenges and Opportunities.' *International Studies*, vol. 50, no. 1–2, Jan. 2013
- [25] Prime Minister's High level Committee, *Social, Economic and Educational Status of the Muslim Community of India: A Report* (2006)
- [26] Government of India, Planning Commission, *Report of the Task Group on Development of Scheduled Castes and Scheduled Tribes* (2005)
- [27] Gaurav Vivek Bhatnagar, 'Testimonies of Torture Victims Lay Bare India's Claim of It 'Being Alien to Our Culture'', *The Wire* (29 October 2018)

- [28] UPR info, India: Third Review, *India's responses to recommendations* (15 December 2017)
- [29] A. Mark Weisburd, 'Customary International Law and Torture: the Case of India' [2001]
- [30] Law Commission of India, Report No. 273, *Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation* (October 2017)
- [31] Office of the High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (14 June 2018)
- [32] Meenakshi Ganguly, 'India should not reject UN Report on Kashmir' (14 June 2018)
- [33] Permanent Mission of India to the United Nations Offices at Geneva, NV.GEN/PMI/353/05/2019
- [34] Sukanya Roy, 'No man's land is no woman's land either: The fraught relationship between residents and the Border Security Force at the Indo-Bangladesh Border' (*The Polis Project*, 11 February 2021)
- [35] Apurva Vishwanath, Shruti Dhapola, 'Explained: How Section 144 CrPC works' *The Indian Express* (New Delhi, 20 December 2019)
- [36] Human Rights Watch, "'Trigger Happy": Excessive Use of Force by Indian Troops at the Bangladesh Border' 9 December 2010
- [37] Parliamentary Standing Committee on Home Affairs, *Border Security: Capacity Building and Institutions* (April 2017)
- [38] The Wire Staff, 'SC Refuses to Direct Parliament To Enact Stand-Alone Law Against Custodial Torture', *The Wire* (5 September 2019)
- [39] National Human Rights Commission, *Mid-Term Report of India* (May 2020)
- [40] Working Group on Human Rights, 'Factsheet - UPR 2017 - India 3rd Cycle Universal Periodic Review' (2017)
- [41] Human Rights Watch, 'India: Investigate Alleged Border Force Killings' 9 February 2021

Cases

India

- [42] *DK Basu v State of West Bengal* [1997]
- [43] *Anuradha Bhasin v Union of India* [2020]
- [44] *EEVFAM v Union of India* [2016]
- [45] *Mahendra Chawla v Union of India* [2018]

THE PROHIBITION OF TORTURE IN CANADA AND VIETNAM THROUGH THE LENS OF INTERNATIONAL, CONSTITUTIONAL AND CRIMINAL LAW

Sébastien Lafrance*

1. INTRODUCTION

This paper provides a critical overview of the issue of torture in Canada and Vietnam through the lens of international, constitutional and criminal with a particular focus on the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. The comparison between Canada and Vietnam is justified on the basis that “Canada as a nation [has] a well-deserved reputation as a leading nation in the field of human rights.”²²⁷ The author submits that the similarities and differences between the two countries may be beneficial to the debate surrounding the legal issues raised by the prohibition of torture.

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²²⁷ See, e.g., Senate of Canada, *Report of the Standing Senate Committee on Human Rights*, December 2001. Retrieved online: <https://sencanada.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm>

2. INTERNATIONAL LAW AND THE PROHIBITION OF 'TORTURE'

Since torture mainly targets an attack on the life and physical integrity of a person, they are formally prohibited in international law by various conventions. When defining the concept of 'torture' in the international law, the literature, according to Rodley, focuses, among some legal instruments²²⁸, on definitions contained in the 1975 United Nations Declaration against Torture²²⁹ and the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment²³⁰ ('Convention against Torture') as well as "on the case law of bodies set up human rights treaties prohibiting torture ... even though the treaties may not themselves contain a definition of torture."²³¹

The Convention against Torture defines 'torture' as:

For the purposes of this Convention, 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 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 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.

In a nutshell, other international legal instruments provide about 'torture':

- *Universal Declaration of Human Rights 1948*
Article 5: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."
- *International Covenant on Civil and Political Rights 1966*
Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
- *United Nations 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*

²²⁸ For example, UN General Assembly (1966) International Covenant on Civil and Political Rights, Treaty Series, 999, 171.

²²⁹ UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX).

²³⁰ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465.

²³¹ Nigel S. Rodley, 'The Definitions of Torture in International Law' (2002) 55 *Current Legal Problems* (Oxford University Press).

Article 3: “No State may permit or tolerate torture and other cruel inhuman or degrading treatment or punishment.”

The prohibition of torture became a norm of customary international law and was also crystalized in the *Rome Statute of the International Criminal Court*.²³² Its Article 7(2)(e) defines ‘torture’ in the context of ‘crimes against humanity’ as follows:

‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The International Criminal Tribunal for the former Yugoslavia (‘ICTY’) has also explored the definition of torture. In the *Furundžija* case²³³ decided in 1998, the ICTY set out standards in international law on the issue of torture and cruel, inhuman and degrading treatment. In its judgment, the Trial Chamber of the ICTY stated:²³⁴

States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irretrievably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. ... It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

In addition, “the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right.”²³⁵ In a classic passage of the *Barcelona Traction* case, the International Court of Justice (‘ICJ’) explained in an *obiter*

²³² UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

²³³ *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998 [*Furundžija*]; see also *Prosecutor v. Delacic and Others*, 16 November 1998, case no. IT-96-21-T, para 454); *Prosecutor v. Kunarac*, 22 February 2001, case nos. IT-96-23-T and IT-96-23/1, para 466.

²³⁴ *Furundžija*, *ibid*, para 148.

²³⁵ *ibid*, para 151.

*dictum*²³⁶ the obligations *erga omnes* as follows:²³⁷ “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising visàvis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

Also, the ICTY stated that the “prohibition of torture has the value of *jus cogens*, that is to say, that it became a peremptory norm of international law, which means that “the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.”²³⁸ Article 53 of the *Vienna Convention on the Law of Treaties* (‘VCLT’) succinctly defines *jus cogens* as “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”.²³⁹

Further, the position of ICTY regarding the prohibition of torture as a norm of *jus cogens* was also adopted by the House of Lords in the United Kingdom in its decision regarding the former Chilean dictator Augusto Pinochet.²⁴⁰ Moreover, it was also adopted by the European Court of Human Rights in its judgment *Al-Adsani v. The United Kingdom*.²⁴¹

Summarily, in international law, “the two concepts [of *jus cogens* and *erga omnes*] may be distinguished by their role: the norms of *jus cogens* are said to be peremptory,

²³⁶ Ian Brownlie, *Principles of Public International Law* (Oxford, 4th ed, 1990), p. xlvi: “lesser propositions of law stated by tribunals or by individual members of tribunals; propositions not directed to the principal matters in issue.” Nevertheless, “Judge Fitzmaurice acknowledged that comments made by the International Court by way of *obiter dicta* cannot have the authority of a judgment. Yet, he remarked, in the absence of international legislation, judicial pronouncements ‘of one kind or another’ are the principal instrument for the clarification and development of international law”: Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press, 2000) 7.

²³⁷ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970, para 33.

²³⁸ *Furundžija (n 7)* paras 153-154.

²³⁹ *Vienna Convention on the Law of Treaties*, 1969 1155 UNTS. 331. Its Article 64 narrowly describes the effect of the emergence of a new peremptory norm of general international law (*jus cogens*).

²⁴⁰ *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] 2 All ER 97.

²⁴¹ *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, para 26.

the equivalent of imperative law, and are essential in international law; international obligations can also be of interest to all States, be *erga omnes*, giving everyone an interest in taking action and seeing to their application.”²⁴²

The concept of *erga omnes* is broader (since it can, for example, be based on an international treaty) than the concept of *jus cogens* (that has a customary basis).²⁴³ Most importantly, the *jus cogens* norms are “very exceptional” and come into play when, for example, “there is or would be a clear consensus for the protection of human rights, such as the prohibition of torture”.²⁴⁴

a. Canada’s Reception of International Law and the Convention against Torture

Canada has ratified various international human rights instruments aimed at prohibiting torture and other cruel, inhuman and degrading treatment or punishment. Because “in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within [the Canadian] legal system”²⁴⁵, because the Convention against Torture is binding on Canada²⁴⁶, and also because the question of ‘torture’ has been addressed by Canadian courts²⁴⁷, it is worth to examine the interaction of international and domestic law

Beaulac notes that “[t]he traditional position about unimplemented treaty norms is the direct result of the so-called dualist approach to international convention”²⁴⁸, i.e. “the legislative transformation of treaty obligations is required to incorporate them within the internal legal order of Canada”.²⁴⁹ Maxwell Yalden, former member of the UN Human Rights Committee, stated that “Canada is a dualist country where, in theory, [the Parliament] must legislate in order to bring an international treaty into Canadian law in order for it to be justiciable in the courts.”²⁵⁰

²⁴² Stéphane Beaulac, *Précis de droit international public* (LexisNexis, 2012) 270 [translated from French by Sébastien Lafrance].

²⁴³ *ibid*, 288.

²⁴⁴ *ibid*, 271.

²⁴⁵ *Newsun Resources Ltd. v. Araya*, 2020 SCC 5, para 49.

²⁴⁶ See, e.g., *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, para 39.

²⁴⁷ See, e.g., *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176.

²⁴⁸ Stéphane Beaulac, ‘The Suresh Case and Unimplemented Treaty Norms’ (2002) 15 *Revue québécoise de droit international* 221, 222.

²⁴⁹ *ibid*, 223.

²⁵⁰ Maxwell Yalden, former member, United Nations Human Rights Committee, testimony before the Committee, 21 March 2005, cited in *Final Report of the Standing Senate Committee on Human Rights*, ‘Effective Implementation of Canada’s International Obligations with respect to the Rights of Children’, footnote 16. Retrieved from: https://sencanada.ca/content/sen/committee/391/huma/rep/rep10apr07-e.htm#_ftn16

However, van Ert criticizes the application in Canada of the dualist approach. He rather argues that Canada is neither dualist nor monist, but a hybrid of the two models.²⁵¹ Crawford describes 'monism' as a theory that "postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent. On that basis, international law can be applied directly within the national legal order"²⁵² whereas "[d]ualism emphasizes the distinct and independent character of the international and national legal systems."²⁵³ Regarding the application of these models in Canada, van Ert contends:²⁵⁴

Canada's reception scheme is not as dualist as the orthodox approach to treaties may suggest. But the more important qualification of Canada's dualist stance, in my view, arises from Canadian judicial interpretive practices. For every Canadian decision affirming that treaties are not a source of law, often in the same decision, there is another argument that supports the counter proposition that Canadian courts strive to interpret domestic laws in conformity with the state's international legal obligations.

We will see an example of this latter approach to Canada's reception of international law later when we will discuss the Suresh decision rendered by the Supreme Court of Canada ('SCC').

b. Vietnam's Reception of International Law and the Convention against Torture

Since 1998, Vietnam has concluded or acceded to more than one thousand international treaties.²⁵⁵ Therefore, the issues related to the reception of international law in Vietnam matter.

Nguyen, Phan and Freeman state that Vietnam follows a monist approach to the reception of international law.²⁵⁶ However, because "Viet Nam decides on the

²⁵¹ See, e.g., Gib van Ert, *Using International Law in Canadian courts*, (Irwin Law, 2nd ed., 2008), 3-5.

²⁵² James Crawford, *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press, 2019), 45.

²⁵³ *ibid.*

²⁵⁴ Gib van Ert, 'Dubious Dualism: The Reception of International Law in Canada' (2010) 44 Val. U. L. Rev. 3, 931.

²⁵⁵ Dr. Nguyen Thi Hoang Anh, Deputy Director, Department of International Law and Treaties, Ministry of Foreign Affairs of Vietnam, 'Law of treaties' (2005) Vietnam Law & Legal Forum. Retrieved from: <https://vietnamlawmagazine.vn/law-of-treaties-3631.html> (consulted on April 21, 2021).

²⁵⁶ Lan Ah Nguyen, Hao Duy Phan and Jessye Freeman 'International and ASEAN Law in the ASEAN 10 National Jurisdictions: The Reception of International Law in the Legal System of Vietnam' *ASEAN Integration Through Law: The ASEAN Way in a Comparative Context* (Plenary on Rule of Law in the ASEAN Community). Retrieved from: https://cil.nus.edu.sg/wp-content/uploads/2016/08/SD_ES-ASEAN-10-Vietnam-study.pdf.

incorporation of treaties into Vietnamese law on a casebycase *basis*. It does not strictly follow the monist theory”, contrary to what the latter author stated, “[n]or does [Vietnam] agree to the dualistic doctrine that international law must be transformed into national law to become domestically binding on a state”.²⁵⁷ Yen rather argues that “[a]lthough the Constitution of the Socialist Republic of Vietnam 2013 (‘the Constitution’) does not address the relationship between national law and international law, an examination of various legal documents suggests that it adopts a *modified monist* approach”.²⁵⁸

In fact, beyond the controversy that exists in the doctrine between the dualist and monist models²⁵⁹, there are practical issues regarding the reception of international law in Vietnam. For example, “there remains a very low uptake of international law by the Vietnamese judicial bodies in practice. ... There is no guidance on the explicit criteria to determine whether a treaty or which parts or provisions therein are ‘explicit and specific’ enough for direct implementation. Nor is there established procedure on how courts and state agencies would directly apply treaties.”²⁶⁰ This issue is not new. Before the most recent Constitution of Vietnam adopted in 2013, “the revised 1992 Constitution, as well as the Law on promulgation of legal documents enacted in 1996 and revised in 2001 and the 1998 Ordinance on conclusion and implementation of treaties, contain[ed] no provision relating to the application of treaties and the incorporation of treaties into Vietnam’s legislation in general.”²⁶¹ Mendez explains that “[b]y incorporation what is meant here is that the treaty is considered to become a binding part of domestic law.”²⁶² In short, there was no guidance provided to Vietnamese courts and litigants regarding the application of treaties ratified or acceded to by Vietnam.

Thus, it is fair to wonder, based on the above-mentioned information and from a procedural point of view, about how treaties ratified or acceded by Vietnam are applied and incorporated into Vietnam’s domestic law, and then, in turn, to wonder

²⁵⁷ Trinh Hai Yen, ‘Part III International Law in Asian and Pacific States, Southeast Asia, Vietnam’ in Simon Chesterman, Hisashi Owada, Ben Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific*, 2019, 479-480.

²⁵⁸ *ibid*, 478-479 (italics added).

²⁵⁹ A.F.M. Maniruzzaman, ‘State Contracts in Contemporary International Law: Monist versus Dualist Controversies’ (2001)12 *European Journal of International Law* 2; see also Sébastien Lafrance, ‘India, International Energy Law and Transboundary Environmental Harms’ (IJPIEL, 5 April 2021). Retrieved from: <https://ijpiel.com/index.php/2021/04/05/india-international-energy-law-and-transboundary-environmental-harms/> (consulted on April 19, 2021).

²⁶⁰ (n 30).

²⁶¹ (n 29).

²⁶² Mario Mendez, ‘The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts’ in *The Legal Effects of EU Agreements* (2013) Oxford University Press, 17.

about how these treaties could be practically used and relied upon by domestic courts. In other words, it is difficult in such a context not to think, without proposing here a final answer in that regard, that perhaps international law may have been, at least in appearance, an empty shell in Vietnam's domestic law while being officially abode by at the international level.

Korenica and Doli recall that "[i]n the monistic doctrine, international law and national law always come together to form a single legal system. In monist models, a ratified international treaty forms part of the domestic legal order and is directly incorporated and often directly applied at the national level."²⁶³ Therefore, if Vietnam genuinely follows either a 'monist' or a 'modified monist' model, as we have seen above, the lack of guidance in Vietnam's domestic law about how and when to apply these treaties would practically keep them out of reach, and in a somewhat legal vacuum before they may be applied in domestic courts. These treaties would still have, in principle, the force of law in Vietnam, but they would hardly be enforced by domestic courts for lack of understanding about their relevancy or their scope, for instance.

Vietnam signed the 1984 Convention against Torture in 2013. Its National Assembly ratified it in 2014. The State party's ratification occurred in 2015.²⁶⁴ Immediately after ratifying the Convention against Torture, the Decision No. 364/QĐ-TTg approving its implementation in Vietnam was issued.²⁶⁵ It is noteworthy to mention, however, that Vietnam did not accede to the Optional Protocol to the Convention against Torture²⁶⁶, which established "a Subcommittee for the Prevention of Torture that has authority to visit places of detention and to assess the conditions of that detention as a way to reduce the incidence of torture or cruel, inhuman or degrading treatment or punishment."²⁶⁷ In addition, Vietnam eluded the potential scrutiny of international

²⁶³ Fisnik Korenica and Dren Doli, 'The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice' (2013) 24 Pace Int'l L. Rev. 92 (2012), 94.

²⁶⁴ Human Rights Committee, United Nations, International Covenant on Civil and Political Rights, 'Concluding observations on the third period report of Viet Nam', CCPR/C/VNM/CO/3, 29 August 2019, para 30(g).

²⁶⁵ Nguyen Tung Lam, 'Công ước của Liên Hiệp quốc về chống tra tấn và các hình thức đối xử hoặc trừng phạt tàn bạo, vô nhân đạo hoặc hạ nhục con người và pháp luật Việt Nam về phòng, chống tra tấn' [*United Nations Convention against torture and brutal, inhuman or degrading treatment or punishment and Vietnamese legislation on prevention and combat of torture*] (October 29, 2020) Học viện lục quân (*The Army Academy*). Retrieved online: <http://hvlq.vn/tin-tuc/tin-quoc-te/cong-uoc-cua-lien-hiep-quoc-ve-chong-tra-tan-va-cac-hinh-thu.html> (consulted on April 21, 2021).

²⁶⁶ (n 38), para 4(b).

²⁶⁷ Alice Edwards, 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 *The International and Comparative Law Quarterly* 4, 789.

justice tribunals by making it clear that it is not bound to submit disputes concerning the interpretation or application of the 1984 Convention against Torture either to arbitration or to the ICJ.²⁶⁸

Even though the official message conveyed by Vietnam in 2017 was that “[i]nternational treaties to which Viet Nam is a party, including the [Convention against Torture], have been incorporated into domestic laws”²⁶⁹, Tung Lam Nguyen writes in late 2020 that “Vietnam *does not directly apply* the provisions of the Convention against Torture, but the implementation of the Convention will comply with provisions of the Constitution and the laws of Vietnam.”²⁷⁰ This raises an important question: why Vietnam does not directly apply, for instance, this convention when it is a ‘monist’ or ‘modified monist’ State (as identified as such by some authors) since it should apply international law “directly within the national legal order”²⁷¹ according to the monistic model of reception of international law? A possible explanation could perhaps be that Vietnam is, contrary to what has been stated by some authors, like Canada, i.e. neither dualist nor monist, but a hybrid of the two models.²⁷²

In light of the above, the implementation of the legal standards established by the Convention against Torture in Vietnam’s domestic courts, for example, remains a concern. This should be understood in the context where one of the rules of particular importance for international law, *pacta sunt servanda* (treaties must be executed)²⁷³, applies to the treaties ratified and acceded to by Vietnam since it became a party to the VCLT in 2001.²⁷⁴ The VCLT provides, under its Article 26, “Every treaty in force

²⁶⁸ (n 31), 494 referring in the relevant footnote to Viet Nam’s reservation to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 10 December 1984, entered into force 26 June 1987).

²⁶⁹ United Nations Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure, Initial report of States parties due in 2016, Viet Nam, CAT/C/VNM/1, 13 September 2017, para. 8 *in fine*.

²⁷⁰ (n 39) (italics added). In the original: “Việt Nam không áp dụng trực tiếp các quy định của Công ước chống tra tấn, mà việc thực hiện Công ước sẽ theo quy định của Hiến pháp và pháp luật của Việt Nam” (italics added) [translated from Vietnamese by Sébastien Lafrance].

²⁷¹ (n 26).

²⁷² See, e.g., (n 25).

²⁷³ See, e.g., A. A. Краевский, ‘Исследования права с позиций социальных и гуманитарных (неюридических) наук’ [Legal Research from the standpoint of social and humanitarian (non-legal) sciences] (2021) 12 *Вестник Санкт-Петербургского университета – Право* [Bulletin of the University of Saint-Petersburg - Law] 1, 193. Retrieved from: <https://lawjournal.spbu.ru/> [translated from Russian by Sébastien Lafrance].

²⁷⁴ (n 29).

is binding upon the parties to it and *must be performed* by them in good faith”.²⁷⁵ Thus, even though “States are free to determine how they meet their international obligations” and even though “international law leaves it to the domestic legal order to determine how it gives effect to its treaty obligations in the domestic legal arena”²⁷⁶, States must still *entirely* meet their treaty obligations at the domestic level, not only at the international level, and then ensure their application.

2. FUNDAMENTAL RIGHTS

Because “the question of how norms of public international law are received into domestic legal systems is largely a matter of constitutional law”²⁷⁷, but keeping in mind that it would go beyond the scope of this paper to examine closely the details of constitutional law in Canada and Vietnam, our analysis will still benefit from doing first a short review of the general principles that apply in the context of the prohibition of torture in both countries.

In Canada, the *Canadian Charter of Rights and Freedoms*²⁷⁸ (hereinafter ‘*Charter*’) enacted in 1982 guarantees the basic rights and freedoms of all Canadians that are considered essential in the Canadian society. In Vietnam, the fundamental rights of Vietnamese citizens are provided by the most recent constitution, the 2013 Constitution of Vietnam.

a. Fundamental Rights in Canada and Torture

With respect to the risk of torture, sections 7 and 12 of the *Charter* apply more particularly, even if torture is not expressly mentioned. These sections read as follows. Section 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 12: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” It is these articles that are primarily examined by Canadian courts in their analysis of the validity of a decision approving the extradition of a person, for example, to a country where he or she is at risk of being subjected to torture or cruel treatment.

These two sections should not leave unnoticed the clause “permitting reasonable limitations on the right if those limits are justified and proportional”.²⁷⁹

²⁷⁵ (n 13) (italics added).

²⁷⁶ Mendez (n 30) 2.

²⁷⁷ (n 28), 927.

²⁷⁸ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c. 1 (‘*Charter*’).

²⁷⁹ Rosalie Silberman Abella, ‘Freedom of Expression or Freedom from Hate: A Canadian Perspective’ (2018) 40 *Cardozo L Rev*, para 518. The Honorable Justice Abella was the most

These limitations are established by section 1 of the *Charter*. The seminal decision of the SCC that interpreted this section is the oft-cited decision *R. v. Oakes* that was rendered in 1986. It is still applied nowadays. It “created what is called the ‘Oakes test’ in Canadian constitutional law. This legal test applies, explained summarily, in cases where there is a *Charter* breach of a right or a freedom in order to determine whether such a breach could be ‘justified in a free and democratic society’”.²⁸⁰ In plain terms, this means that “all *Charter* rights and freedoms can be limited by the State.”²⁸¹

In that respect, Bird submits that “there are potential candidates for ‘absolute’ status”, which means that their breach may not be justified via the application of the Oakes test. He suggests that “[t]he right ‘not to be subjected to any cruel and unusual treatment or punishment’ guaranteed by section 12 is one”²⁸², implying that this right is not currently absolute. This goes in line with what the Human Rights Committee recommended to Canada in its Consideration of Reports Submitted by States Parties under Article 40 of the *International Covenant on Civil and Political Rights*, i.e. Canada “should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from.”²⁸³

As the SCC recalled in the decision *Suresh v. Canada (Minister of Citizenship and Immigration)* (*Suresh*), “When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12.”²⁸⁴ Section 12 of the *Charter* protects against “cruel and unusual treatment or punishment”, although the more common language in international and comparative human rights instruments is that of “cruel, inhuman, or degrading treatment or punishment”. The *Charter* was enshrined in the Canadian constitution, and then the rights and freedoms it provides have a fundamental value in Canadian society.

The prohibition of torture applies not only to acts committed directly by the Canadian State, but also to its decisions to extradite a person to a country where

senior puisne judge of the Supreme Court of Canada (‘SCC’) in 2021. She retired from the SCC in the summer of 2021.

²⁸⁰ Herlambang P. Wiratraman and Sébastien Lafrance, ‘Protecting Freedom of Expression in Multicultural Societies: Comparing Constitutionalism in Indonesia and Canada’ (2021) 36 *Yuridika* 1, 84 footnote 64.

²⁸¹ Brian Bird, ‘Are All *Charter* Rights and Freedoms Really Non-Absolute?’ (2017) 40 *Dalhousie Law Journal* 1, 108.

²⁸² *ibid*, 116.

²⁸³ UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada*, 20 April 2006, CCPR/C/CAN/CO/5, para 15.

²⁸⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 51.

these practices are still present. One of the most important Canadian cases that addressed this issue is the *Suresh* decision. Manickavasagam Suresh was a Sri Lankan citizen of Tamil descent. In 1991, he was recognized as a refugee. However, in 1995, he was subject to deportation orders from Canada on security grounds. These reasons were based on an opinion of the Canadian Security Intelligence Service to the effect that Suresh belonged to the Liberation Tigers of Tamil Eelam ('LTTE') and would collect funds for them. The LTTE was engaged in acts of terrorism in Sri Lanka and its members are at risk of torture there. The SCC examined the Canadian context in the *Suresh* decision and found that "torture is seen in Canada as fundamentally unjust."²⁸⁵ It also observed that there are "compelling indicia [at the international level] that the prohibition of torture is a peremptory norm."²⁸⁶

Nevertheless, the SCC circumscribed in *Suresh* the application of international law in Canada in the following terms:²⁸⁷

International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

More recently, in the decision *India v. Badesha* rendered in 2017, the SCC noted that the inquiry of a court reviewing the decision of the Minister of Justice to extradite an individual to his or her country of origin "is not whether there is no possibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment"²⁸⁸, which would offend the principles of fundamental justice.²⁸⁹ Arguably, this legal standard alone could potentially leave room for quite unfortunate situations where torture or mistreatment may still occur. However, another layer of protection for such individuals exists. Indeed, the SCC recalls that "[w]here the Minister is satisfied that the person sought for extradition does not face a substantial risk of torture or mistreatment and that his

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*, para 62 and ss.

²⁸⁷ *ibid.*, para 60. This goes in line with what stated Ruth Sullivan, *Driedger on the Construction of Statutes* (Toronto: Butterworths, 3rd ed., 1994) 330, i.e. international law, both customary and conventional, is part of the legal context of statutory interpretation; see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 70.

²⁸⁸ [2017] 2 S.C.R. 127, para 62.

²⁸⁹ *ibid.*, para 43; section 7 of the *Charter*.

or her surrender is compliant with the *Charter*, the Minister must nonetheless refuse the surrender [of an individual] if he or she is satisfied that it would be otherwise unjust or oppressive."²⁹⁰

Harrington criticizes Canada's extradition process in the following manner:²⁹¹

It is worrisome that a country committed to a principled foreign policy does not insist that its extradition partners be parties to the Convention Against Torture. This treaty provides more than support for the customary rule that prohibits the sending of an individual to face a substantial risk of serious ill-treatment. It also imposes a legal requirement for regular state reporting to an independent, international, treaty-monitoring body, with monitoring mechanisms, whether consular or otherwise, viewed as an important safeguard to enhance the reliability of a diplomatic assurance.

That being said, it must be noted that, in spite of these general reporting obligations, Vietnam's non-accession to the Optional Protocol to the Convention against Torture, as we have seen earlier, would not make possible for Canadian authorities, for instance, to require the supervision of Sub-Committee for the Prevention of Torture to monitor the situation of an individual surrendered from Canada to Vietnam.

b. Fundamental Rights in Vietnam and Torture

Summarily, the legal framework of Vietnam includes "36 articles in Chapter II of the 2013 Constitution of Viet Nam regulating on human rights, fundamental rights and obligations of citizens, including ... the right not to be subjected to torture."²⁹²

The right not to be subjected to torture, cruel, inhuman or degrading punishment or treatment is provided by Article 20 paragraph 1 of the 2013 Constitution as follows: "Everyone has the right to physical inviolability and to have their health, honour and dignity protected by law; the right not to be subjected to torture, violence, coercion, applying corporal punishment or any other form of treatment which involves in physical violation or violation of health, honour and dignity".²⁹³

However, acknowledging the various amendments brought to various legal instruments of Vietnam²⁹⁴ in order to meet its international obligations, including

²⁹⁰ *ibid*, para 53. See also *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 156, para. 56.

²⁹¹ Joanna Harrington, 'Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in *India v. Badesha*' (2019) 88 *Supreme Court Law Review* 273, 291-292.

²⁹² (n 43), para. 6. Retrieved from: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/VNM/1&Lang=en.

²⁹³ *ibid*, para 7.

²⁹⁴ For an entire list and discussion of the amendments, see (n 38).

the prohibition of torture, the question remains as to how compliance with the fundamental rights provided by the Constitution and the laws of Vietnam be eventually verified and reviewed by courts when courts in Vietnam has a “low or no independence[, which] directly influence[s] the implementation of basic human rights, especially rights of individuals”²⁹⁵ An independent court that does constitutional judicial review is a crucial legal body to exercise “a restriction on the abuse of state power, [it] indirectly protects basic rights by maintaining mechanisms for human rights protection stipulated in the constitution and restricting the abuse of state power.”²⁹⁶

3. CRIMINAL LAW

Even though jurisprudence plays a major role in its interpretation and the establishment of rules and legal tests, the main source of criminal law in Canada is the *Criminal Code*.²⁹⁷ Vietnam has its *Penal Code*, which most recent version was adopted by the Vietnam’s National Assembly in 2015²⁹⁸ and took effect on the first day of 2018.

a. Criminal Law in Canada and Torture

Paragraph 4 of the Convention against Torture clearly stipulates that “Each State Party shall ensure that all acts of torture are offences under its criminal law”. Because Canada follows the dualist model when it comes to the incorporation of treaties into its domestic, one “way to implement a treaty in Canada is to amend domestic law to bring it into conformity with the treaty’s requirements, without expressly mentioning the treaty in the amending legislation.”²⁹⁹ This is exactly what Canada did regarding this obligation provided by the Convention against Torture by enacting section 269.1 of the *Criminal Code*.³⁰⁰

This section defines torture at the hands of a public official as “any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for purposes including “intimidating or coercing the person”. It

²⁹⁵ Do Minh Khoi, ‘The Impact of the Rule of Law on Protection of Human Rights in Vietnam’ (2016) *Asia-Pacific Journal on Human Rights and the Law* 17, 18

²⁹⁶ *ibid*, 19.

²⁹⁷ R.S.C., 1985, c. C-46.

²⁹⁸ The Vietnam’s National Assembly adopted Resolution No. 41/2017/QH14 dated 20 June 2017 on the implementation of Penal Code No. 100/2015/QH13 dated 27 November 2015, amended and supplemented by Law No. 12/2017/QH14.

²⁹⁹ Gib van Ert, ‘Canada’ in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement* (Cambridge University Press, 2010) 169-170.

³⁰⁰ *ibid*, 170 footnote 12.

practically means, as noted by the SCC in *Kazemi Estate v. Islamic Republic of Iran*, that “[i]f the Canadian government were to carry out acts of torture, such conduct would breach international law rules and principles that are binding on Canada, would be illegal under the *Criminal Code*, and would also undoubtedly be unconstitutional.”³⁰¹

b. Criminal Law in Vietnam and Torture

Quý Vương Lê, Deputy Minister of Public Security of Viet Nam, reported in 2018 to the Committee against Torture of the United Nations Human Rights Office of the High Commissioner that “[i]n 2015, the [Vietnam’s] National Assembly had amended many important laws and regulations pertaining to the prevention of torture, including the *Criminal Code* [and] the *Criminal Procedure Code*”.³⁰²

He added that “[a]lthough the 2015 *Criminal Code* *did not define a separate offence of torture*, it did define crimes such as ‘the use of corporal punishment’ and ‘obtaining testimonies under duress’ as offences that in their nature constituted torture.”³⁰³ For example, Article 373 of the Vietnam’s *Criminal Code* titled ‘Use of Torture’ covers possible cases where a person “who, in the course of proceedings, trial, or implementation of measures including mandatory attendance at a correctional institution or rehabilitation centre, uses torture or brutally treats or insults another person in any shape or form”.

This is a step in the right direction, but this may not comply directly with paragraph 4 of the Convention against Torture. In fact, the United Nations Human Rights Committee expressed concerns in 2019 regarding the absence of criminalization of torture in Vietnam.³⁰⁴ The Committee then recommended that Vietnam amend its criminal law to *explicitly criminalize* acts of torture and include a definition of torture in conformity with international standards, and preferably by also codifying torture as an independent crime.³⁰⁵

CONCLUSION

The issue of torture is never to be taken lightly. The presentation and the discussion of Canada’s and Vietnam’s legal reality regarding the question of torture in light of international law but also through the lens of their respective domestic law allowed

³⁰¹ (n 21) para. 52.

³⁰² Committee against Torture of the United Nations Human Rights Office of the High Commissioner, ‘Committee against Torture considers the initial report of Viet Nam’ (Geneva, 15 November 2018). Retrieved from: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23895&LangID=E>.

³⁰³ *ibid* (italics added).

³⁰⁴ (n 38), para 27.

³⁰⁵ *ibid*, para 28(a).

us to observe some similarities and differences between the two countries. There remain serious legal issues to be explored for both countries. The author hopes to have contributed with this paper, said with the utmost humility, to this important debate.

REFERENCES

Legal Instruments

International

- [1] Committee against Torture of the United Nations Human Rights Office of the High Commissioner, 'Committee against Torture considers the initial report of Viet Nam' (Geneva, 15 November 2018).
- [2] Human Rights Committee, United Nations, International Covenant on Civil and Political Rights, 'Concluding observations on the third period report of Viet Nam', CCPR/C/VNM/CO/3, 29 August 2019.
- [3] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465.
- [4] UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX).
- [5] UN General Assembly (1966) International Covenant on Civil and Political Rights, Treaty Series, 999, 171.
- [6] UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada*, 20 April 2006, CCPR/C/CAN/CO/5.
- [7] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.
- [8] United Nations Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure, Initial report of States parties due in 2016, Viet Nam, CAT/C/VNM/1, 13 September 2017.
- [9] *Vienna Convention on the Law of Treaties*, 1969 1155 UNTS. 331.

Vietnam

- [10] Resolution No. 41/2017/QH14 dated 20 June 2017 on the implementation of Penal Code No. 100/2015/QH13 dated 27 November 2015, amended and supplemented by Law No. 12/2017/QH14.

Canada

- [11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (U.K.)*, 1982 c.11.
- [12] *Criminal Code of Canada*, R.S.C., 1985, c. C-46.

Literature

- [13] Abella, Rosalie Silberman. 'Freedom of Expression or Freedom from Hate: A Canadian Perspective' (2018) 40 *Cardozo L Rev.*

- [14] Beaulac, Stéphane. *Précis de droit international public* (LexisNexis, 2012).
- [15] Beaulac, Stéphane. 'The Suresh Case and Unimplemented Treaty Norms' (2002) 15 *Revue québécoise de droit international* 221.
- [16] Bird, Brian. 'Are All *Charter* Rights and Freedoms Really Non-Absolute?' (2017) 40 *Dalhousie Law Journal* 1.
- [17] Brownlie, Ian. *Principles of Public International Law* (Oxford, 4th ed, 1990).
- [18] Crawford, James. *Brownlie's Principles of Public International Law* (9th edition, Oxford University Press, 2019).
- [19] Edwards, Alice. 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 *The International and Comparative Law Quarterly* 4.
- [20] Harrington, Joanna. 'Extradition, Assurances and Human Rights: Guidance from the Supreme Court of Canada in *India v. Badesha*' (2019) 88 *Supreme Court Law Review* 273.
- [21] Korenica, Fisnik and Dren Doli, 'The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice' (2013) 24 *Pace Int'l L. Rev.* 92 (2012).
- [22] Краевский, А. А. 'Исследования права с позиций социальных и гуманитарных (неюридических) наук' [*Legal Research from the standpoint of social and humanitarian (non-legal) sciences*] (2021) 12 *Вестник Санкт-Петербургского университета – Право* [*Bulletin of the University of Saint-Petersburg - Law*] 1.
- [23] Lafrance, Sébastien. 'India, International Energy Law and Transboundary Environmental Harms' (*IJPIEL*, 5 April 2021).
- [24] Maniruzzaman, A.F.M. 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12 *European Journal of International Law* 2.
- [25] Mendez, Mario. 'The Legal Effects of Treaties in Domestic Legal Orders and the Role of Domestic Courts' in *The Legal Effects of EU Agreements* (2013) Oxford University Press.
- [26] Minh Khoi, Do Minh. 'The Impact of the Rule of Law on Protection of Human Rights in Vietnam' (2016) *Asia-Pacific Journal on Human Rights and the Law* 17.
- [27] Nguyen, Lan Ah, Hao Duy Phan and Jessye Freeman 'International and ASEAN Law in the ASEAN 10 National Jurisdictions: The Reception of International Law in the Legal System of Vietnam' *ASEAN Integration Through Law: The ASEAN Way in a Comparative Context* (Plenary on Rule of Law in the ASEAN Community).
- [28] Dr. Nguyen, Thi Hoang Anh. Deputy Director, Department of International Law and Treaties, Ministry of Foreign Affairs of Vietnam, 'Law of treaties' (2005) *Vietnam Law & Legal Forum*.
- [29] Nguyen, Tung Lam. 'Công ước của Liên Hiệp quốc về chống tra tấn và các hình thức đối xử hoặc trừng phạt tàn bạo, vô nhân đạo hoặc hạ nhục con người và pháp luật Việt Nam về phòng, chống tra tấn' [*United Nations Convention against torture and brutal, inhuman or degrading treatment or punishment and Vietnamese legislation on prevention and combat of torture*] (October 29, 2020) *Học viện lục quân (The Army Academy)*.

- [30] Ragazzi, Maurizio. *The Concept of International Obligations Erga Omnes* (Oxford University Press, 2000) 7.
- [31] Rodley, Nigel S. 'The Definitions of Torture in International Law' (2002) 55 *Current Legal Problems* (Oxford University Press).
- [32] Senate of Canada, *Report of the Standing Senate Committee on Human Rights*, December 2001.
- [33] Sullivan, Ruth. *Driedger on the Construction of Statutes* (Toronto: Butterworths, 3rd ed., 1994).
- [34] van Ert, Gib. *Using International Law in Canadian courts*, (Irwin Law, 2nd ed., 2008).
- [35] van Ert, Gib. 'Dubious Dualism: The Reception of International Law in Canada' (2010) 44 *Val. U. L. Rev.* 3.
- [36] van Ert, Gib. 'Canada' in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement* (Cambridge University Press, 2010).
- [37] Wiratraman, Herlambang P. and Sébastien Lafrance, 'Protecting Freedom of Expression in Multicultural Societies: Comparing Constitutionalism in Indonesia and Canada' (2021) 36 *Yuridika* 1.
- [38] Yalden, Maxwell. United Nations Human Rights Committee, testimony before the Committee, 21 March 2005, cited in *Final Report of the Standing Senate Committee on Human Rights*, 'Effective Implementation of Canada's International Obligations with respect to the Rights of Children, footnote 16.
- [39] Yen, Trinh Hai. 'Part III International Law in Asian and Pacific States, Southeast Asia, Vietnam' in Simon Chesterman, Hisashi Owada, Ben Saul (eds.), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019).

Jurisprudence

International

- [40] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, International Court of Justice (ICJ), 5 February 1970
- [41] *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998.
- [42] *Prosecutor v. Delacic and Others*, 16 November 1998, case no. IT-96-21-T.
- [43] *Prosecutor v. Kunarac*, 22 February 2001, case nos. IT-96-23-T and IT-96-23/1.

European

- [44] *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001.

United Kingdom

- [45] *R v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] 2 All ER 97.

Canada

[46] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

[47] *India v. Badesha*, [2017] 2 S.C.R. 127.

[48] *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176.

[49] *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 156

[50] *Newsun Resources Ltd. v. Araya*, 2020 SCC 5.

[51] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32.

[52] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

DOES AN EVASION OF CRIMINAL PROCEDURE EXIST IN THE TRADITIONAL LEGAL CULTURE OF VIETNAM?

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Abstract: Criminal procedure refers to the state's performance of activities to handle criminal cases and bring criminal proceedings against offenders. However, in Vietnam's history of law, many provisions were set out minimizing crime denunciation in order to reduce the number of criminal cases that the state apparatus must solve. On the part of the people, their fear of proceedings and the criminal justice system's coercive power is manifested in the notions of "Vô phúc đảo phụng đình" (*being involved in lawsuits is a bad luck and those who are involved in lawsuit are idiots*), "Con kiến mà kiện củ khoai" (unofficial translation: *the ants that sue the potato, referring to futile lawsuits in which the plaintiff are ordinary people and the defendants are the upper class who are superior on account of their wealth and power*), and "Được vạ thì má đã sưng" (equivalent in English: *while the grass grows, the horse starves, referring to all the sufferings and losses inflicted on the participants in legal proceedings until they win the lawsuit*) (Vietnamese proverbs). Both the state and the people seem to share one thing in common, which is their tendency to avoid criminal proceedings. In the light of this issue, the paper aims to answer the questions: is there really a so-called mindset of evading criminal procedure in the traditional legal culture of Vietnamese people? If so, what are the causes? Do such mindsets and causes still exist in contemporary society? Seeking the answers to those questions nowadays has an important relationship with and significance in the process of realizing the rule of law and due process of law in Vietnam.

Key words: Criminal procedure, evasion, laws, traditional culture, Vietnam.

INTRODUCTION

Trê Cóc (equivalent in English: "The chronicle of the catfish and the frog") is a popular poem in Vietnamese folklore describing the frog's involvement in a lawsuit to reclaim its offspring and reclaim justice from the catfish, caused by the similarity

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between the tadpoles and the catfish couple, which results in them taking the tadpoles home and bring them up. The chronicle of the catfish and the frog specifically and vividly reflects Vietnamese people's views on proceedings. Accordingly, it is unfortunate to be involved in lawsuits for the state has absolute power in proceedings while the people can be crushed, broken and may spend a fortune just like the situation of the accused catfish in this case:

“The mandarin orders and the underling commands
Tied during the day, shackled during the night.
The imprisoned got crushed flesh and bones,
Hit for several times with a double whip.
The catfish husband and wife pity,
No matter how much it costs.”

So do people avoid legal proceedings? Or vice versa, as remarked by a renowned scholar in Vietnam in the early twentieth century, historian and cultural researcher Dao Duy Anh once said: “people in the countryside are very fond of proceedings” (Dao, 2002, p 171). For such cause, there were various state regulations enacted to limit litigation of the people in the medieval and early modern Vietnamese criminal procedure law³⁰⁶. Is the restriction on proceedings of the state a reflection of Confucian's disregard for proceedings, stemming from the upholding of the idea of neutrality, harmony, tolerance, amiability and from the state's responsibility for putting an end to proceedings based on Confucius' conception? The aforementioned avoidance of proceedings has not been identified, thus it is crucial for studies to continue the clarification and especially the determination of a possible consequence in the modern legal life.

This article answers the above questions by starting from the generalization of the transformation and development process of Vietnam's criminal procedure law to clarify the nature of the criminal procedure law, thereby explaining the people's perceptions on criminal proceedings as well as clarifying the authorities' legislative views on the role of the criminal procedure law and the necessity of criminal proceedings. In order to explicate the people's feelings for criminal proceedings as well as the authorities' legislative views regarding this issue, the article will take a deep approach from the Confucian political – legal ideology applied by feudal authorities and from the legal psychology of the majority of people in traditional society. Accordingly, the article will present a comparison with the contemporary

³⁰⁶ We will refer to and analyze the regulations restricting litigation of the people in the legal history of Vietnam in the following section of the article.

context to determine if the mindset of evading criminal proceedings still exists in the current Vietnamese legal life.

CRIMINAL PROCEDURE LAW IN THE MEDIEVAL AND EARLY-MODERN HISTORY OF VIETNAM

Contemporary criminal procedure law in Vietnam is the product of a multi-layered sedimentary process: Eastern medieval imperial criminal procedure, Western early-modern capitalist criminal procedure, modern socialist criminal procedure in the second half of the twentieth century, and later on, the legal acculturation of certain aspects of adversarial procedures with the trend of expanding adversarial litigation from the early 2000s to date. (Le, 2021, p 482).

The first sedimentary layer of Vietnam's criminal procedure is the Eastern medieval imperial criminal procedure, including Quoc trieu hinh luat (National Penal Code, 15th century), Tu tung dieu le (Statutory and Customary Stipulations on Procedure, 15th century), Quoc trieu Hong Duc chu cung the thuc (Hong Duc National Regulations on Forms of Testimony and other Procedure Activities, 15th century), Quoc trieu chieu lenh thien chinh (National Ordinance, 17th century), Quoc trieu kham tung dieu le³⁰⁷ (National Regulations on Investigation and Litigation, 18th century), Hoang Viet luat le (National Penal Code, 19th century). Vietnam had a considerably developed legal system for criminal procedure. The imperial states held the responsibility for conducting criminal proceedings against the offender with the system of competent authorities. The burden of proof belonging to the public institutions, was allocated, from cases under the authority of a village to competent state agencies with the specific authority. The criminal procedure of imperial dynasties demonstrated myriads of characteristics of the proceedings with the state's role of hearing actions on the basis of medieval Eastern interrogation. The criminal procedure law required the accuser to gather and adduce evidence, which was shown under multiple provisions and sanctions applied to unproven accuser and denunciation without the observation of the hierarchy of competent agencies and procedural order. The criminal procedure law also set out a lot of rules that require impartial and cautious attitudes towards officials in charge of conducting procedure during the course of "hearing a case" as well as compliance with the law in the process of evidence collection and trial (Le, 2021, p 483). However, in essence, medieval Vietnamese criminal procedure law demonstrated the role of a

³⁰⁷ This Code was evaluated (Vu, 1967, p 143; Nguyen, 2015; Le, 2020) with its endorsement of the humanitarian spirit, procedural thinking and legislative techniques. Particularly, Nguyen (2015) argued that generally while there were sets of General Laws in the medieval period in the East which were comprehensive laws containing provisions of different legal fields, the existence of the National Regulations on Investigation and Litigation with the nature of a separate and independent law in the field of proceedings revealed its own uniqueness and rarity.

legal framework (in terms of procedures) in order to realize criminal laws (in terms of content) in the performance of the general duty of the laws, which is to protect the feudal social order and Confucian moral standards in the family and society (Nguyen, in Nguyen, Pham, Mai (eds.), 2017 p 168). The feudal dynasties of Vietnam also made full use of criminal procedure law to protect their interests (Hoang & Phan, in Hoang (eds), 2005, p 20).

After the French arrival in Vietnam in 1858, legal transitions gradually appeared in all three regions of the country (Cochinchina, Annam, Tonkin) where the French applied the principle of “divide and rule”, with the *Bo hình luật canh cai* (Code Pénal modifié) in Cochinchina in 1912, *Bo luật hình su Trung Viet* in Annam in 1933, *Bo luật hình su Bac Viet* in 1921 and *Bo luật hình su to tung Bac Viet* in 1917 in Tonkin. The new criminal statutes were introduced by the French on the basis of the 1810 Napoléon Criminal Code and revised to obtain the proper application in Vietnam (Le, 2021). The criminal procedure law of the French was the inquisitorial procedure model with a strong emphasis on the stage of investigation and the role of the Court in determining the truth of the case. Although it existed only for a short time (from 1917 to the middle of the twentieth century), the presence of French criminal procedure law is considered the second sedimentary layer and an important transition for the application of Soviet criminal procedure law – the third sedimentary layer of the criminal procedure law of Vietnam. The criminal justice system imposed by the French served as an efficient tool for the repression carried out by the colonial regime in Vietnam. Nonetheless, by looking at it from another angle, it can be seen that Vietnam adopted the legal institutions which embody a progressive law, contributing to the endorsement of equality and transparency in society, promoting the elimination of outdated customs of the feudal society, at the same time such institutions had already gone hand in hand with traditional customs, practices and culture. (Dao, in Rualin, Pastorel, Trinh and Nguyen (eds), 2016, p 18).

Thus, both medieval and early-modern laws set out competent agencies to handle criminal cases. More specifically, the political regimes in Vietnam in medieval and early-modern history demonstrated awareness by regulating criminal procedure in order to establish a procedural framework for combating crime, an assertion of responsibility and also the power and interests of the state in the course of conducting legal proceedings against offenders. However, does this contradict a traditional legal culture characterized by the combination of two Confucian ideologies - characterized by elements of power regards as law, law regards as a penalty, disregard proceedings, respect reconciliation, disregard rights and respect prevention (Du, 2020, p 15-26)?

CONFUCIAN RULERS' VIEWS ON THE RESTRICTION OF PROCEEDINGS

As an East Asian country deeply influenced by Chinese Confucian ideology for more than two millennia, medieval Vietnamese laws upheld and defended Confucian moral values as the value of Confucian moral values such as Ren, De, Li had great significance in relation to populism in maintaining social order in favour of the authorities. Confucius was the one who introduced the policy of leading the people with "De" (morality, virtue), bringing the people into order by "Li" (rites). From the perspective of "Ren", Confucianism especially attached great importance to the Rule of Virtue and the Rule of Rite. Confucius affirms, "Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves" (Analects II, 3). Given the context of Qi state where the number of people having their legs cut off as a form of penalty got so high that in markets of the capital city, shoes were too cheap and crutches were too expensive (the Book "Zuo zhuan"), Confucius did criticize the so-called "道政齊行" or "道之以政，齊之以刑" (the use of orders to govern and the use of penalty to rule). This ruling approach only makes people refrain from wrongdoings due to temporary fear. The radical solution is to make people feel humiliated if they do something wrong and breach the law, thus they will not do it. As the result, it is necessary to uphold "道德齊禮" (to make use of morality to lead and use rite to rule the people). Accordingly, Confucius stated: "听讼，吾犹人也，必也使无讼乎" (In hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations) (Analects, Yan Yuan). Therefore, "no litigations" being the best solution was the original expression of the so-called disregard for proceedings and respect for precautions of Confucianism (Le, 2021).

No litigations or disregard for litigations with Confucius' starting point refer to the fact that the government must create a prosperous and equal society that honors De and Li so that people refrain from committing crimes, thereby they will not be punished. Accordingly, there will be no more proceedings, which means no litigations, and the state are not subject to initiating criminal proceedings and then solving cases. The Confucian bureaucratic feudal regime considered the number of cases as the main indicator for examination of the mandarins' performance. Therefore, as the local mandarins wanted to show that they knew how to use ethics to teach the people, they restricted litigations and used devious means to oppress the right to prosecution of the people (Du, 2020, p 19). This is considered to be one of the important reasons for the control over the number of criminal cases resolved by official means which is criminal proceedings. The restriction on the right to denounce and to sue is evident in the medieval criminal procedure law of Vietnam.

In Vietnam, concerns about the right to denunciation being abused to become “indiscriminate lawsuits” existed broadly in the regulations and legal documents of the feudal dynasties³⁰⁸. The rules for magistrates requested: “When the magistrate in the judiciary office finds that someone has filed a lawsuit, they must examine carefully to see if the lawsuit can be processed, if it cannot be handled then the magistrate shall explain and return to prevent litigation... False claims shall not be handled to maintain the country’s rules and prevent indiscriminate lawsuits” (Nguyen (eds), Le and Tran, 2006, p 478)³⁰⁹. The prevention of indiscriminate lawsuits, according to Dao 2002, p 171, is that a lawmaker (in the monarchy) shall contemplate helping the people refrain from litigation, so the state even punished those who appealed with no basis and forbade lawyers. As disputes and lawsuits were mostly seen as a possible cause of chaos and a threat to social stability, they were limited to the fullest extent to maintain the “stability” of villages and the state. Such restriction could be realized through the provisions on the right holder of denunciation. A number of documents such as Regulations for proceedings in the case of bodily injury in the National Regulations on Investigation and Litigation specifically stipulated the right to litigation of the representatives of the victim’s family with the principle of determining the litigation status of the victim’s family as follows: “if there is a murder case because of vengeance, adultery, brawl or robbery in the locality, only the spouse, children, parents or the siblings of the victim can file a lawsuit. The relatives of the victim can file a lawsuit only if the victim has no spouse, children, parents or siblings”³¹⁰ (Nguyen (eds), Le and Tran, 2006, p 740). This is considered a necessary provision in order to properly and uniformly determine the status of the plaintiff. However, it also limits the number of denunciations by limiting the status of the denunciators. In addition, there are provisions restricting the scope of denunciation. For example, there are provisions limiting the number of criminals included in the file report of the case: “The submissions were only allowed to be filled with no more than one or two names of the mastermind of the crime and no more than three to four names of the assailants. It is not allowed to record the perpetrators randomly, fabricate the content of the report or submit a blank application and fabricate the names later on. If

³⁰⁸ These ancient legal sources were gathered, translated and published by scholars named Nguyen Ngoc Nhuan, Le Tuan Anh and Tran Thi Kim Anh of the Institute of Han-Nom Studies, Vietnam Academy of Social Sciences in the series of books called “Some Vietnam legal instruments from the 15th to 18th century”, published by the Khoa hoc xa hoi Publishing House in 2006

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³¹⁰ Vietnam Academy of Social Sciences, Institute of Han-Nom Studies, Some Vietnamese legal instruments, Volume 1, from the fifteenth century to the eighteenth century, the Khoa hoc xa hoi Publishing House, Hanoi, p. 740

the victim's report states more than two masterminds and more than four assailants, the head of the commune will omit the names before the examination. If the person refuses to cut down the names, the head of the commune shall guide such person to the place where the corpse is reported in accordance with the law, once the district authority finishes examination and filling of the report, the person shall submit their report in conformity with the rules. The district authorities shall not make excuses and intentionally delay the completion of the report" (Nguyen (eds), Le and Tran, 2006, p 740, 741). The restriction of litigation in these regulations stem from the fear of "fabricating information", slandering or exacerbating the criminal situation, causing social instability.

However, restrictions on litigation do not mean that the state will give up its role in resolving criminal cases. In the history of the laws of Vietnam, there have been a variety of laws stipulating the responsibility of the state apparatus in the thorough acceptance of denunciations, the responsibility to handle criminal cases to proceed with legal proceedings with the allocation and decentralization for determination of authority. For example, Quoc trieu hinh luat (National Penal Code, 15th century) discerned: "for a very small issue, one shall sue in the commune; for a small issue, one shall sue in the district; for an average issue, one shall sue at the court officials' place; the mandarins shall judge fairly and in accordance with the law; for a great issue, one shall come to the capital... Those who denounce treason shall not be subject to this law" (Article 672). The law also presented regulations on sanctions against competent persons who intentionally fail to receive and handle victims' denunciation of crime: "If anyone outside of town makes a denunciation, the local authorities shall carefully consider the situation and request on behalf of the officials. The underlings shall not delay or ignore the indictment, instigate (the person who submits the indictment) or return the indictment (fail to submit to the superior mandarin), and decide for themselves; if someone acts against this law, then the local authorities shall report to the superior to convict the person inciting the plaintiff. If the local authorities fail to acknowledge, they shall be demoted or disqualified from their position or received other common punishment for their crime" (Article 673). Bo Hoang Viet luat le of the Nguyen dynasty continued to provide regulations on the responsibility for handling denunciation - an issue posed by the Quoc trieu hinh luat (National Penal Code, 15th century). Hoang Viet luat le (National Penal Code, 19th century) clarified the relationship between the nature of denunciation and the responsibility of the person handling it: "If a bureaucrat fails to handle a case, he shall be sentenced to 3 years of penal labor in prison for a case of treason

or rebellion; beaten with a heavy stick for 100 times if committing other crimes and beaten with a heavy stick for 80 times for murder" (Article 303).

In addition, in order to prevent disturbances against the stability and order of the society, imperial laws of Vietnam focused on regulations on reconciliation and encouraged peace and harmony. This legislative view also stems from the respect for reconciliation and the core ideology promoting Humanitarianism, "仁者二人者" (respect for the relationship between people and people, human beings have to care for, love and tolerate each other) and Rule of virtue of Confucianism: "古者修教訓之官，務以德善化民，民已大化之後，天下常亡一人之獄矣" (in ancient times, the mandarins shall look after and use virtue to educate the people, once educated, there shall be no litigations in the society" (Hanshu, Biography of Dong Zhongshu. Regulations for proceedings in the case of bodily injury stipulated: "If the report of the victim is still under suspicion, not truly witnessed and the incident happened in the same commune due to an unintentional brawl and both sides compromise, they shall be allowed to discuss to with each other to end the lawsuit". Another provision related to crime and illegal acts between the parties: "For common lawsuits related to miscellaneous actions of disputes relating to gift-given property, social position and tussles, debt, if the plaintiff agrees to compromise, the judges shall also follow the rules of reconciliation and agree with each other to prevent litigation, reduce the costs for the people and refrain from extortion" (Nguyen (eds), Le and Tran, 2006, p 770). From the above philosophies and regulations, it can be seen that the laws promoted reconciliation, morality, unity and social harmony, and reduced procedural costs in handling crimes by creating other methods to handle the case: instead of dealing with crime by criminal proceedings, it shall be handled by reconciliation.

However, because of the fact that the promotion of reconciliation may lead to the omission of crime, lawmakers set out strict regulations for cases in which "people who make a separate agreement with the criminal mentioned above are those who are acquisitive, who only care about money in the short term and forget about the grudge of a lifetime. Such separate agreement not only causes injustice for the deceased, but also the fact that criminals are not punished; thus it is necessary to report to the mandarins. If anyone dares to negotiate privately with the criminals as stated, once discovered, such person shall be punished by law and not forgiven. This notice is made available to everyone" (Nguyen (eds), Le and Tran, 2006, p 478). Reconciliation being restricted in order to protect social order and social morality is a uniform requirement between "private" and "public" crimes. For public crimes, Quoc trieu hinh luat (National Penal Code, 15th century stated: "Those who report on public crimes shall not reconcile with the defendant. If the judicial official and the

prison official obey, they shall be whipped 50 times, degrade one level downward a lower rank of position. One shall be accused of breaching the law if he acts because of personal relationship or a bribe" (Article 718).

The essential cause of the stipulation of the above provisions is that: the perceived crime is an act not only violating an individual but also harming the position and power of the state. Therefore, the state does not give up the right to punish offenders and the right to prosecute criminal liability against the offenders. On the one hand, imperial laws set out provisions for criminal proceedings to form "天網恢恢, 疏而不失" (The heavenly net is vast, loose, and yet does not let anything slip through) (Lao Tzu, Tao Te Ching) for criminals in order to protect the public interests, to prevent the state apparatus from accidentally or intentionally neglecting criminals and to prevent the overuse of reconciliation; on the other hand, they set out regulations to restrict criminal proceedings or more precisely, restrict allegations and claims that could cause disturbances to social order and stability. Considering the issue from a general standpoint, the application of criminal procedure law to deal with crimes is a question that can be answered in many different ways, but one thing in common is the interests of the authorities – Confucian moral relations. Therefore, it is not extreme to say that "according to traditional conception, the laws are merely a tool of suppression, one of the devious means to dominate which can be manipulated and combined by the ruler at his discretion. (Luong Tri Binh, 1996 ("Phap bien", Tap chi Khoa hoc xa hoi Trung Quoc so. 4 in Du, p 850).

The legal culture in feudal dynasties in China and Vietnam was Confucian legal culture because the moral values according to Confucian standards were highly upheld and defended. Nonetheless, the rulers upheld and defended such standards by Legalist approach on the severe penalty-based legal system, which was well disguised by the formal and populism formula of "德主刑輔" (morality is first, punishment is secondary). Given the fact that criminal law and punishment were applied to govern almost all social relations and the various harsh penalties were common punishment and enforced in many harsh forms, in practice, the formula demonstrating the nature of Confucian legal culture, at least, in the criminal justice field was "刑主德輔" (the supremacy of "刑" (punishment or penalty" and the subservience of "德" (morality). Law or criminal laws showed the authoritarian power of the rulers, so "刑" (regarding punishments, incapacitation, deterrence, and prevention with the severity of penalty) shows the main role, expressed in a major, common and permanent manner; "德" (virtues, rites) as a supplementary role, expressed in a minor, uncommon, non-permanent manner in stipulations on punishments and their practice of execution (Le, 2020, p 407, 408). The intrinsic

relationship between Morality and Penalty in Confucian legal culture shows that with a criminal justice system upholding the protection of the state's interests with the above punishment, although there are restrictions on proceedings on the part of the Confucian authorities, restrictions on proceedings should be construed as restrictions on the rights of the people in litigation and it should not be understood as restrictions on the role, rights and responsibilities of the state in their participation in criminal cases.

THE PEOPLE'S MINDSET OF EVASION OF LEGAL PROCEEDINGS IN TRADITIONAL LEGAL CULTURE

The relationship between the state and the people in traditional laws is an unequal relationship between the king (the king is the father) and the people (the people are the children), the father is honoured and the children are disregarded, the people – the children obeying the king – the father is the characteristic of Confucian morality. This relationship is protected by law. The king/father has the right to enact laws, and the people/children are obliged to observe the laws, otherwise they will be punished by the legal sanctions. This is the “power regards as law, the law regards as a penalty” of the traditional legal culture. This creates the people's fear of the laws as the laws belong to the state, of the state and for the state and the implementation of the laws is guaranteed by repression of the state. From a general fear of the law, when disputes occur, instead of participating in legal proceedings to be protected, the people avoid litigation and the laws. When being oppressed by public agencies and authorities, it is burdensome for people to sue public institutions due to the inequality between the two parties. Therefore, litigation is unrealistic - “the ant that sues the potato” (Vietnamese proverbs) and if litigation is to be done, “being involved in lawsuits is a bad luck and those who are involved in lawsuit are idiots”. People are aware that state agencies and the court are the places where “the mandarins' words are iron and steel”, where people have to deal with the fact that “the proof of wisdom is in the court”. Therefore, it is very challenging to access justice through criminal proceedings, litigation takes a long time and there are too many losses and consequences in the pursuit of the case, because “Được vạ thì má đã sưng” (Vietnamese proverb, equivalent in English: while the grass grows, the horse starves”).

More specifically, the avoidance of proceedings stems from the fear of repressive power, coercive measures as well as other possible disadvantages in the process of resolving criminal cases. Criminal procedure law vests too much power to the bureaucracy and imposes too many obligations on those participating in litigation. The burden of proof - the obligation to provide testimony and evidence remains subject to the accused person. If this obligation is not fulfilled, the right to apply corporal punishments of the State will be activated. This means the accused

person can be legally tortured, and such person is not exempt from the obligation to present evidence against himself. In addition, the criteria for assessing the level of fulfilment of the burden of proof by the criminal prosecution agency are extremely vague. They are not as clear as the standard, which requires that when it is impossible to convict or when there is insufficient evidence for a conviction, it shall be concluded that the accused person is not guilty. In the process of resolving a criminal case, the principle of presumption of guilt is applied instead of the presumption of innocence. The accused person is biased guilty in the mindset of the judicial official (expressed through the application of corporal punishment so that the accused shall confess, through the way the accused is referred to as a sinner and through the way the accused is educated and lectured in an inferior manner (Le, 2021, p 483, 484).

Dao (2002, p 171) believed that "people in the countryside are very fond of proceedings" with the cause indicated as "the influence of agriculture". It is probably due to the fact that a majority of Vietnamese people were farmers living in highly self-governing villages and communes. The tradition of rural settlements existed in "autonomous" villages and small-scale production methods formed a peasant mentality, partly leading to narrow-mindedness and envy. "The autonomy of the village is the cause of the diseases of narrow-mindedness, selfishness and faction" in the way that "my house is my castle", "one shall take care of his own business", "the buffalo takes care of itself and so does the cow" (Vietnamese proverbs). "The diseases of narrow-mindedness, selfishness and faction" might be real; however, this mentality is different from the preference for litigation.

On the other hand, "the diseases of narrow-mindedness, selfishness and faction" is only a small part of the national mentality. It is also because of the organization of the population in the villages and communes that the highly appreciated collective character, collective value and value of the community were formed. "Vietnamese collectivism is distinct from communitarian attitudes in the West. A human being is born to be a member not only of a family, but a village and, in a broader sense, a member of a country. He or she lives in natural connection with other members of the society, as an integrated part of one organic body. Under such a system, the collective interest of society is supreme over individual interests; people who fight for their own interests are often viewed as selfish and egotistical (Marr, 2000 in Nghia, p 80).

With respect to the traditional agricultural society of Vietnam, the organization of residents by village units formed a community of villages associated with a stable geographical area to reside and cultivate agricultural crops, which were mainly wet rice cultivation. Such communities are highly stable and autonomous. There is

an internal system of regulations of villages and communes called village internal regulations and customs. These norms are not the law, but for each village, depending on the time and circumstances, they can act as a substitute, have an equal or even higher value than the law of the country in the mentality of the residents. The feudal dynasties always wanted to build a centralized state in which the central government takes control over the grassroots authority efficiently (with the restrictive regulations for the villages: approving the list of the village's council, regulating the status and conditions for drafting the village internal regulations...), the regulations inside villages internal are the supplement to the law, the "extended arm" of the state. On the other hand, there is a separation of powers between the state and the village in handling the village's order and security in general and dealing with criminal cases. In certain cases, "the will of the king yields to the people's customs". Article 74 of the internal regulations of Quynh Doi village, Quynh Luu, Nghe An requested: "If the situation cannot be considered, it shall be handled by the district officials and the court officials. They shall handle the case the same as the village, and the criminal shall pay with a pig. For those who fail to submit to the village and go to district authorities and court officials to sue, the village also fine them with the same amount" (Le, 1998, p 288). The barrier set up for the case to be handled only in the village and for the village to handle itself not only existed in the internal regulations of Quynh Doi village above but also in many other ones which were published. The 70th clause of the village regulations of Phu Xa Doai commune, Phu Xa locality, Kim Anh district, Phuc Yen province stipulated: "If anyone has any dissatisfaction, they shall report to the head of the court, they shall not be involved in a brawl. If one fails to obey the deposition, on the day the council brings the case to trial, the person at fault shall be punished heavily, and the innocent person shall punish the person who is at fault. Both shall be punished to encourage tolerance for harmony with other people" (Le, 1998, p 348). On the one hand, the appreciation of tolerance for harmony with other people shows the respect for affections and relationships in the village or the respect for community values, especially the village community of the Vietnamese people in one's behaviour. On the other hand, it shows that the access to criminal proceedings as a formal means of handling crimes is also limited. We hereby believe that the limited access to criminal proceedings of the State comes from the "sovereignty" of the "village" with the significant position of the village in relation to the state in the history of Vietnam and the fact that the people want to avoid non-democratic relations between the people and the state, especially when the state has the right to use corporal punishment and promote presumption of guilt in criminal proceedings.

IS THERE ANY RESIDUE OF THE MENTALITY OF AVOIDING CRIMINAL PROCEEDINGS NOWADAYS?

In the medieval law, Confucianism became a tool of ruling the spiritual life of the people applied by the authorities successfully. Specifically, the feudal states turned moral obligations into legal obligations that people had to comply with, and Vietnamese laws set out the rules that punish criminal acts that violate Confucian moral values and social relations according to the three moral bonds and five constant virtues. The process of accepting and complying with the laws of the people gradually became the process of accepting the obligations of the citizens, in other words, the laws strengthened morality, and at the same time, they turned legal values into moral ones.

When the French came to Vietnam, the criminal procedure law they brought to Vietnam in the whole legal system acted as an efficient tool for the policy of barbaric exploitation, colonial exploitation and brutal repression that the French carried out in Vietnam. However, the philosophy of Western criminal procedure was at least introduced for the first time in the early twentieth century on the right of individuals in harmony with the state's powers: "The noble principle of the stipulation of criminal procedure law is to reconcile these two things: 1. On the one hand, to maintain social order so that the offenders are all condemned and not neglected. 2. On the other hand, equality must be maintained for each individual so that there is no bias and one shall not be oppressed. Then the criminal procedure law is regulated to harmonize the interests of society and individuals..." (Nguyen, 1923, p 96, 97). In the second half of the twentieth century in Vietnam, after the August revolution in 1945 and especially after the end of the war against the French, Marxism–Leninism replaced the Confucian worldview—the puppet son of heaven abdicated its power and was replaced by the people's republic, which again was replaced by the 'dictatorship of the proletariat'. Socialist collectivism replaced the Confucian three yokes and five relationships (*tam-cuong, ngu-thuong*) (Nghia, 2005). The modern political values namely "Socialist collectivism" and the traditional political values of Confucianism are similar in terms of emphasizing collectivism. Confucianism has shaped the relationship between the people and the state as one between the individual and the collective, between the private and the common for more than 2000 years. In this relationship, "the primacy of public or common interests over individual interests, the broad and active role of the ruler or state to serve the common interests of the people, and the conception that law is just one of the tools used by the state to maintain social order. This also explains why the Confucian authoritarian style of government may also have contributed its characteristics to Asian Communism (Peerenboom, 2002 in Nghia, 2005). Collectivism place individuals, especially the accused, the victim in a lower position in criminal proceedings, in a position where their individual rights are easily overlooked or even

ignored. The same applies to China, a country with Confucian and Marxist ideology, the criminal justice agencies pay more attention to crime control than to human rights in criminal cases. In order to efficiently solve case and control crime, the authorities usually cooperate with each other to convict more accused, or follow public opinion to relieve the indignation of the public. Strengthening so-called collective interests against law abuses individual rights, particularly the rights of the accused (Jiang, 2016, p 119). However, unlike China, criminal law and criminal procedure law maintained the characteristic of the authoritarian instrument in the second half of the twentieth century (from 1945 to 1988 when the criminal procedure code was enacted in 1988), caused by the fact that this was the period when Vietnam was still suffering wars and solving post-war issues (Anti-French Resistance War in Vietnam, Anti-US Resistance War in Vietnam and unification, Sino-Vietnamese War and the Cambodian–Vietnamese War). As a result, a criminal procedure law was not enacted in Vietnam. On the other hand, the legal documents of criminal proceedings in this period partly showed the consistency in the direction of the development of the criminal procedure law, under which the police, the prosecutors and the courts were perceived as the three agencies that share the same task of settling criminal cases in order to: (1) suppress anti-revolutionaries who are the enemies of the people and the socialist regime; (2) protect public and private property; (3) protect social order, security and safety (Nguyen, p 45 in Nguyen & Le, 2019). The criminal justice of the new regime has protected the interests of the majority of people in society, one thing that the old regime failed to accomplish. However, due to the country's objective conditions, which were inadequate for the balance of interests between the group and the individual of the criminal justice of the new regime, the human rights of the accused were not emphasized. As a result, the accused person was afraid of the proceedings not only because in the end, they would be punished but also because individual procedural rights were not specified and fully implemented, they were still presumed guilty and considered anti-revolutionary, anti-social, condemned and boycotted by the society. As for victims of crime, when the criminal proceedings were caught up in the protection of the common interests, they were not in the right position to recognize, fully ensure private prosecution and privacy rights, the right to friendly treatment in criminal proceedings of the victims. If these factors are believed to be the cause of the evasion of proceedings by accused persons and victims of the crime, it is somewhat forced, but it is also possible to say that they did not have access to criminal proceedings as a mechanism assuring an adequate position compared to the giant procedural apparatus that represented the state, the whole of society when they were accused of a crime, or they did not have access to criminal proceedings as a mechanism to be heard and understood with respect to their individual needs when they were harmed by crimes.

Modern criminal procedure has a completely new approach compared to the past in its mission: "The Criminal Procedure Code has the duty to ensure accurate detection and fair and timely handling of all criminal acts, to prevent crimes and the omission of crimes, prevent innocent people from being slandered; contribute to the protection of justice, human rights, citizenship, socialist regime, interests of the state, legitimate rights and interests of organizations and individuals; educate all people to observe the law, fight and prevent crimes." (2015 Criminal Procedure Code, Article 2). Accordingly, the protection of human rights and citizenship is a priority task which is put above the task of protecting the socialist regime and the interests of the state. However, the above characteristics of the legal culture in wartime and partly also the traditional legal culture are still more or less existing at present. Modern criminal proceedings still follow a clear distinction between criminal justice agencies of the state as the subjects conducting the proceedings. Criminal justice agencies such as investigation agencies, custody and temporary detention enforcement agencies, and criminal judgment enforcement agencies are mostly located in the armed forces (people's police). Meanwhile, the Law on People's Public Security 2018 provides for the people's public security forces, with the tasks and powers to "apply measures to mobilize the masses, laws, diplomacy, economics, science – technology, profession and armed forces to protect national security, ensure social order and safety, combat and prevent crime and violations against the law on national security, social order and safety" (Article 16, Clause 14), the law is only one of the measures to handle crimes applied solely or simultaneously with one or many of the above measures. This shows that the law (criminal procedure law) is not the only option for dealing with crimes and that the criminal justice agencies have a lot of measures and powers to apply in the detection, investigation and prevention of crime.

The above factors create the proactivity, flexibility and high repressive ability against crimes of state agencies, at the same time, they increase the inequality between individuals participating in the proceedings and the criminal justice agencies. The criminal procedure law and criminal justice agencies are still prioritizing the protection of the people as a group over the protection of an individual – one who is directly involved in crime in settlement of a criminal case. Therefore, in modern times, while criminal proceedings cannot be evaded due to the criminal procedure law, criminal justice agencies must "be responsible for ensuring accurate detection and fair handling, in a timely manner all criminal acts and preventing crimes" (Criminal Procedure Code 2015, Article 2), these individuals have low self-esteem, feel small and accept the procedural decisions and acts from criminal justice agencies. The overwhelming number of pre-trial detention cases, the extremely low number of

cases with lawyers are in fact proof of this mentality of the people. It is both a residue of the past and a consequence of the current model of criminal control, the barriers to the progress to the so-called due process of law and criminal justice is also an area where the requirements of the rule of law are hard to meet.

CONCLUSION

Thus, in the traditional legal culture, when the Confucian rulers applied the formula “Morality is primary and Penalty is secondary” in form and “Penalty is primary, and morality is secondary” in essence, the state apparatus restricted criminal proceedings to limit social struggles and unrests in the society to ensure stability and order. At the same time, the emperor states had a cautious attitude to start criminal proceedings in order to refrain from neglecting criminals who infringed upon the interests of the state, to prevent the abuse of bureaucrats’ power, the overuse of village institutions and reconciliation.

For the common people, the unequal social order with the repressing power of the procedural apparatus and the mentality of submission, low self-esteem, the king is considered the father and the people are regarded as children more or less made the people have the mentality of avoiding proceedings. Criminal proceedings, although placed on a relatively complete legal system, gave too much power to state agencies and vice versa for the people. Confucianism also lulled the people to accept respect to the state, not to mention that the Confucian rulers also knew how to apply Buddhism, Taoism and the village self-governing institutions so that the people accepted being tolerant to achieve harmony.

In modern society, when the Criminal Procedure Code 2015 set out the goals for criminal proceedings (ranked in order of priority) as “contributing contribute to the protection of justice, human rights, citizenship, socialist regime, interests of the state, legitimate rights and interests of organizations and individuals; educate all people to observe the law, fight and prevent crimes” (Article 2), the avoidance of proceedings in terms of theory will no longer exist when the first goal is to protect justice, followed by human rights, citizenship and lastly, to protect the socialist regime and the interests of the state. However, the appreciation of the collective value of socialist laws and the recognition of the laws as an authoritarian tool of state power are similar to Confucian and Legalism in traditional legal culture and also strengthened by the ideological legacies of Confucianism and Legalism in modern legal culture. Therefore, the individual, the personal interests of the participants in the modern criminal proceedings, though recognized, are not easily respected and guaranteed to be fully implemented in the practice of criminal justice. This is an obstacle to the process of democratization and transparency of criminal proceedings,

and such obstacle needs to be acknowledged for further adjustments by lawmakers and law applicators in order to realize the above objectives of criminal proceedings.

REFERENCES

Satutes and Statutory instruments

1. Bộ luật tố tụng hình sự Việt Nam 2015 (Vietnam Criminal Procedure Code 2015)

Books

2. Dao Duy Anh, *Viet Nam van hoa su cuong (Overview of the history of Vietnamese Culture)* (first published Quan Hai Tung Thu 1938) (Van Hoa Thong Tin 2002)
3. Du Vinh Can, *Nho gia phap Tu tuong thong luan (Overview on Confucianism on Philosophy of Law)*, translated from Chinese into Vietnamese by Nguyen Duc Sam, Le Van Toan (first published Renmin Guangxi 1991)
4. Jiang Na, *Wrongful Convictions in China* (Springer 2016)
5. Le Duc Tiet, *Ve huong uoc, le lang (On village Internal Rules and Customs)* (Chinh tri Quoc gia, 1998)
6. Nguyen Van Dien, *Luoc khao ve bo luat moi o Bac Ky (Overview on the new code in Tonkin (north Vietnam))*, (Kim Duc Giang 1923)
7. Nguyen Ngoc Nhuan (eds), Le Tuan Anh, Tran Thi Kim Anh, *Mot so van ban dien che va phap luat Viet Nam (Some Vietnam legal instruments from 15th to 18th century)*, Vol 1 (Khoa hoc xa hoi 2006)
8. Nguyen Minh Tuan, Pham Thi Duyen Thao, Mai Van Thang (eds), *Lich su Nha nuoc va phap luat Viet Nam (History of the State and Law of Vietnam)* (Dai hoc quoc gia Ha Noi 2017)
9. Randall Peerenboom, *China's long march toward rule of law* (Cambridge University Press 2002)
10. Vu Van Mau, *Dan luat luoc giang (Overview of Civil Law)* (Vol.1) (Sai gon 1967)

Contributions to edited books

11. Dao Tri Uc, 'Liaison entre droit Vietnamien et droit français: regard sur la réception et l'adaptation du droit', in Arnaud De Raulin, Jean Paul Pastorel, Trinh Quoc Toan, Nguyen Hoang Anh (eds), *Anh huong cua truyen thong phap luat Phap toi phap luat Viet Nam (Influence of French law tradition on Vietnam Law)* (Dai hoc Quoc gia Ha Noi 2016)
12. Hoang Thi Minh Son, Phan Thanh Mai, 'Khai niem, nhiem vu va cac nguyen tac co ban cua Luat to tung hinh su' (Concept, Task and Fundamental Principles of Criminal Procedure Law), in Hoang Van Hanh (eds), *Luat to tung hinh su Viet Nam (Vietnam Criminal Procedure Law)* (Cong an nhan dan 2005)
13. Le Lan Chi, 'The Principle of Presumption of Innocence in the History of Criminal Procedure in Vietnam', in *Presumption of Innocence (international workshop proceedings)* (Hong Duc 2021)
14. Le Lan Chi, 'Policy on Enforcement of Imprisonment Sentences in Vietnam and China - from the
15. Perspectives of Tradition, Constitution and Statutory Law', in *Asian Constitutional Law Recent Developments And Trends (8th Asian Constitutional Law Forum conference proceedings)* Vol. 1 (Dai hoc Quoc gia Ha Noi 2020)

16. Nguyen Ngoc Chi, 'Nhap mon Luat to tung hinh su' (Introduction of the Subject Criminal Procedure Law), in Nguyen Ngoc Chi, Le Lan Chi (eds), *Luat to tung hinh su Viet Nam* (Vietnam Criminal Procedure Law) (Dai hoc Quoc Gia Ha Noi 2019)

Journal Articles

17. Nguyen Minh Tuan, 'Quoc trieu kham tung dieu le voi viec bao ve quyen loi chinh dang cua con nguoi' (Quoc trieu kham tung dieu le and the due protection of human rights) [2015] *Nghien cuu lap phap*, 1(281)
18. Luong Tri Binh, 'Phap bien' [1996] *Khoa hoc xa hoi Trung Quoc* (4) in Du Vinh Can, *Nho gia phap Tu tuong thong luan* (Overview on Confucianism on Philosophy of Law), translated from Chinese into Vietnamese by Nguyen Duc Sam, Le Van Toan (first published Renmin Guangxi 1991) (HongDuc 2020), p 850
19. Pham Duy Nghia, 'Confucianism and the conception of the law in Vietnam' [2005] *Asian socialism and legal change: The dynamics of Vietnamese and Chinese reform*, 76-90.

Websites

20. Le Lan Chi, 'Death penalty in confucian legal culture in China and Vietnam' (Melbourne Law School, 18-19 February 2021) <https://law.unimelb.edu.au/centres/alc/news-and-events/death-penalty-in-asia-law-and-practice-online-conference/_recache#papers> accessed 30 April 2021

OPPORTUNITIES AND CHALLENGES FOR VIETNAM IN IMPLEMENTING THE RECOMMENDATIONS OF THE UNITED NATIONS COMMITTEE AGAINST TORTURE

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Abstract: After ratifying the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the UN Convention against Torture) in 2014, Vietnam has been very active in implementing this Convention in practice. Legally, the issue of anti-torture is now regulated in most important legal documents of Vietnam, including the 2013 Constitution, the 2015 Penal Code (revised 2017), the 2015 Criminal Procedures Code, the 2015 Law on Temporary Detention and Custody, and the 2019 Law on Execution of Criminal Judgments. Even so, the UN Committee against Torture in its Concluding Observations³¹¹ on the Initial Report of Vietnam on the Implementation of UNCAT,³¹² still expressed its concern about some torture cases that recently occurred in the country, and made some recommendations to Vietnam in the effective implementation of the Convention.

This paper analyzes the advantages and disadvantages of Vietnam in implementing the recommendations of the UN Committee against Torture. As argued by the authors, the advantages are that Vietnam has a high political commitment to preventing torture, and its legal system against torture has been comprehensively upgraded. Meanwhile, the biggest challenges facing Vietnam are the ineffective monitoring mechanism of law enforcement officials, while the awareness of many law enforcement officials on combating torture is still limited. The authors also suggest amending some specific legal provisions to effectively implement the recommendations of the UN Committee against Torture in Vietnam in the coming years.

Keywords: Anti-torture, CAT, human rights, Constitution, Criminal Code, Criminal Procedure Code, Law on Execution of Criminal Judgments, Vietnam

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³¹¹ CAT/C/SR.1708.

³¹² CAT/C/VNM/1.

1. INTRODUCTION

Having ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Vietnam subsequently has an obligation to continue reviewing and synchronizing legislative, administrative and judicial measures in the combat and prevention of torture. After joining CAT, Vietnam has been seen as an active and responsible CAT member thanks to the incessant national efforts to promptly revise the legal framework in order to meet the requirements of CAT. However, the United Nations Committee Against Torture still expresses concern about a number of recent cases of torture occurring within Vietnam and therefore proposed some recommendations on effective implementation of CAT in their conclusion after the assessment of the first National Report of Vietnam on the implementation of CAT.

In addition, with the current context, Vietnam is concentrating on developing its economy and all the while being required to fulfil its international commitments. To carry out both of these responsibilities in parallel is not an easy task. Nevertheless, it can be said that Vietnam has quite well-prepared for the CAT signing process even before ratifying the Convention since Vietnam had been in the process of promulgating policies and laws and enforcing laws that inherently recognized and respected human rights values. However, as Vietnam is still a developing country, economic resources are still limited, and the general level of awareness of public officials as well as the people on combat and prevention of torture are still inadequate. These are challenges that Vietnam faces in the implementation of CAT.

Considering the above-mentioned reasons, research to clarify the opportunities and challenges that Vietnam has in implementing the recommendations of the United Nations Committee Against Torture through analysis of the current legal framework of Vietnam on anti-torture and law enforcement in this area and on the basis of which, proposing a number of solutions to enhance the effectiveness of prevention and combat against torture will significantly contribute to ensuring effective implementation of CAT in Vietnam. This paper mainly focuses on combat and prevention of torture in the field of criminal justice.

2. THE CURRENT LEGAL FRAMEWORK ON ANTI-TORTURE IN VIETNAM

For Vietnamese people, “torture” is a familiar term. Vietnam’s independence is achieved not without the blood and bones of the entire nation, and the most barbaric and terrible tortures in history that the Vietnamese revolutionaries have had to suffer. The truth of these tortures, when exposed, has shocked the whole international community with the brutal and barbaric methods used by the colonial regimes to

trample on and torture people. These are true stories that had been recorded in various documents both in Vietnam and abroad, which can be vividly reimagined through the narratives of historical witnesses, with indisputable historical evidence to back up, which are displayed at a number of ancient but well-known prisons of Vietnam, commonly called “the hell on earth”, such as the prisons in Con Dao, Hoa Lo, and Phu Quoc.³¹³

Vietnamese people, moving forward with those traumatic experiences, have always been against torture and condemn acts of torture with the most resolute attitude. This is the reason why in the first Constitution of Vietnam after the country gained independence, it is clearly stated that: “It is prohibited to torture, abuse, or mistreat defendants and prisoners.”³¹⁴ Acts of torture, abuse, or mistreatment were thus directly prohibited in the 1946 Constitution, but prohibition scope only limited to defendants and prisoners, which means it only covers the field of criminal justice but not all social fields. With the awareness of that period, legislators believed that only officers of judicial agencies could be the perpetrator committing acts of torture, this explains why acts of torture were provided in Chapter 6 of 1946 Constitution on Judiciary (Article 68).

The constitutions following the 1946 Constitution (Constitutions of 1959, 1980, 1992) saw a change on the terminology and mentioned the phrases “inviolability of the body”, “coercion, corporal punishment”, “offences against honour and dignity” instead of using the term “torture”.

Right away after signing CAT on 7 November 2013, the National Assembly of Vietnam adopted its new Constitution on 28 November 2013. However, long before this Constitution was adopted, its draft was published for public opinion, in which there was a proposed provision: “All acts of torture, violence, coercion, corporal punishment or any other forms of treatment that infringe upon the human body, health, honour, and dignity are strictly prohibited.”³¹⁵ This fact shows that Vietnam has had preparations in place before joining CAT, therefore even though the 2013 Constitution was adopted merely weeks later than the day when Vietnam signed CAT, the human right to be “free from torture, violence, coercion, corporal punishment”

³¹³ CAT/C/VNM/1. s are no longer used to hold prisoners but preserved as historical sites for domestic and foreign tourists.

³¹⁴ 1946 Constitution of the Democratic Republic of Vietnam, art 68.

³¹⁵ Draft 2013 Constitution of Vietnam, art 22(2) (posted for public opinions from 2 January 2013 to 31 March 2013 on the web portal of the Government of the Socialist Republic of Vietnam) <http://www.chinhphu.vn/portal/page/portal/chinhphu/congdan/DuThaoVanBan?_piref135_27935_135_27927_27927.mode=detail&_piref135_27935_135_27927_27927.id=748> accessed 3 May 2021.

was timely recognized as a general principle in this supreme legal instrument. Accordingly, clause 1, Article 20 of the 2013 Constitution states that: “Everyone shall enjoy the inviolability of the body and the legal protection of their life, health, honour and dignity and is protected against torture, violence, coercion, corporal punishment or any form of treatment that infringe upon their body, health, honour, and dignity.” It’s clear that the language of this provision has been retouched to ensure semantic compatibility with CAT, thereby proving that the National Assembly of Vietnam has been serious and highly responsible in implementing its international commitments as a member state of CAT.

When developing the plan to amend, supplement or promulgate not only the Constitution but all other legal instruments in the legal system of Vietnam, one of the requirements that need to be fulfilled is ensuring the internalization of international treaties to which Vietnam is a signatory. Legal instruments in the field of criminal justice which were promulgated before 2013 such as the 1985 and 1999 Penal Code, the 1989 and 2003 Criminal Procedure Code, the 2010 Law on Execution of Criminal Judgments, all prohibited acts that infringe upon human life, health, honour, and dignity. However, the terms used were not as semantically in line with CAT compared to the 2013 Constitution. The enter into force of the 2013 Constitution has required for all the above-mentioned legal instruments to be amended so as to institutionalize and harmonize with the new provisions of the Constitution, including those related to torture. In particular:

First, the 2015 Penal Code prohibits not only “cruel”, “humiliating” acts, “corporal punishment”, acts that cause damage to the human “health” and “seriously infringe upon the human dignity and honour”, but now has also added other acts that are prohibited such as “cruel treatment”, “cruel punishment”, “degrading treatment”, “inhuman treatment”, “torture”. With this new change, these acts are incorporated as an aggravating fact in the 2015 Penal Code, such as when “the victim is tortured or treated in a cruel and inhuman way, or the victim’s dignity is destroyed”, this is considered to be an aggravating fact to the Crime of illegal arrest, detention, or imprisonment of a person (point b, clause 3, Article 157); and when “the offense involves corporal punishment or cruel, degrading treatment” this is considered to be an aggravating fact to the Crime of obtainment of testimony by duress (point d, clause 2, Article 374). In other cases, these acts are specified in the elements of various crimes as a factor to determine the crime.

Second, the 2015 Criminal Procedure Code not only recognizes the principle of protecting human life, health, dignity and honour and prohibiting coercion and corporal punishment, but also has added an element to the principle of “inviolability

of the body” to “prohibit torture or any treatment that infringes upon the human body, life and health.”³¹⁶

Third, the accused persons, defendants and prisoners have always been the vulnerable actors in criminal justice activities; therefore, Vietnam has made many positive changes to protect their legitimate rights and interests. For example, before the existence of the Law on Custody and Temporary Detention, activities related to custody and temporary detention must follow the regulations of the Criminal Procedure Code and the 1998 Regulation on Custody and Temporary Detention (amended and supplemented in 2011). Accordingly, this Regulation only provides that “any acts that infringe upon the life, health, property, honour and dignity of persons held in custody or temporary detention are strictly prohibited.”³¹⁷ However, when the 2015 Law on Custody and Temporary Detention was adopted, it has recognized the principles of ensuring humanity, ensuring that no torture, coercion, corporal punishment or any other form of treatment infringes upon the legitimate rights and interests of persons held in custody or temporary detention.³¹⁸

Fourth, the 2010 Law on Execution of Criminal Judgments has only recognized the principle of ensuring humanity, respecting the dignity, legitimate rights and interests of persons serving sentences but hasn’t had any provisions to ensure their health. However, up to now, this Law has been replaced by the 2019 Law on Execution of Criminal Judgments with quite specific provisions in line with the provisions of the 2013 Constitution and CAT. Accordingly, other than the provision in clause 3, Article 4 on the principle of ensuring humanity, respecting the dignity, legitimate rights and interests of persons serving sentences,³¹⁹ the 2019 Law on Execution of Criminal Judgments also provide a list of prohibited acts in the execution of criminal judgments in Article 10, with an addition of clause 8 prohibiting acts of “torture or cruel, inhuman or degrading treatment or punishment against persons serving sentences.”³²⁰

Fifth, the 2015 Law on Organization of Criminal Investigation Bodies provides a list of prohibited acts in the investigation in Article 14. Clause 2 of this article stipulates that “obtainment of testimony by duress, use of corporal punishment and other forms of torture or cruel, inhuman, or degrading treatment or punishment or any other acts that infringe upon the legitimate rights and interests of agencies, organizations and

³¹⁶ 2015 Criminal Procedure Code, art 10.

³¹⁷ 1998 Regulation on Custody and Temporary Detention, art 5.

³¹⁸ 2015 Law on Custody and Temporary Detention, art 4(3).

³¹⁹ 2019 Law on Execution of Criminal Judgments, art 4(3).

³²⁰ 2019 Law on Execution of Criminal Judgments, art 10(8).

individuals are strictly prohibited.” This is a new provision that the 2004 Ordinance on Organization of Criminal Investigation (amended and supplemented in 2009) didn’t mention.

Therefore, judging from the legal perspective in the field of criminal justice, there are grounds to conclude that the legal framework of Vietnam has been improved so as to combat and prevent torture or cruel and inhuman treatment of people. This can only be achieved thanks to Vietnam’s strong political determination in implementing the recommendations of the United Nations Committee Against Torture. Every time a law is amended or promulgated, the National Assembly always set out the mission to ensure the implementation of Vietnam’s commitments related to the international treaties to which Vietnam is a signatory.³²¹ Ever since contemplating joining the Convention, The Drafting Committees for the Penal Code, the Criminal Procedure Code, the Law on Custody and Temporary Detention, etc. had researched and proposed the internalization of CAT, which was reflected in the provisions on laws promulgated since 2015. Vietnam, as a result, has promptly internalized the provisions of CAT within its first year as a member of this Convention.³²²

3. THE IMPLEMENTATION OF THE LAW ON COMBAT AND PREVENTION OF TORTURE IN VIETNAM

In the implementation process of CAT, aside from improving the system of policies and laws to ensure the right to be free from torture and prevent acts related to torture, Vietnam has been paying special attention to raising the awareness of public officials and the people about human rights and anti-torture through training, education, legal dissemination programs through the media, press, radio, television, conferences, and workshops. In addition, the Government of Vietnam has approved the Project on the dissemination of CAT provisions and the law of Vietnam on combat and prevention of torture to public officials and the people. The goal is to raise awareness and promote understanding among public officials and the people on CAT and the law of Vietnam related to combat and prevention of torture; to educate and foster their respect towards the provisions of CAT and the law of Vietnam related to combat and prevention of torture. At the same time, Vietnam has approved numerous projects on legal dissemination from ministries, departments and localities to raise awareness on human rights for target groups, notable is the Project on promoting

³²¹ Assessment Report on the amended Penal Code Project; Assessment Report on the amended Criminal Procedure Code Project.

³²² Socialist Republic of Vietnam, *First National Report on the Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2017) <<http://bocongan.gov.vn/tin-tuc-su-kien/chuoi-hoat-dong-cua-thu-truong/bao-cau-quoc-gia-ve-thuc-thi-cong-uoc-chong-tra-tan-s18-t24805.html>> accessed 3 May 2021.

legal dissemination and education on human rights for persons serving sentences, persons subjected to judicial or administrative measures, newly released inmates who are reintegrating into society, juvenile offenders, and the homeless in the 2018-2021 period.³²³

According to the first National Report of Vietnam on the implementation of CAT in 2017, crimes that are torturous in nature are common in Vietnam, there had been only a few cases recorded related to the Crime of use of corporal punishment, and these takes up a very small percentage of the total number of criminal cases that goes to trial annually. For example, in 2014 there were 3 cases and 7 defendants out of the total of 65,858 criminal cases and 118,372 defendants (0.0045%); in 2015 there were only 2 cases and 9 defendants out the total of 59,196 criminal cases and 106,078 defendants (0.0033%). The cases are reported to be strictly and justly adjudicated in accordance with the law, such as the case in Tuy Hoa city, Phu Yen province where Nguyen Than Thao Thanh, Nguyen Minh Quyen, Pham Ngoc Man, Nguyen Tan Quang, Do Nhu Huy were convicted of the Crime of use of corporal punishment by the High People's Court in Da Nang with the highest sentence of 05 years in prison. This shows Vietnam's determination to punish all acts of torture, obtainment of testimony by duress, and use of corporal punishment with no exception, including public officials violating human rights, at the same time reaffirms Vietnam's strong commitment to respect and protect human rights.³²⁴

The current situation proves that Vietnam has established a rather adequate legal framework on combat and prevention of torture. While the number of cases related to torture remains small, there are still challenges in implementing the law in practice as crimes related to torture still existed. The above-mentioned numbers only reflect crimes that are reported, it is still uncertain how high the number of hidden crimes may reach. This uncertainty can be explained on the basis of various reasons. Within the scope of this paper, we only address the following reasons:

First, despite the early efforts to implement intensive programs and plans on implementing CAT, it is not possible to expect that the legal awareness among public

³²³ Speech by Le Quy Vuong, Deputy Minister of Public Security, Head of the Vietnamese Delegation at the Defense Session of the First National Report of Vietnam on the Implementation of CAT (Geneva, 14 - 15 November 2018) <<http://bocongan.gov.vn/KND/TT/Lists/TinTuc/Attachments/24805/1.B%20C3%A0i%20ph%20C3%A1t%20bi%20E1%BB%83u%20declare%20m%20E1%BA%A1c%20c%20E1%BB%A7a%20Tr%20C6%B0%20E1%BB%9Fng%20%20C4%91o%20C3%A0n%20Vi%20E1%BB%87t%20Nam.pdf>> accessed 3 May 2021.

³²⁴ First National Report (n 10); Ngoc Tuong, 'Police officer who used corporal punishment causing death to get mitigating sentence' *Vnexpress* (Hanoi, 13 September 2016) <<https://vnexpress.net/cong-an-dung-nhuc-hinh-gay-chet-nguoi-duoc-giam-an-3467115.html>> accessed 3 May 2021.

officials can be improved consistently right away. To change the mindset of oneself, time and dedication are required not only from learners but also teachers, therefore it may take a generation time to be able to see the effect.

Second, even though the principle of assurance of adversary in adjudication is officially recognized in legal instruments, and adversary in criminal cases has been improved, however, its quality has not reached the expectation. Lawyers have been empowered with more rights under the provisions of the 2015 Criminal Procedure Code, but their criminal litigation skills and experience have not been profound (since the laws did not provide them with the extended rights as of now). As a result, the lawyer rarely receives advantages in the trial, and usually the person conducting the proceedings enjoy the advantages, which can be a premise for negligence, impatience or the imposition of the prejudice of the person conducting the proceedings against the accused person. This is one of the reasons leading to the possibility of obtainment of testimony by duress, use of corporal punishment, etc.

Third, the mechanism to monitor criminal justice activities has not been much efficient, contributing to cause a number of wrongful convictions that shocked the community when innocent people have been convicted of a particularly serious crime or had been serving their sentence for a long time before they name was cleared. The question is, why are all these people accept to admit guilt and spend decades in prison even when they did not commit the crimes? The public would not be in any doubt if the mechanism to monitor criminal justice activities operated more actively and effectively.

Fourth, under the current context, Vietnam has to perform simultaneously many tasks for the development of the country. Despite the dedication, resources to be invested in skill and professional training for judicial titles and other actors in anti-torture are still limited. This is the common challenge depicted in developing countries, including Vietnam.

4. SOME RECOMMENDATIONS TO ENHANCE THE EFFECTIVENESS OF ANTI-TORTURE IN VIETNAM

a. On improving the law

Vietnam's legal system is relatively comprehensive, however, to ensure the awareness of the people, particularly law enforcement officers on anti-torture, are promoted, as well as to strengthen the legal basis for strict handling of these offences, it is necessary for some legal instruments to be revised further to clearly show the State's resolution in condemning and punishing such torturous acts and ensuring the consistency of the law in general, ensuring the provisions of the 2013 Constitution and CAT in particular.

Regarding the 2015 Penal Code, we proposed to continue criminalizing a number of acts that are torturous in nature, including “torture and causing serious physical distress” to be added as an aggravating fact in some crimes. Should this fact happen, it will significantly heighten the degree of danger posed by the objective behaviour in those components of crimes. Specifically, the degree of danger posed by crimes infringing upon the dignity and honour of others committed by a public official or another person but with the consent or permission of a public official when accompanied by signs of serious physical pain (which may not have reached the rate of physical damage determined by the Penal Code for the circumstance to be considered as an aggravating fact for such crime) would be much higher than the usual acts that infringe upon the dignity and honour of others. For example, if the offence inflicts over 31% physical damage to the victim then it is considered an aggravating fact as stipulated in clause 2, Article 141 on the Crime of rape. Therefore, in rape cases where the offender also tortures, causes severe physical pain to the victim, but the rate of physical damage is recorded to be under 31% (less than 31% rate of physical damages but with signs of torture) then there is not enough ground to prosecute according to clause 2, Article 141, and the penalty can only be determined based on clause 1 of Article 141. In the opinion of the authors, the degree of danger of the crime of rape will significantly heighten if there are signs of torture. If based only on clause 1, Article 141 to decide the criminal liability of the offender (according to which the penalty shall be from 02 - 07 years of imprisonment), even if aggravating fact of “using cruel method while committing a crime” is applied, the offender may face a highest penalty of only 7 years in imprisonment. Therefore, considering the dangerous nature of rape crimes, it is recommended to add, Article 141 (according to the penalty shall be from 07 - 15 years of imprisonment) to ensure that the penalty is commensurate and appropriate with the dangerous nature of this act. With the same argument, “torture” should be added as an aggravating fact in clause 2 of Article 142 (Rape of a person under 16), Article 143 (Sexual abuse), and Article 144 (Sexual abuse of a person aged from 13 to under 16).

Regarding the 2019 Law on Execution of Criminal Judgments, it is recommended to move the provision prohibiting acts of “torture and other cruel, inhuman or degrading treatment or punishment against persons serving sentences or judicial measures” from clause 8, Article 10 (on prohibited acts in the execution of criminal judgments) to Article 4 and incorporated into clause 3, Article 4 to be a principle in the execution of criminal judgments. Making this anti-torture provision a principle in the execution of criminal judgments has great importance for two reasons: 1) This is a constitutional content under clause 1, Article 20 of

the 2013 Constitution; 2) As a principle, it shall become the fundamental direction recognized in the law, reflected in the application of law in practice as well as in legal interpretation and guidance.³²⁵ When seen as a principle in the execution of criminal judgments, its content will act as the “important, core and main motto and direction” in the execution of criminal judgments, which is reflected in both law-making process and law enforcement process related to the execution of criminal judgments.³²⁶ Defining anti-torture as a principle in the execution of criminal judgments would not only reflect the importance of a constitutional content, but also ensure consistency in the legal system, since in practice, both the Criminal Procedure Code and the Law on Custody and Temporary Detention recognize anti-torture as their guiding principle.

Similar to the recommendation on revising the 2019 Law on Execution of Criminal Judgments, it is recommended that clause 2, Article 14 of the 2015 Law on Organization of Criminal Investigation Bodies also needs to be moved to Article 3 so as to make the provision of “obtainment of testimony by duress, use of corporal punishment and other forms of torture or cruel, inhuman, or degrading treatment or punishment or any other acts that infringe upon the legitimate rights and interests of agencies, organizations and individuals are strictly prohibited” a principle in the organization of criminal investigations.

b. On training for judicial titles

Aside from improving the law, another important factor that can't be overlooked is human resources, in particular the capability and qualifications of the judicial staff working in the criminal justice system.

To improve capability and qualifications of the judicial staff, the State needs to invest more on professional training for the judicial sector, especially in investigation skills, and training to raise awareness among judicial titles on the requirements and responsibilities in combat and prevention of crime in general and torture in particular. In particular, it is necessary to research more to incorporate the following content into the professional training curricula for investigators: affirming that torture is not an effective means in crime fighting nor clarifying the objective truth of the criminal case; on the contrary, torture is the root cause of unjust and wrongful convictions, and are acts that can be prosecuted for criminal liability for offences infringing upon judicial activities.

325 Le Van Cam (eds), *Textbook on Vietnamese Criminal Law – General part* (Vietnam National University Publishing House 2020) 95.

326 Nguyen Ngoc Chi & Le Lan Chi (eds), *Textbook on Vietnamese Criminal Procedure Law* (Vietnam National University Publishing House 2019) 68.

To ensure the qualifications of judicial titles, a strict and thorough screening for the recruitment process is required. In addition, judicial agencies need to organize more training courses on professional ethics for their staff, organizing events to award staff with strong skills and moral standards, as well as to inspire judicial staff to nurture the qualities required when working in the judicial sector. Furthermore, the State should pay attention to reform the salary regime to ensure a better income for judicial titles, which prevents them from material temptation. This is an important condition to promote passion and dedication in the work of public officials in general and judicial titles in particular.

c. On improving the quality of litigation in criminal proceedings

It can not be denied that recently, the presence of lawyers and quality of litigation at the trial have seen positive changes. However, the quality of litigation brings about by defence lawyers still needs to be further improved. The principle of assurance of adversary in adjudication recognized by the 2013 Constitution and the 2015 Criminal Procedure Code can be considered as the launching pad for training to the best of their potential so as to promote their intellectual abilities and professional skills; the foundation for a strong and stable judiciary. As the quality of litigation is enhanced, lawyers will be more skilful at giving arguments to defend their clients, including detecting procedural errors and violations made by procedure-conducting persons, in particular investigators. Furthermore, as the quality of litigation is improved, there is higher pressure on investigation officers and procedure-conducting persons. They are encouraged to improve themselves, raise their legal awareness and be more attentive when conducting legal proceedings, thereby minimizing errors and violations in the process to settle criminal cases and limiting obtainment of testimony by duress and corporal punishment cases.

d. On establishing an effective mechanism to monitor criminal justice activities

Law enforcement always requires a mechanism for inspection and supervision. The authors of this paper agree with the opinion that it is necessary to promote the supervisory role of the Judiciary Committee and the National Assembly deputies; to expand the conditions to allow the mass media to effectively and regularly monitor the activities of judicial authorities, including detention facilities. In addition, it is necessary to encourage the formation and operation of NGOs working in the field of human rights, especially those dedicated to protecting the rights of persons deprived of liberty, to the combat and prevention of torture and to supporting victims of torture.³²⁷

³²⁷ Pham Thanh Son and Vu Cong Giao, 'Finalizing the legal framework against torture in Vietnam' (2019) <<http://tapchicongthuong.vn/bai-viet/hoan-thien-khuon-kho-phap-luat-ve-phong-chong-tra-tan-o-viet-nam-62242.htm>> accessed 3 May 2021.

The role of the people also needs to be strengthened when establishing a monitoring mechanism. It is recommended for Vietnam to design prisons and detention facilities in a way that facilitate supervision such as open space, installing monitoring devices, or even allowing students, volunteers, or the people to come to visit at a fixed day monthly under the supervision of officials, the number of visitors shall be limited, and there shall be certain conditions for visitors.

CONCLUSION

Vietnam has certain advantages in the implementation of CAT thanks to the determination of the State and a rather comprehensive legal system on criminal justice, which is relatively in line with the international law on anti-torture. However, to effectively enforcing the law in practice, Vietnam needs to continue its efforts in enhancing the awareness and professional quality of the judicial staff, and promote further the quality of litigation in criminal cases and establish a more effective mechanism to monitor criminal justice activities. Furthermore, even though the legal system on criminal justice is relatively comprehensive, it is necessary to continue reviewing and revising to ensure consistency and uphold the principle of freedom from torture, violence, coercion, corporal punishment or any form of treatment that infringes upon the body, health, honour, and dignity of a person under clause 1, Article 20 of the 2013 Constitution.

REFERENCES

1. The 1946 Constitution of the Democratic Republic of Vietnam
2. Draft 2013 Constitution of Vietnam, art 22(2) (posted for public opinions from 2 January 2013 to 31 March 2013 on the web portal of the Government of the Socialist Republic of Vietnam) <http://www.chinhphu.vn/portal/page/portal/chinhphu/congdan/DuThaoVanBan?_piref135_27935_135_27927_27927.mode=detail&_piref135_27935_135_27927_27927.id=748> accessed 3 May 2021
3. The 2015 Criminal Procedure Code
4. The 1998 Regulation on Custody and Temporary Detention (revised and supplemented on 2011)
5. The 2015 Law on Custody and Temporary Detention
6. The 2010 Law on Execution of Criminal Judgments
7. The 2019 Law on Execution of Criminal Judgments
8. The 2015 Law on Organization of Criminal Investigation Bodies
9. Assessment Report on the amended Penal Code Project; Assessment Report on the amended Criminal Procedure Code Project

10. Socialist Republic of Vietnam, *First National Report on the Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2017) <<http://bocongan.gov.vn/tin-tuc-su-kien/chuoi-hoat-dong-cua-thu-truong/bao-cao-quoc-gia-ve-thuc-thi-cong-uoc-chong-tra-tan-s18-t24805.html>> accessed 3 May 2021
11. Speech by Le Quy Vuong, Deputy Minister of Public Security, Head of the Vietnamese Delegation at the Defense Session of the First National Report of Vietnam on the Implementation of CAT (Geneva, 14 - 15 November 2018) <<http://bocongan.gov.vn/KND/TT/Lists/TinTuc/Attachments/24805/1.B%20C3%A0i%20ph%C3%A1t%20bi%E1%BB%83u%20declare%20m%E1%BA%A1c%20c%E1%BB%A7a%20Tr%C6%B0%E1%BB%9Fng%20%C4%91o%C3%A0n%20Vi%E1%BB%87t%20Nam.pdf>> accessed 3 May 2021
12. Ngoc Tuong, 'Police officer who used corporal punishment causing death to get mitigating sentence' *Vnexpress* (Hanoi, 13 September 2016) <<https://vnexpress.net/cong-an-dung-nhuc-hinh-gay-chet-nguoi-duoc-giam-an-3467115.html>> accessed 3 May 2021
13. Le Van Cam (eds), *Textbook on Vietnamese Criminal Law – General part* (Vietnam National University Publishing House 2020)
14. Nguyen Ngoc Chi & Le Lan Chi (eds), *Textbook on Vietnamese Criminal Procedure Law* (Vietnam National University Publishing House 2019)
15. Pham Thanh Son and Vu Cong Giao, 'Finalizing the legal framework against torture in Vietnam' (2019) <<http://tapchicongthuong.vn/bai-viet/hoan-thien-khuon-kho-phap-luat-ve-phong-chong-tra-tan-o-viet-nam-62242.htm>> accessed 3 May 2021.

EXISTING ISSUES IN VIETNAM REGARDING THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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Abstract: The 13th National Assembly of Vietnam ratified its accession to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on November 28, 2014 by Resolution No. 83. On this basis, Vietnam has internalized the international standards prescribed into the 2013 Constitution, the 2015 Penal Code (amended in 2017), the 2015 Criminal Procedure Code, the 2014 Law on Organization of Criminal Investigation and other relevant laws. This internalization is the basis for human rights in criminal proceedings to be guaranteed. However, the status quo of law enforcement in practice requires further efforts to improve its effectiveness, in particular regarding the law against torture, which will contribute to Vietnam's fulfilling its commitments when joining the Convention. Therefore, this paper will cover the following issues: (i) The process of joining and internalizing the United Nations Convention Against Torture in Vietnam; (ii) Requirements and challenges for Vietnam regarding the implementation of the United Nations Convention Against Torture; (iii) Some proposals for effective implementation of the United Nations Convention Against Torture in Vietnam.

Keywords: CAT, internalization of law, criminal procedure law, Vietnam.

1. THE PROCESS OF JOINING AND INTERNALIZING THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN VIETNAM

1.1. The process of Vietnam joining the United Nations Convention Against Torture

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by the United Nations General Assembly Resolution No. 39/46 of 10 December 1984 and entered into force

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on 26 June 1987. However, due to a number of objective and subjective reasons, it's not until 7 November 2013 that Vietnam signed this Convention, which was then ratified by the National Assembly of the Socialist Republic of Vietnam on 28 November 2014. Vietnam submitted its instrument of ratification to the Secretary-General of the United Nations on 20 May 2015.

Vietnam joining CAT demonstrates its point of view to respect, ensure and protect human rights during the construction and development of the country. Resolutions of the Communist Party of Vietnam in recent years have affirmed: "Our goal is to better ensure people's fundamental rights"³²⁸ and to realize this goal, it is necessary to "establish and step by step improve the legal system in terms of human rights, taking into account the economic, cultural and social conditions of our country and ensuring conformity with international treaties to which Vietnam has signed or acceded."³²⁹ Joining CAT has certainly contributed to improving Vietnam's legal system regarding human rights and protection of human rights, and at the same time served as a legal basis for lawmaking and enforcement of the law on combat and prevention of torture.

Vietnam joining CAT also demonstrates its direction for international integration, thereby strengthening Vietnam's reputation in the international arena, affirming Vietnam's commitment to protecting human rights, and at the same time established a legal framework for international cooperation in the combat and prevention of torture on a global scale. According to an input received at a workshop organized by the Ministry of Public Security, "Article 9 of the Convention emphasizes that upholding the principle of international cooperation and judicial assistance on prevention and combating of torture is the responsibility of States Parties in order to improve legal procedures and criminal proceedings for the crime of torture."³³⁰

Despite not being a party to CAT from the very beginning (from 1984), Vietnam had taken most of the provisions in CAT into its law-making process and had been actively preparing to fulfil the conditions for accession to CAT.³³¹ These efforts are reflected in Vietnam's legal system, and most prominently, in the field of criminal justice, which aims towards human rights protection and combat against all acts of

³²⁸ Directive No. 44 – CT/TW dated 20/ 7/2010 of the Secretariat of the Communist Party of Vietnam on human rights in the new context.

³²⁹ Ibid.

³³⁰ Ministry of Public Security & the Embassy of the Kingdom of Belgium in Vietnam *Workshop on the draft National Report on the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Phu Tho, 12 November 2017) 81.

³³¹ See the 1999 Penal Code, the 2003 Criminal Procedure Code and other relevant documents.

torture. These efforts also show Vietnam's humanitarian culture and legal tradition. The draft national report of Vietnam clearly stated that: "Even before joining the Convention, Vietnam has respected and protected human rights values through the laws and policies that it promulgated and through implementing them in practice. Acceding to the Convention is an important step that the Socialist Republic of Vietnam has taken to move forward with the process to establish and improve regimes, policies and protect human rights, including the right to be free from torture."³³²

Therefore, Vietnam's joining CAT is a process consistent with its state of perception, its points of view as well as the level of economic, social, and legal development of the country. During this process, in addition to researching and actively fulfilling requirements for joining the Convention, Vietnam had adopted the most fundamental provisions that reflect the nature of the Convention for its Constitution and system of legal instruments, affirming the humanitarian spirit and respect towards human rights protection of the country.

1.2. The internalization of the United Nations Convention Against Torture in Vietnam

1.2.1. The basis and principle regarding the internalization of the United Nations Convention Against Torture in Vietnam

Internalization of law is the process to adopt the provisions of international treaties into the domestic legal system through the development and promulgation (amendment, supplementation, annulment or newly promulgation) of domestic legal instruments so that the domestic law is consistent with the provisions of the treaty which the country has signed or acceded to. The 2016 Law on International Treaties and the 2015 Law on Promulgation of Legal Instruments stipulate that in case a legal instrument and an international treaty to which Vietnam is a signatory provide differently on the same issue, the provision of that international treaty shall prevail, except for the Constitution,³³³ and when choosing to accept the binding force of that international treaty as well as how its provisions should be applied (either directly or indirectly through internalization of international law into the domestic legal system) then it is compulsory to comply with such treaty provisions. Being consistent with the above-mentioned rule, the provisions of the Convention are not among provisions that are directly applicable. Article 3 of Resolution No. 83/2014/QH13 dated November 28, 2014 of the National Assembly of the Socialist Republic

³³² *Draft National Report on the Implementation of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2016) 15 (Draft National Report).

³³³ 2015 Law on Promulgation of Legal Instruments, art 156(5); 2016 Law on International Treaties, art 6(1).

of Vietnam to ratify CAT states that: “The Socialist Republic of Vietnam establishes and improves its law to align with the provisions of CAT.” Accordingly, Vietnam shall internalize the provisions of CAT, and in particular, criminalize acts of torture, and amend, supplement provisions on the investigation, prosecution, adjudication, execution of prison sentences, complaints, denunciations, extradition, immigration management, deportation, etc.

“Internalization of law is the process to adapt the provisions of international treaties into domestic legal provisions through the development and promulgation (amendment, supplementation, annulment or newly promulgation) of domestic legal instruments so that they are consistent with the provisions of the treaty to which the country is a signatory.”³³⁴ The purpose of internalization of law is not to confirm the legal effect of the treaty because, from an international legal perspective, the validity of a certain international treaty is not determined by whether it has been internalized or not.

When proceeds to internalize CAT, Vietnam adheres to the following principles: (i) The principle of ensuring the constitutionality, legitimacy and uniformity of legal instruments; (ii) The principle of compliance with authority, form, order and procedure for the development and promulgation of legal instruments; (iii) The principle of ensuring publicity in the process of developing and promulgating legal instruments, except for state secrets privilege reason; ensuring transparency in the provisions of legal instruments; (iv) The principle of ensuring the feasibility in the practice of legal instruments; (v) The principle of not hindering the implementation of international treaties to which Vietnam is a signatory.

1.2.2. The internalization of CAT provisions

On the basis of Resolution No. 83/2014/QH13 of the National Assembly of the Socialist Republic of Vietnam dated 28 November 2014 on ratifying CAT, the Prime Minister issued Decision No. 364/QĐ-TTg dated 17 March 2015 approving the Action Plan on implementation of CAT. Accordingly, CAT covers four fundamental contents: (i) combat against torture and other destructive, inhuman or degrading treatment or punishment; (ii) investigation on allegations of acts of torture; (iii) prevention by condemning torture and bringing offenders to justice; (iv) guarantee for victims of torture the right to effective treatment and full rehabilitation.

These contents of CAT have been internalized into the domestic legal system of Vietnam, in particular:

³³⁴ ‘Internalization international conventions and fundamental principles’ (A Dong Law Firm, 26 November 2014) <<http://www.luatsudong.vn/chi-tiet-tin/1923-noi-luat-hoa-cac-dieu-uoc-quoc-te-va-cac-nguyen-tac-co-ban.html>> accessed 19 May 2021

- The 2013 Constitution addresses human rights and citizens' rights in its Chapter II with 33 articles, affirming that the State recognizes, respects, protects and guarantees human rights and citizens' rights, including the inviolability of the physical body, the right to honour and dignity, and the freedom from torture. Clause 1, Article 20 of the Constitution states: "Everyone shall enjoy inviolability of the body and the legal protection of their health, honour and dignity; and is protected from torture, harassment and coercion, or any other forms of treatment that infringes upon their body, health, honour, and dignity."

- The 2015 Penal Code (revised in 2017) provides for the following crimes: Obtainment of testimony by duress (Article 374), Use of torture (Article 373), Bribing or forcing another person to give testimony or provide documents (Article 384), and certain other crimes related to infringement on the right not to be tortured such as offences against human life and health (under Chapter XIV), Illegal arrest, detention, or imprisonment of a person (Article 157), Crime of humiliation (Article 155), Abuse (Article 140), etc. The elements constituting these crimes are specified in the 2015 Penal Code and reflect most of the acts of torture that CAT requires States Parties to criminalize.

- The 2015 Criminal Procedure Code provides for the fundamental principles of criminal procedures,³³⁵ including principles related to the right to be free from torture, to serve as the basis and orientation for proceedings to settle criminal cases, namely: Assurance of the inviolability of the physical body, "every person is entitled to inviolability of the physical body. No person is arrested without a Court's warrant or the Procuracy's decision or approval, except for acts in flagrant" (Article 10); Protection of life, health, honour, dignity and property of the natural person; honour, prestige and property of the legal person (Article 11); Presumption of innocence (Article 13); Assurance of the right to defence of accused persons, protection of legitimate rights and interests of victims and litigants (Article 16); Assurance of the adversary in adjudication (Article 26). The 2015 Criminal Procedure Code also regulates the order, procedures, competence to settle criminal cases that ensures objectivity, fairness and procedural publicity, justice, democracy, protection against abuses of human rights, including the right to be free from the torture of accused persons and other persons participating in the proceedings.

- The 2019 Law on Execution of Criminal Judgments recognizes the principle of "Assurance of socialist humanism; respect for the dignity, legitimate rights and interests of persons serving sentences, persons serving judicial measures, and legitimate rights and interests of commercial legal persons serving sentences" (Clause

³³⁵ 2015 Criminal Procedure Code, ch II.

3, Article 4) and the principle of “Assurance of the right to complain and denounce illegal acts and decisions of competent agencies and persons in the execution of criminal judgments” (Clause 7, Article 4) as the guiding lights in the process of enforcing criminal judgments. The Law on Execution of Criminal Judgments provides in detail the rights of persons serving sentences, including the right to be free from torture during the execution of the sentence, and at the same time, they also have the right to complain and denounce the wrongdoings of the person or agency who are the competent authority to execute judgments which include acts of torture.

- The 2015 Law on Organization of Criminal Investigation provides “principles for the organization of criminal investigation; the organizational structure, responsibility and competency of the investigating agency; responsibility and competency of agencies assigned to conduct a number of investigative activities; investigators and other titles in criminal investigation; regulates the assignment, coordination and monitoring in criminal investigation activities; ensures conditions for criminal investigation activities and stipulates the responsibilities of relevant agencies, organizations and individuals” (Article 1). This Law identifies specific acts that agencies and persons with investigative competence are prohibited from doing in the investigation process (six acts), three of which are related to the right to be free from torture of accused persons and persons participating in the legal proceedings, namely: (i) Obtainment of testimony by duress, use of torture and other cruel, inhuman or degrading treatment or punishment or any other forms that infringe upon the legitimate rights and interests of organizations or individuals; (ii) Obstructing the person held in custody or temporary detention or the accused from exercising their right to defend themselves or their right to legal counsel, right to legal aid; their right to complain and denounce; their right to compensation for material and moral damage and restoration of honour; (iii) Obstructing defence counsels and legal aid providers from providing legal defence and legal aid in accordance with the law (Clauses 2,3,4 of Article 14).

- Some other relevant legal instruments: The Convention’s content and scope of regulation is quite wide and diverse, touching many aspects of life and many different areas of law, therefore it is necessary to internalize the provisions of the Convention into appropriate legal instruments of the domestic legal system. As a result, in addition to the above-mentioned laws, the provisions of CAT are also internalized in some other domestic legal instruments, such as the 2015 Law on Custody and Temporary Detention, the 2012 Lawyer Law, the 2017 Law on Legal Aid, the 2017 Law on State Compensation Liability, etc. These instruments have, at different scopes and degrees, internalized certain provisions of the Convention, in accordance with the nature of the instrument to be enacted.

The internalization of CAT in Vietnam has the following characteristics: (i) Some provisions of the Convention had already been internalized even before Vietnam joined the Convention in 2014; (ii) Despite Vietnam only recently joined CAT in 2014, fundamental contents of CAT has been internalized into many legal instruments, notably the 2015 Penal Code and the 2015 Criminal Procedure Code; (iii) Although the fundamental contents of CAT have been internalized, they are still incomplete and haven't covered all the contents of the Convention, some provisions are too general and haven't been specified which lead to inconsistency in interpretation and application in practice.

2. REQUIREMENTS AND CHALLENGES FOR VIETNAM REGARDING THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE

Joining CAT means Vietnam has to fulfil certain requirements and face significant challenges when implementing the Convention, in particular:

First, regarding the requirement to internalize the Convention. When joining CAT, Vietnam is required to fully internalize the contents of the Convention, except for the reservation clause (Articles 20 and clause 1, Article 30, not considering that the provisions in clause 2, Article 8 of CAT is the direct legal basis for extradition³³⁶). The contents of the Convention need to be internalized fully, accurately and timely; at the same time, feasibility as well as the establishment of a mechanism to ensure effective implementation of the Convention in practice need to be guaranteed. This requirement is a big challenge since "CAT is a human rights convention which is related to many areas of social life, with many difficult and complex issues."³³⁷ Therefore, meeting this requirement requires the efforts of the legislative body in developing and improving the law in order to quickly internalize the contents of the Convention into the Vietnamese legal system. However, the internalization of the Convention cannot be done in a short time as it is a process with the participation of many agencies and organizations, especially those directly related to the implementation of the Convention.

Second, the limited capability of state agencies and officials to implement the Convention is a challenge that needs to be overcome in order to meet the requirements in implementing the Convention. One of the factors that determine the effectiveness of the implementation of CAT is the human factor, which needs to be mentioned first

³³⁶ Resolution No. 83/2014/QH13 dated 28 November 2014 of the National Assembly XIII on the ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³³⁷ The Socialist Republic of Vietnam, *First National Report on the Implementation of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2017) 9.

of all is the capability of government officials related to the implementation of the Convention. Due to objective and subjective reasons, the awareness of the officials responsible for the implementation of the Convention on human rights and as well as their capability in upholding human rights, remain limited. According to the first National Report of Vietnam: “The legal and professional qualifications of civil servants are not uniform, so they may haven’t all had the correct understanding. Therefore, individual abuse of power when performing official duties may still happen.”³³⁸ Therefore, it is necessary to raise awareness on human rights, including the right to be free from torture, as well as to provide regular professional training for officials.

Third, regarding the monitoring of the implementation of CAT. In addition to the requirement to internalize the Convention into domestic law, CAT requires member states to have a mechanism in place to monitor and assess the implementation of the Convention to ensure that the provisions of the Convention are strictly and fully implemented. The monitoring and supervision of the exercise of state power is considered a fundamental and important component of the state that espouses a rule of law. However, limiting the abuse of power is not a simple feat, but an extremely difficult challenge for all states, as Prof. Dr. Nguyen Dang Dung has stated: “Constraining the use of state power is a challenge for any state, especially so long as this must not deprive state agencies of the flexibility they need to do their jobs. The improper use of state power causes grave problems to the reputation of the state in the eyes of the people.”³³⁹ Limiting the abuse of power is only effective when there is an appropriate mechanism for inspection and supervision, “establishing a reasonable, adequate and effective control mechanism is always the guarantee for effective use of power and at the same time prevents situations where that the power apparatus operates beyond control, which leads to bureaucracy and corruption.”³⁴⁰ Therefore, when joining the Convention, it is required for Vietnam to improve the mechanism to monitor and assess the implementation of the Convention, in which the monitoring mechanism in criminal proceedings is an important, key component for the inspection and supervision of judicial activities. As A. Prof. Dr. Nguyen Hoa Binh has commented on the position, role and importance of the principle of inspection and supervision in criminal proceedings: “Power without strict inspection, supervision and control will lead to corruption and abuse of power against the wishes

³³⁸ Ibid.

³³⁹ Nguyen Dang Dung, ‘Limit the arbitrariness of the state agencies’ (Judicial Publishing House 2010) 34.

³⁴⁰ Dao Tri Uc, ‘Organizational structure and operation of the socialist rule of law state of Viet Nam’ (Judicial Publishing House 2007) 44.

and interests of the people. Criminal proceedings that lack inspection, supervision and control will lead to even more serious problems because this is an area directly related to the combat and prevention of violations and crimes, directly link to the peaceful life of the people as well as social order and discipline; at the same time, the whole process touches on the most sacred human rights and freedom. Therefore, the State must pay particular attention to establishing mechanisms to strictly and comprehensively inspect, supervise and control judicial activities.”³⁴¹

Fourth, the common awareness of human rights and the combat against torture is still limited. Due to the difficult economic conditions, the level of education of the people is the lowest in remote areas where there are a large number of ethnic minorities; therefore their awareness and capacity to understand the law and their rights are still at a low level. According to the first draft of the National Report, “a part of the population do not comprehensively understand the rights and benefits that they are entitled to follow policies and laws.”³⁴² This is a big challenge that requires enhancing the effectiveness of legal dissemination on CAT and the laws of Vietnam on human rights, including the right to be free from torture. The difference in customs and culture among ethnic groups of different regions throughout the country is also a significant barrier to raise people’s awareness on the right to be free from torture as well as the law related to the protection of this right. Therefore, legal dissemination and education on CAT to public officials and the people must also be carried out regularly and continuously in a way that is easy to understand and assimilate. For civil servants, it is necessary to conduct regular legal and professional guidance and training to improve their capability and qualifications to prevent possible abuse of power.

3. SOME PROPOSALS FOR EFFECTIVE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TORTURE IN VIETNAM

Improving the effectiveness of the implementation of CAT involves many factors; however, within the scope of this paper, we only focus on the aspect of improving the law so that the contents of CAT are fully internalized in the current context of Vietnam.

Although the current legal system of Vietnam has had provisions that are relatively consistent with the fundamental principles and standards of CAT, there are still areas to improve so as to be more and more in line with the requirements of the Convention. The 2013 Constitution recognizes people’s right to be free from torture;

³⁴¹ Nguyen Hoa Binh ‘New provisions of the 2015 Criminal Procedure Code’ (National Politics Publishing House 2016) 38.

³⁴² Draft National Report (n 5) 9.

however, acts of torture haven't been specified in accordance with the standards of CAT. Therefore, it is necessary to improve the law in the direction of specifying the elements of torture according to the provisions of CAT.

- Improving the criminal law: According to the 2015 Penal Code of Vietnam, there are two groups of crimes: acts directly related to the prohibited acts in CAT and torturous acts which are an element of other crimes specified in the Penal Code. However, these provisions haven't covered all prohibited acts that must be criminalized according to the requirements of the Convention. Furthermore, and the penalties prescribed for such crimes are not commensurate with the nature of the crimes and their degree of danger to society. Therefore, it is necessary to improve the 2015 Penal Code in the following directions:

First, supplementing the elements of the crime of torture in the 2015 Penal Code: The group of crimes directly related to the prohibited acts in CAT only comprises of 03 crimes without having criminalized all elements of torture according to Article 1 of the Convention. These three crimes are: Use of torture (Article 373), Obtainment of testimony by duress (Article 374), Bribing or forcing another person to give testimony or provide documents (Article 384). The Penal Code just stops at describing the acts of use of torture, obtainment of testimony by duress, bribing or forcing another person by public officials. Therefore, it is necessary to amend the elements constituting the crime of torture to include the acts specified in Article 1 of CAT, which has not been specified in the composition of the three above-mentioned crimes, such as acts of bodily harm, violations to the honour and dignity of the person responsible for escorting suspects and the accused persons, acts of public officials in temporary detention facilities, etc.

Second, the punishment prescribed for these crimes must be severe and highly deterrent because these offences not only infringe upon the health, honour, dignity and safety of the human body but also upon judicial activities and justice in the proceedings to settle the cases, which in turns inflict the reputation of the national judiciary. Of the three crimes mentioned above, the crime of bribing or forcing another person to give testimony or provide documents (Article 384) has the most severe penalty, which is only up to 07 years in prison, applicable in the following cases: a) The offence involves the use of violence, threat of violence, or other dangerous methods; b) The offender abuses their position and power to commit the offence; c) The offence results in misjudgment of the case (Clause 2). With these aggravating facts, especially when "the offence involves the use of violence, the threat of violence, or other dangerous methods", prescribing the highest penalty of 07 years in prison is not adequate with the nature and degree of danger of the crime and therefore this provision need to be revised so that the punishment for this crime is stricter.

- Improving the criminal procedure law: In the spirit of the judicial reform following the Politburo's Resolution No. 49-NQ/TW in 2005, the 2015 Criminal Procedure Code affirms the goal to defend human rights, uphold justice in addition to timely, just crime detection in accordance with the law.³⁴³ This goal is reflected in the fundamental principles of Vietnam's criminal procedure law: Presumption of innocence; Assurance of adversary in adjudication; Ensuring the right to defence of the accused; Implementation of two levels of trial; etc.³⁴⁴ and is ensured through the provisions of the 2015 Criminal Procedure Code. However, in order to meet the requirements for the implementation of CAT, further improvements should be made in the following directions:

(i) The legal principle of the "right to silence" should be added to the Criminal Procedure Code. The 2015 Criminal Procedure Code has had provisions displaying certain elements of the principle of the "right to silent", such as: The right to "give statements and opinions, not to have an obligation to testify against themselves or admit guilty" is prescribed to apply to persons held in emergency custody, arrestees (point d, clause 1, Article 58); temporary detainees (point c, clause 2, Article 59); accused persons (point d, clause 2, Article 60); defendants (point h, clause 2, Article 61). However, the "right to silence" has not yet become a principle of criminal procedure law in Vietnam. Therefore, it is necessary to recognize this fundamental principle in Chapter 2 of the 2015 Criminal Procedure Code so that it becomes the guidance for all procedural activities of agencies or persons competent to conduct proceedings in the process to settle criminal cases.

(ii) On the basis of the Criminal Procedure Code, when conducting procedures, competent agencies and persons have the responsibility to explain and guide persons participating in procedures on their rights, especially for suspects and accused persons in each specific case and situation so that they are aware of their rights and obligations when participating in legal proceedings. The 2015 Criminal Procedure Code requires procedure-conducting agencies and persons to comply with this obligation; however, it has not yet provided any legal consequences and responsibility for failure or inadequacy in performing this obligation. Therefore, it is necessary to provide further provisions on explaining and guiding persons participating in procedures on their rights so that this becomes a mandatory legal responsibility of the competent procedure-conducting agencies and persons. Procedural acts or decisions of competent procedure-conducting agencies and persons that fail to comply with

³⁴³ 2015 Criminal Procedure Code, art 2.

³⁴⁴ 2015 Criminal Procedure Code, ch II.

this obligation shall be considered violations of legal procedure and result in the cancellation of such acts or decisions or not be used as a basis to prove the crime. Furthermore, the offender must receive an appropriate legal penalty according to the law depending on the degree of their violations.

(iii) It's necessary to improve the mechanism to ensure the exercise of human rights in criminal proceedings, including the right to be free from torture. Ensuring human rights in criminal proceedings is not merely the recognition of human rights in the criminal procedure law, but also the meaningful implementation of these rights in the investigation, prosecution and adjudication of criminal cases in practice, as well as effective monitoring of human rights protection in criminal proceedings. Providing provisions on the procedural status of actors in criminal proceedings by itself does not solve the issue of ensuring the rights and freedoms of actors participating in criminal proceedings. Ensuring human rights in criminal procedure is how to ensure the rights of actors participating in criminal procedural activities to be exercised in practice. That is the mechanism to ensure human rights in criminal proceedings, which is defined as a system of legal measures and methods to protect human rights and ensure the exercise of those rights in practice. Therefore, the 2015 Criminal Procedure Code needs to be revised to specify the mechanism to ensure the exercise of human rights in legal proceedings, with particular emphasis on the importance of ensuring that only the heads of competent procedure-conducting agencies may have the authorization to apply procedural measures that limit human rights.

(iv) It's necessary to improve the mechanism for inspecting and monitoring procedural activities, to ensure the legitimacy and necessity of the applied measures, and to promptly cancel or change those measures if there are signs of violations of law or when these measures are no longer necessary.

- Improving the law on execution of criminal judgments: It is necessary to continue to revise the 2019 Law on Execution of Criminal Judgments to specify in detail acts of torture prohibited in the process of executing judgments. Similar recommendation for the 2015 Law on Custody and Temporary Detention.

- Improving the law on state compensation responsibility: According to Article 14 of CAT, victims have a "feasible right to fair and adequate compensation," therefore it is necessary to revise the 2017 Law on State Compensation Responsibility to ensure that victims of torture are entitled to claim compensation for both direct and indirect, material and moral damages, thereby ensuring that victims of torture, or other cruel, inhuman or degrading treatment or punishment will be promptly and adequately compensated.

REFERENCES

1. 2003 Criminal Procedure Code
2. 2015 Criminal Procedure Code
3. 2016 Law on International Treaties
4. 2015 Law on Promulgation of Legal Instruments
5. 2015 Penal Code
6. 1999 Penal Code
7. Directive No. 44 – CT/TW dated 20/7/2010 of the Secretariat of the Communist Party of Vietnam on human rights in the new context.
8. Resolution No. 83/2014/QH13 dated 28 November 2014 of the National Assembly XIII on the ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
9. Ministry of Public Security & the Embassy of the Kingdom of Belgium in Vietnam *Workshop on the draft National Report on the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Phu Tho, 12 November 2017) 81.
10. *Draft National Report on the Implementation of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2016) 15 (Draft National Report).
11. The Socialist Republic of Vietnam, *First National Report on the Implementation of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2017) 9.
12. 'Internalization international conventions and fundamental principles' (*A Dong Law Firm*, 26 November 2014) <<http://www.luatsuadong.vn/chi-tiet-tin/1923-noi-luat-hoa-cac-dieu-uoc-quoc-te-va-cac-nguyen-tac-co-ban.html>> accessed 19 May 2021
13. Dao Tri Uc, 'Organizational structure and operation of the socialist rule of law state of Viet Nam' (Judicial Publishing House 2007) 44.
14. Nguyen Dang Dung, 'Limit the arbitrariness of the state agencies' (Judicial Publishing House 2010) 34.
15. Nguyen Hoa Binh 'New provisions of the 2015 Criminal Procedure Code' (National Politics Publishing House 2016) 38.

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

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The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted on December 10, 1984. It is one of the nine core international conventions on human rights. UNCAT came into force on June 26, 1987 following ratification by 20 countries. It now has 155 State parties³⁴⁵. Vietnam signed the Convention on November 7, 2013, and the National Assembly of the Socialist Republic of Vietnam ratified it on November 28, 2014. The signing and ratification of the Convention is of significance, demonstrating the humanitarian criminal policy of the Vietnamese State and the determination to maintain the foundations of human rights-related morality, legality and culture being stated in the policies and guidelines of the Party and the 2013 Constitution. This also mirrors Vietnam's efforts in acknowledging, respecting, guaranteeing and protecting human rights, creating an important legal basis to effectively contribute to the fight against slanders and distortions of hostile forces which aim to overthrow the Vietnamese State. The ratification of the Convention also facilitates the review, amendment and supplementation of relevant legal regulations, making them more consistent with the Convention and general regulations of international law on human rights. The article focuses on analysing the harmony and compatibility between the Vietnamese law and the Convention, thereby defining problems and necessary solutions to bring the Convention into the political and legal life in Vietnam.

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³⁴⁵ On November 7, 2013, Vietnam signed the UNCAT, which was then ratified by the National Assembly on November 28, 2014. The Prime Minister on March 17, 2015 issued Decision No. 364/QĐ-TTg approving the plan on the implementation of the Convention. On January 12, 2018, the Prime Minister signed and issued Decision No. 65/QĐ-TTg ratifying the project on popularising the Convention and Vietnamese laws on torture prevention among officials, civil servants, public employees and the public.

1. ASSESSING THE HARMONY BETWEEN THE VIETNAMESE LAW AND UNCAT 1984

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

- **The harmony and compatibility of the Constitution with the Convention:** The 2013 Convention, which was built on the previous Constitutions of Vietnam, specifically stipulates the protection of human rights and the promotion of freedom and dignity of each individual, while committing to the world that there is no excuse for human torture³⁴⁶.

Clause 1, Article 20 of the 2013 Constitution prescribes the right not to be subjected to cruel, inhuman torture or degrading treatment: "1. Everyone has the right to inviolability of his or her body and to the protection by law of his or her health, honour and dignity; no one shall be subjected to torture, violence, coercion, corporal punishment or any form of treatment harming his or her body and health or offending his or her honour and dignity." The Constitution also defines the State's responsibility for protecting human rights if he/she is the victim of abuse that threatens his/her life, health, honour and dignity, relating to procedural acts.

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

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

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

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

³⁴⁶ This matches the provision of the Convention: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." (Clause 2, Article 2 of the Convention).

or judgment enforcement, thereby causing damage to others, shall be punished in accordance with law.” (Clause 5);

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

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

- The harmony and compatibility of the 2015 Criminal Procedure Code³⁴⁷ with the Convention: With the aim of integrating the spirit of the Convention and the Constitution on human rights protection in criminal justice and torture prevention and combat, the 2015 Criminal Procedure Code prescribes basic principles of criminal procedures in one chapter with 27 articles as follows:

+ Article 8 of the 2015 Criminal Procedure Code³⁴⁸ prescribes the respect and protection of human rights, and individuals’ legal rights and interests.

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

³⁴⁷ The 2015 Criminal Procedure Code was approved at the 10th session of the 13th National Assembly on November 27, 2015 and took effect on July 1, 2016.

³⁴⁸ To concretise Clause 1, Article 20 of the 2013 Constitution

+ Article 11 of the 2015 Criminal Procedure Code³⁴⁹ stipulates the protection of individuals' life, health, honour, dignity and property. All unlawful violations of a person's life, health, honour, dignity and property and a legal entity's honour, prestige and property will be handled in line with the law.

+ Article 13 of the 2015 Criminal Procedure Code³⁵⁰ matches the content of the Convention: an accused person is deemed innocent until his guilt is evidenced according to the process and procedures as defined in the Criminal Procedure Code and a court passes a valid conviction. If the evidence fails to prove the person is guilty in accordance with the process and procedures defined in the Criminal Procedure Code, competent procedure-conducting agencies and persons shall adjudge the accused person to be not guilty.

+ Article 16 of the 2015 Criminal Procedure Code³⁵¹ prescribes the guarantee of the right to defence of accused persons and the protection of legitimate rights and interests of victims and concerned parties. The stipulation comes from the reality and data of lawmakers regarding the possibility and risk of torture, extortion of deposition and corporal punishment in the period from custody and temporary detainment to prosecution, for timely prevention. Therefore, it stipulates that the defence counsel has the right to participate in the initial stage of the procedure. Specifically, during the initiation of legal proceedings, the defence counsel will participate in the process from when a person is arrested (in case of emergency and being caught red-handed), held in custody and temporarily detained. It also prescribes the right of the defence counsel to be present when taking statements of the person who is arrested and temporarily detained, and questioning the accused. The defence counsel can even question them if allowed by investigators or prosecutors.

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

³⁴⁹ To concretise Clause 5, Article 31 of the 2013 Constitution

³⁵⁰ To acknowledge the principles of presumption of innocence in the spirit of Clause 1, Article 31 of the 2013 Constitution

³⁵¹ To concretise Clause 4, Article 31 of the 2013 Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and the right to the complaint of individuals in all fields, especially the judicial aspect and matters related to the protection of individuals from harm to life, health, honour, reputation and dignity³⁵². In particular, the 2018 Law on Denunciations has a separate chapter (Chapter VI) stipulating the protection of denunciators, with specific regulations on the protected person, the scope of protection, the rights and obligations of the protected person, and the agency responsible for applying protection measures, order and procedures.

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

2. COMMENTS AND RECOMMENDATIONS TO ENSURE THE ENFORCEMENT OF THE CONVENTION AND THE VIETNAMESE LAWS IN THE COMING TIME

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

Firstly, documents and laws related to the prevention and combat of torture and other cruel, inhuman or degrading treatment have been amended and supplemented with increasing numbers and content. Recently, especially after the 2013 Constitution

³⁵² To concretise the 2013 Constitution: "Everyone has the right to filing a complaint and denunciation to competent agencies, organisations and individuals about illegal acts of agencies, organisations and individuals. Competent agencies, organisations and individuals are responsible for receiving and handling complaints and denunciations. The aggrieved person has the right to material and spiritual compensation and restoration of honour in accordance with legal regulations. Taking revenge against complainants or denunciators or abusing the right to filing a complaint or denunciation to slander, calumniate or harm others are prohibited."

was enacted, not only the laws directly related to the prevention and combat of torture or brutal, inhuman or degrading treatment have been revised, such as the Penal Code 2017, the Civil Code 2015, the Criminal Procedure Code 2015, the Law on Enforcement of Custody and Temporary Detention 2015, the Law on Legal Aid 2017, the Law on State Compensation Liability 2017, the Law on Denunciations 2018... but the laws on the organisation of the apparatus also prohibit extortion of depositions, corporal punishment and forms of torture and cruel, inhuman or degrading treatment or any other forms that infringe upon legitimate rights and interests of agencies, organisations and individuals like the Law on the Organisation of Criminal Investigation Agencies 2015, the Law on the Organisation of People's Procuracies 2014 and the Law on the Organisation of People's Courts 2014. In addition, the Labor Code, the Law on Gender Equality, the Law on Domestic Violence Prevention and Control, and the Law on Children also affirm the principle of protecting workers and people with disabilities, women and children in labour, family and social relations. This is a positive sign, demonstrating the consistency and unity of the legal system on the spirit of the Convention.

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

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

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

- Fifthly, the competent agencies have issued many rules and regulations to improve professional ethics, integrity and reputation of the sector. For example, the

National Council for Judge Selection and Supervision issued Decision No. 87-QD-HDTC promulgating the Code of Ethics and Conduct of Judges. The Minister of Justice also promulgated the professional ethics of officials, civil servants and public employees in the judicial sector. The procuracy sector has been implementing a project on preventing and combating negative acts in the procuracies' activities, and at the same time carrying out the sector's campaign to build a contingent of officials and prosecutors with political firmness, good professional knowledge, legal expertise, justice and mettle, discipline and responsibility". The Minister of Public Security issued a circular stipulating the code of conduct of the people's public security force, etc.

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

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

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

objective investigation and prosecution for timely detection of torture acts committed by procedure conducting persons or inmates.

Secondly, there are still loopholes in investigation control and supervision mechanisms, if the law is not promptly completed, it will lead to unbiases in the investigation process. For example, the 2015 Criminal Procedure Code stipulates that procuracies are responsible for supervising the law observance in the investigation, prosecution, adjudication and judgment execution. However, there is no regulation on agencies outside the procuracy system which are responsible for directly supervising the exercise of the prosecution right and judicial control of the procuracies for specific cases. This creates loopholes in the control of the exercise of state power in the judiciary field, so it is necessary to bring the Convention to life and effectively to prevent legal violations.

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

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

Fifthly, the dissemination of the Convention's content and the perfection of the Vietnamese legal system towards ensuring harmony and compatibility are not really effective. Therefore, it is necessary to renovate methods and forms of dissemination and education of legal regulations on torture prevention and control as well as related legal documents, focusing on measures to bring the issue to the stage and

cinema, while conducting re-dissemination in each working environment such as office, factory, enterprise, prison, and detention establishment.

Sixthly, it is a must to attach importance to enhancing the integrity, morality and reputation of officers involved in the investigation, prosecution, adjudication and judgement execution related to human rights in criminal justice through improving legal documents on professional ethics, especially for judicial positions in courts, procuracies, and judgment execution agencies etc... This requires a review of the current Criminal Code to take stronger action and penalties for certain types of crimes related to torture and other cruel, inhuman or degrading punishment or treatment.

REFERENCES

1. Government Inspector, Training Materials: "An Introduction to the Content of The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and Participation of Vietnam". <<http://www.thanhtra.hochiminhcity.gov.vn/Hnh%20nh%20bn%20tin/2019-4/Tai%20lieu%20tap%20huân%20chông%20tra%20tân.pdf>>
2. Dr. Dao Le Thu, "The trend of internationalization of Vietnam's criminal law and some raised issues" Journal of Legislative Studies [2020] No. 12 (412)
3. Assoc.Prof. Dr. Vu Cong Giao, MSc. Pham Thanh Son, "Completing the legal framework on prevention and combat of torture in Vietnam" <<https://www.google.com.vn/amp/amp.tapchicongthuong.vn/bai-viet/hoan-thien-khuon-kho-phap-luat-ve-phong-chong-tra-tan-o-viet-nam-62242.htm>>
4. Assoc.Prof.Dr. Truong Thi Hong Ha "The harmony and compatibility of Vietnamese law with the Convention on the Prevention and Combat of Torture", Journal of Political Theory [2015], No. 3.

CHALLENGES FOR VIETNAM IN IMPLEMENTING THE UN CONVENTION AGAINST TORTURE

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Abstract: The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) is one of 28 important international conventions on human rights, adopted on December 1, 1984 and effective from June 26, 1987. The Convention is built on the principles stated in the Charter of the United Nations on the recognition of equal and inalienable rights of all members of the human community, which is the basis of freedom, justice and peace in the world and in accordance with other legal documents of the United Nations on human rights.

On November 28, 2014, the National Assembly of the Socialist Republic of Vietnam ratified the Convention. The participation in the Convention is a remarkable step in the international integration of Vietnam, affirming that Vietnam is an active and responsible member of the international community, significantly improving the international reputation of Vietnam in the field of human rights, and creating new incentives and foundations to promote the torture prevention in Vietnam. This article provides an overview of the basic contents of the Convention and the challenges for Vietnam in implementing the Convention.

Key words: Convention against torture; United Nations; torture; human rights.

1. INTRODUCTION

Torture (and its 'secondary' behaviours including punishment, brutal, inhumane or corporal treatment) is a legal as well as ethical and cultural issue. From a cultural and ethical perspective, the United Nations condemns torture as one of the most inhumane and despicable acts committed by humans to their fellow human beings,

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because torture denies dignity, destroys both the body and mind of the victim who cannot resist. From a legal perspective, under the international human rights law, torture is one of the most serious and severely criticized violations of human rights; under the international criminal law, torture which is conducted systematically and pervasively can, depending on the context, constitute genocide, war crimes or crimes against humanity, and thus the perpetrators can be prosecuted and tried under the Rome Statute (1998). Due to the particularly serious nature of torture, the prohibition of torture is regulated in many documents of international human rights and criminal laws, including the 1948 Universal Declaration of Human Rights (UDHR) (Article 5)³⁵³, the 1966 International Covenant on Civil and Political Rights (ICCPR) (Article 7)³⁵⁴, and especially the 1984 Convention Against Torture and Other Treatment or brutal, inhumane or humiliating sanctions (UNCAT), etc. Ensuring human rights, including prevention and combat against torture, brutal and inhumane treatment or punishment, and humiliation, to help people in the world develop comprehensively in freedom and peace is also the orientation and goal of socio-economic development of many countries.

On November 7, 2013, the Socialist Republic of Vietnam signed the Convention. On November 28, 2014, the National Assembly of the Socialist Republic of Vietnam ratified the Convention. The participation in the UNCAT is a remarkable step in the international integration of Vietnam, affirming Vietnam as an active and responsible member of the international community, significantly enhancing the reputation of Vietnam in the field of human rights and creating new motivations and foundations to promote the prevention and control of torture in the country.

Before joining the UNCAT, to protect human rights and citizenship, Vietnamese laws have provided a relatively basic and complete mechanism to ensure the right not to be subject to torture, brutal or inhuman treatment and punishment or humiliation. Especially, the 2013 Constitution specifically mentioned the prohibition of torture for the first time. Clause 1 of Article 20 of the 2013 Constitution clearly states: “Everyone has the right to body inviolability, to be protected by the law in terms of health, honour and dignity; not subject to torture, violence, persecution, corporal punishment or any other treatment that infringes on the body, health, or offends honour and dignity”. To implement the UNCAT in Vietnam, on March 17,

³⁵³ Article 5 (UDHR): “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

³⁵⁴ Article 7 (ICCPR) “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

2015, the Prime Minister approved the Plan to implement the Convention (under Decision No. 364/QĐ-TT). Accordingly, the Prime Minister clearly determined that one of the major tasks to implement the UNCAT is to incorporate the provisions of the Convention into national laws. Although there has been a legal basis for torture prevention and control in Vietnam, there are still some gaps that need to be resolved when Vietnam ratifies the Convention. Closing these gaps, completing the legal system, and effectively implementing the UNCAT into practice in Vietnam are now urgent tasks.

2. CONVENTION (UNCAT) - ONE OF THE IMPORTANT INTERNATIONAL HUMAN RIGHTS CONVENTIONS

In the historical aspect, torture has existed for a long time and is part of the judicial system in many countries with many different legal traditions. Studies show that torture appeared very early in ancient Roman history. During this period, torture was seen as the most effective form of truth-finding, “the highest form of truth,” and applied to slaves in legal disputes and endorsed by jurists. In societies of different periods, tortures such as crucifixion by Romans, stoning to death by Jews, or sun exposure in deserts by Egyptians were considered necessary to prevent or punish others when believing that they are immoral.

Medieval and modern European courts all used torture, depending on the accused’s level of crime or social status. Torture was considered as a lawful means to obtain a confession or other information of the crime. Usually, the accused sentenced to death were tortured until revealing the names of their accomplices. In the fourth century, there were views of some of the major thinkers of that time who are controversial about the use of torture. Among them is Aristotle’s view when he argued that “Torture is a kind of evidence, which appears trustworthy, because a sort of compulsion is attached to it”. However, at the same time, Aristotle also pointed out that “those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are really ready to make false charges against others, in the hope of being sooner released from torture”.

This shows that, even when people used torture as a lawful way, this form reflected the nature of barbarism and immorality and should be condemned. In 1644, a Dutch lawyer, Atonius Matthaëus, warned of the inherent dangers of torture that might put the danger of death to innocent people. He opined that “the affront to natural justice by torturing an innocent” because “the possibility that the accused person’s perception of truth would be skewed under torture”.

In 1764, Cesare Beccaria published “On Crimes and Punishments”, which is considered to have the most profound influence on criminal justice policy at that

time. Beccaria denounced and fiercely condemned the torture. Torture “is a sure route for the acquittal of robust ruffians and the conviction of weak innocents”, he stated.

Legal documents on human rights since World War II have recognized the right not subject to torture and mistreatment as one of the basic rights of people in general and of the accused in particular. Unlike other rights, the right not to be tortured is considered an absolute right. That is, this right cannot be violated under any circumstances. According to the United Nations Human Rights Committee, the fight against torture is seen as having no limits.

In the context of international law, the definition of torture depends on a legal instrument applied on the basis of the State’s participation in and approval of the UN or regional conventions on human rights. The history of anti-torture begins with Article 5 of the UDHR. As a serious human rights violation, torture is one of the first issues to be addressed by the United Nations with the aim of developing international human rights standards. Article 5 of the UDHR states: “No one should be tortured or subject to cruel and inhumane punishment”. On that basis, the Covenant on Civil and Political Rights (ICCPR) in Article 7 continues to emphasize: “No one should be tortured or subject to cruel and inhumane punishment. Especially, no one shall be deprived of freedom as a laboratory object for medicine or science”. This content is also shown in most of the regional and international legal documents on human rights.

On December 10, 1984, the General Assembly of the United Nations adopted the UNCAT (under Resolution No. 39/46). The Convention is open to signatory states. On June 26, 1987, after the Secretary-General of the United Nations received the instrument of ratification of the 20th State, the UNCAT officially entered into force under the provisions of paragraph 1 of Article 27 of the Convention. During the implementation of the Convention, the General Assembly of the United Nations also adopted the Optional Protocol of the UNCAT on 18 December 2002 (OPCAT) under Resolution No. 57/199.

The Convention is one of the 09 fundamental international human rights conventions of the United Nations. By the end of June 2019, the Convention had 166 member states, including 06 ASEAN countries (including Vietnam). The birth and popularity of the Convention affirm the collective efforts and determination of the international community in the fight against torture and cruel, inhumane or degrading treatment or punishment around the world. The approval of the General Assembly of the Convention is a historic event bearing the mark of human progress in the effort to protect people from torture, a breakthrough in the fight against torture worldwide and an effective tool to completely eliminate torture from the life of civilized society.

The Convention consists of 33 articles, divided into 03 parts with the following specific contents: Articles 1 to 16 provide for the concept of torture and obligations of the Contracting States to strictly prohibit, punish, and prevent torture acts as well as protect torture victims; Articles 17 through 24 provide for the reporting obligations of member states to the United Nations Committee against Torture and the authority of the Commission, the activities of the United Nations Special Rapporteur on the torture, the rights of states to declare signature, ratification or accession to the Convention; Articles 25 through 33 include provisions relating to the signing, ratification, accession, entry into force and amendment of the Convention.

3. ISSUES POSED BY THE CONVENTION FOR A MEMBER STATE

In terms of content, the UNCAT poses a lot of obligations and responsibilities to member states, especially the obligation to criminalize torture, implement legislative, executive, judicial or other effective methods to prevent torture; not deport, return or extradite if there are sufficient grounds to believe that the person is at risk of torture; require establishing jurisdiction; take deterrent measures to initiate criminal proceedings or extradite; obligation to prosecute in case of non-extradition; provide that torture criminals can be extradited in agreements to which a member state has signed or acceded; the obligation to support each other in the criminal proceedings; require the full dissemination and propagation of the prohibition of torture and the training of staff involved in the arrest, interrogation or handling of individuals who may be arrested, detained or imprisoned; ensure a prompt and fair investigation; ensure the right to complain, the right to compensation of the tortured and the obligation to prevent other forms of treatment or other brutal, inhuman or degrading human treatment or punishment which have not been to the extent of torture.

In terms of form, among the provisions on the order and procedures of the Convention are the provisions on the Committee against Torture and Dispute Settlement, which state:

- The Anti-Torture Committee ensures that the member states take the UNCAT seriously. The Commission is well organized (Articles 17 and 18 of the Convention) and has many important functions and duties (Articles 19 and 20). However, some powers of the Committee against Torture are in effect only for a UNCAT member state when that authority is declared by the State (Articles 21, 22). The Convention also permits the reservation of certain powers of the Commission (Article 20).

- Disputes between member states regarding the interpretation or application of the Convention are settled through means such as negotiation, arbitration, the International Court of Justice (Article 30).

With regard to the reservations, the Convention provides that the member states can declare not to recognize the authority of the Committee under Article 20, which is the authority of the Committee against Torture in requiring the member states to cooperate in checking information containing valid evidence that torture is being systematically carried out in the territory of that Member State. Accordingly, a member of the Anti-Torture Committee can also conduct secret investigations, inspections on the territory of a country, this may lead to the release of adverse news reports and reports for the country being investigated and supervised.

On the other hand, member states also have the right to declare that they are not bound by the provisions on the settlement of disputes between member states regarding the interpretation or application of the Convention at the time of signing, ratification or accession to the Convention. Accordingly, if the settlement cannot be resolved through negotiation, one of the parties has the right to request arbitration. If within 6 months from the date of the request for arbitration, the parties still cannot agree on the organization of the arbitration, one of the parties has the right to submit the dispute to the International Court of Justice by request in accordance with the Statute of the Court. The submission of a dispute to the International Court of Justice requires the consensus of all parties involved in the dispute, which ensures the discretion of Vietnam in each specific dispute settlement case.

In terms of basic rights and interests, the member states (including Vietnam) will enjoy the rights and benefits as follows:

First, receiving international support and cooperation from other member states in the criminal proceedings for crimes related to torture;

Second, having the right to nominate citizens to participate in the Committee against Torture;

Third, having the right to reserve certain contents of the Convention;

Fourth, having the right to propose amendments to some contents of the Convention.

In terms of basic obligations, together with the above-mentioned rights and interests, states must fulfill the basic obligations as a member State, including:

First, accepting the Convention's definition of torture (which includes mental torture);

Second, being responsible for enacting and implementing legislative, executive, judicial or other effective measures to prevent torture in the territory of its jurisdiction;

Third, ensuring that all torture is a violation of criminal law and must be punished with appropriate measures;

Fourth, ensuring the laws, policy and mechanism for implementing complaints, denunciations and compensations for victims of torture;

Fifth, assisting as much as possible other member states in preventing torture;

Sixth, reporting about the measures taken to fulfil the obligations under the Convention to the Commission against Torture via the Secretary-General of the United Nations within one year after the date of entry into force of the Convention. Then, every four years, Vietnam is required to submit additional reports on the new measures taken as well as other reports at the request of the Committee against Torture.

4. ISSUES FOR VIETNAM WHEN RATIFYING AND IMPLEMENTING THE CONVENTION

For the development and completion of the law, after ratifying the UNCAT, in the realization of the Government's Plan on the implementation of the UNCAT, the ministries and branches of Vietnam have been reviewing, amending, supplementing and promulgating a number of new legal documents under the following basic orientations:

(1) Complete the provisions on torture-related crimes in the Criminal Code (as amended) in accordance with the definition of torture in the Convention;

(2) Complete the relevant provisions of the Criminal Procedure Code to better ensure human rights, especially the rights of arrestees and detainees;

(3) Continue to develop and perfect the documents guiding criminal judgment execution; speed up the development of projects on Law on temporary custody and temporary detention, Law on organization of criminal investigation agencies and documents guiding the implementation;

(4) Study and propose to complete the provisions of the Civil Code, the Law on State Compensation Liability, Law on Complaints, Law on Denunciations;

(5) Develop and promulgate legal documents on professional ethics for cadres and civil servants, ensuring respect for human rights while on duty;

(6) Research and review laws on workplace violence, gender violence, domestic violence, violence against children and vulnerable groups to make synchronous adjustments to the protection of these groups, which is consistent with Article 16 of the Convention.

Due to the development and issuance of annual legal documents and the above Plan, up to now, the legal framework of Vietnam to implement the Convention has been more complete, which is evidenced in the following:

Firstly, in addition to the provisions of Clause 1 of Article 20 of the 2013 Constitution, the right not to be subjected to brutal torture or punishment, inhumane

or humiliating, is provided for in many legal documents in various fields such as criminal, administrative, civil laws, etc. From 2015 up to now, many important laws directly related to the prevention and control of brutal, inhuman or degrading torture or punishment have been enacted, amended and supplemented, including: Criminal Code 2015 (amended in 2017), Civil Code 2015, Criminal Procedure Code 2015, Law on Enforcement of Temporary Custody and Temporary Detention 2015, Law on Legal Aid 2017, Law on State Compensation Liability 2017, Law on Denunciation 2018, etc. In addition to recognizing rights, legal documents also prohibit the torture, brutal, inhumane treatment or punishment, such as the prohibition of torture, harassment, and humiliation under the Criminal Procedure Code (Article 10), Law on enforcement of temporary custody and temporary detention (Article 4, Article 8), Law on organization of criminal investigation agencies (Article 14), etc.

Second, the Criminal Code has been amended to be more consistent with the provisions of the Convention. Although there is no specific provision on torture, at present, all acts of torture, brutal treatment or punishment, inhumanity or humiliation as governed by the Convention are considered a crime. In addition, Vietnam's legal documents, which are directly or indirectly related to the Convention such as the Criminal Procedure Code, Law on the Execution of Criminal Judgments, Law on Enforcement of Temporary Custody and Temporary Detention, The Law on Mutual Judicial Assistance, the Law on Lawyers have also shown that Vietnam has a relatively complete legal system on the protection of human rights in general and anti-torture in particular, consistent with the general principles and standards of the Convention. Basically, it can be observed that Vietnamese law has a fairly high level of compatibility with the Convention.

Third, Vietnamese law currently has provisions to prevent torture, brutal treatment or punishment, inhumanity or humiliation, especially in criminal proceedings, enforcement of criminal judgments. These include provisions recognizing the rights of individuals at risk of torture, treatment or punishment, brutality, inhumanity or humiliation, such as persons in custody or detention. (Law on enforcement of temporary custody and temporary detention), the person is serving a prison sentence (the Law on Enforcement of Criminal Judgments), etc. Some preventive measures are also present in the regulations on the functions and duties of state agencies, law enforcement officials, for example, the Law on Organization of the Criminal Investigation Agency, Law on Organization of the People's Courts, Law on Organization of the People's Procuracies, the Law on the People's Public Security Forces, etc.

Fourth, Vietnamese law also recognizes the rights to complain, denounce and compensate for victims of torture, brutal treatment or punishment, inhumanity

or humiliation. These rights are recognized in the Law on Complaints, Law on Denunciations, Law on State Compensation Liability and a number of other legal documents such as the Criminal Procedure Code, Law on Temporary Custody and Temporary Detention, etc.

Fifth, the protection of human rights and the right not to be tortured are also regulated in many other relevant legal documents such as the Labor Code, the Marriage and Family Law, the Law on Prevention and Anti Domestic Violence, Law on Gender Equality, Law on Legal Aid, Law on Children, etc.

For the dissemination and propaganda to raise awareness of the implementation of the Convention, the Convention is a human rights convention with content related to many fields of social life, with many difficult contents. Therefore, the implementation of the Convention must be carried out in stages, in accordance with the actual situation and conditions of Vietnam.

Propaganda, dissemination, education and awareness-raising activities on anti-torture for a large number of cadres, civil servants, public employees and people in general, the contingent of cadres and civil servants who are directly handling administrative violations, investigating, prosecuting, adjudicating, and executing judgments in branches and levels outside the People's Public Security branch, the People's Army and those at risk of being subject to torture, brutal treatment, punishment, inhumanity or humiliation, in particular, have not been given adequate attention, implemented evenly or regularly in branches, levels and localities; the quality and effectiveness of this work have not met the requirements; methods of dissemination are not diverse. In addition, the legal and professional qualifications of public employees are not uniform, so they may not understand correctly or completely the obligations and responsibilities of individuals. Therefore, personal abuse of power while on duty might still happen. This also causes certain difficulties for competent agencies in managing and training staff. In addition, in some localities, the economic life and intellectual level of the people are not high; in areas with a large number of ethnic minorities, the propagation and dissemination of the relevant contents of the Convention and the law still face many difficulties due to the differences in customs and culture, the problem of explaining the spirit of the law into the languages of ethnic minorities, etc.

Therefore, the dissemination and propagation of the Convention to all officials and people must also be done regularly and continuously in an easy to understand and comprehend method. For civil servants, it is necessary to regularly guide and foster legal and professional skills to improve their capacity and qualifications to avoid possible abuse of power.

In fact, in some localities, there are still violations of the law on anti-torture in arrest, detention and investigation across the country, limiting and affecting the inalienable rights of to body, legal protection of health, honour and dignity, the right of the people not to suffer torture, violence, persecution, corporal punishment or any other form of treatment. Some cases show signs of injustice related to the use of torture, force, and corporal punishment, which incited public opinion and reduce people's trust in proceedings of state agencies. People are still passive and fail to promptly prevent or combat violations of the law on anti-torture. In some cases, there are infringements of the right not to be brutally and inhumanly tortured, treated or punished, or humiliated, but the violations fail to be promptly denounced. Therefore, it is necessary to study and perfect the mechanism of inspection and supervision of legal compliance by agencies and procedural officers, especially in investigation and detention activities. In this regard, it is important to promote the supervisory role of the Judiciary Committee and members of the National Assembly, and at the same time, facilitate the conditions that allow the mass media to regularly monitor the performance of judicial agencies, including detention facilities.

In addition, it is necessary to study and perfect the regulations to ensure that testimony obtained from torture, corporal punishment or harassment of any kind will not be used as evidence of accusation at all procedural stages.

In order to effectively implement the above activities, it is necessary for the State to develop separate and long-term programs, policies and mechanisms to combat torture (or put in the general programs, policies and mechanisms on human rights protection), which mobilizes the participation of civil society organizations, media agencies, and legal circles; at the same time, it is necessary to strengthen dialogue, international and regional cooperation in torture prevention and control activities, etc.

REFERENCES:

- [1] United Nations - UNO (1948), *Universal Declaration of Human Rights*;
- [2] United Nations - UNO (1984), *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
- [3] Human Rights Center, University of Essex (2015), *The torture reporting handbook*, <https://www1.essex.ac.uk/hrc/documents/practice/torture-reporting-handbook-second-edition.pdf>;
- [4] National Assembly (2013), *Constitution of the Socialist Republic of Vietnam in 2013*.

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 “legalized” conducting torturous behaviours upon the accused is during the exercise of deterrent measures such as temporary detention, custody or emergency custody.

Current inadequate legal regulation along with the abuse of these measures, has revealed certain limitations of state agencies and directly infringing upon the life, health, honor and dignity of the accused. 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, in order to protect the accused from torture, brutality, inhuman or degrading treatment in the process of internalizing the 1984 “Torture Convention” and in accordance with human rights principles, 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 applying 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. INTRODUCTION

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. Till 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

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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/TW³⁵⁵ 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 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 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

³⁵⁵ Resolution No. 49-NQ/TW, <<http://hoiluatgiavn.org.vn/ngghi-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>> accessed 2nd May 2021.

reality, and easy to identify some torturous behaviours, the disadvantage is that it risks not listing every manifestation of tortures.

As for the general legal framework for the protection of human rights from acts of torture, in chapter II of the 2013 Constitution of the Socialist Republic of Vietnam, there are 36 articles stipulating human rights, fundamental rights and obligation of citizens, including the right to equality before the law, freedom from discrimination, the right to life, bodily integrity, not subjected to torture,... Especially in 2015, the National Assembly of the Socialist Republic of Vietnam approved various legal documents with many new contents or amended and supplemented, in a more progressive direction; attach importance to the internalization of provisions of international treaties to which Vietnam is a party, including UNCAT. In the spirit of UNCAT, the 2015 Penal Code amends and supplements the crime of forced confession (Article 374); Crime of using corporal punishment (Article 373); Crime of bribing or forcing others to give testimony and provide documents (Article 384); The 2015 Criminal Procedure Code stipulates the following principles: Torture, coercion, corporal punishment or any other form of treatment infringing upon human body, life and health is strictly prohibited (Article 10); Protection of life, health, honor, dignity and property of individuals (Article 11); The 2019 Law on Execution of Criminal Judgment stipulates the following principles: Complying with the Constitution and laws, ensuring the interests of the State, and the legitimate rights and interests of organizations and individuals; Ensuring socialist humanitarianism; Respecting the dignity, rights and legitimate interests of the sentenced person (Article 4); Prohibit accepting bribes and harassing in criminal judgment execution; obstructing the sentenced person from exercising his/her right to request exemption or reduction of the sentence serving term (Article 10)...³⁵⁶

2.2. An overview of the Vietnamese criminal procedure model

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

³⁵⁶ The introduction outline on the situation of prevention, combatting and handling acts of torture in Vietnam <<https://stp.thuathienhue.gov.vn/?gd=26&cn=686&tc=5303>> accessed 1st June 2021.

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 itself³⁵⁷. The combination of all of these factors has created a favourable environment for the acts of torture to exist.

According to Herbert Packer's model³⁵⁸, 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 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 accused³⁵⁹ is 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 victims³⁶⁰, 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

³⁵⁷ 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.

³⁵⁸ Herbert Packer (1968), *Two Models of the Criminal Process* <<http://my.ilstu.edu/~mgizzi/packer.pdf>> accessed 2nd May 2021.

³⁵⁹ 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.

³⁶⁰ 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.

measures many Constitution rights (especially mobility rights) are significantly limited, posing the potential for torturous behaviours 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 – adjudication – 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*³⁶¹. *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*³⁶².

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 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

The Deterrent measures in Criminal Procedure is an indispensable requirement to resolve Criminal cases. Looking at the internal structure of Criminal Procedure, Deterrent measures include a comprehensive set of legal provisions, governing mechanisms, procedures, jurisdictions, responsibilities and legal obligations of

³⁶¹ 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);

³⁶² 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).

multiple related subjects. Therefore, Deterrent measures in Criminal Procedure possess the following characteristics:

- (i). Coercion;
- (ii). Limitation on freedom;
- (iii). Grounds, procedures, authorities, strict and clear time limit when applying³⁶³.

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 the 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"*³⁶⁴. Therefore, under no circumstances is torture tolerable, 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..."*

In general, in comparison with the previous Codes (1988 Criminal Procedure Code³⁶⁵, 2003 Criminal Procedure Code³⁶⁶) the current Criminal Procedure Code

³⁶³ 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.

³⁶⁴ 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.

³⁶⁵ 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;

³⁶⁶ Article 79 in the 2003 Criminal Procedure Code on Deterrent measures: In order to prevent crimes in time or when enough evidence show the accused will hinder investigation,

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.³⁶⁷

However, the overall study of the 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 Procedure³⁶⁸ 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 detention, arrest, and temporary detention,... However, the law does not specifically explain what those "evidence" are, thus causing problems such as:

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 the 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.

³⁶⁷ Hoàn thiện các quy định về các biện pháp ngăn chặn trong tố tụng hình sự theo yêu cầu của cải cách tư pháp <<https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/40> > accessed 1st May 2021.

³⁶⁸ Article 109. Preventive measures

1. Competent procedural authorities and persons within their powers can implement measures of emergency custody, arrest, temporary detention, 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.

(i). Authorities and persons are 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 proceedings³⁶⁹, 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 rights³⁷⁰.

Article 113³⁷¹ 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, the decision to approve the warrant/ arrest (Clause 2); and apprehension must not occur at night, except for criminals in flagrant or wanted persons (Clause 3). Grounds for the application of this measure are not mentioned.

Up to Article 117³⁷², there is still no grounds for application of detention, leading

³⁶⁹ 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.

³⁷⁰ 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.

³⁷¹ 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.

³⁷² 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.

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 119³⁷³, lawmakers stipulate that

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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 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.

³⁷³ 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;

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 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 for detention.

In addition to the application of Deterrent measures, the 2015 Criminal Procedure Code also provides the ground for cancellation of Deterrent measures³⁷⁴ to fit with the

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- 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.

³⁷⁴ 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;

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 a 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 the victim of torture.

4.2.2. Authority to give out the 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.

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.

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 Court³⁷⁵. 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 Procuracy³⁷⁶, as of 2018, there are still 140 people with overdue detention (**Table 1**).

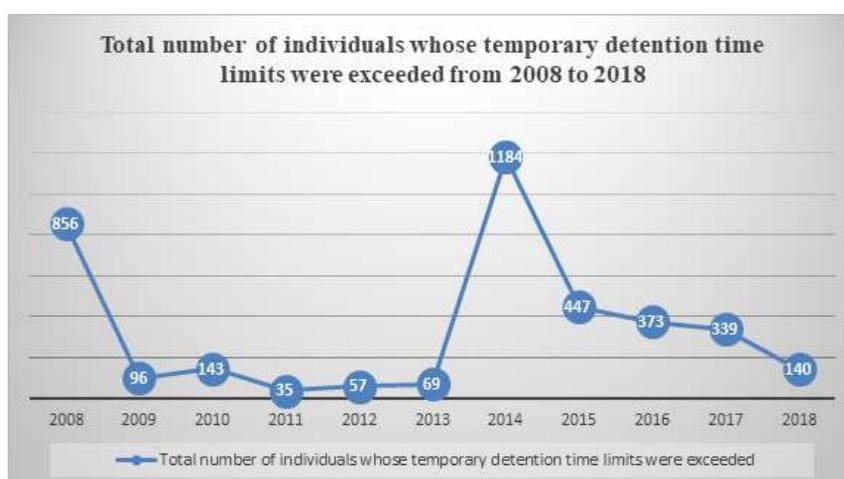


Table 1

³⁷⁵ Về các biện pháp ngăn chặn trong tố tụng hình sự <<http://vks.hagiang.gov.vn/vi/news/Huong-dan-nghiep-vu/Ve-cac-bien-phap-ngan-chan-trong-to-tung-hinh-su-137/>> accessed 3rd May 2021.

³⁷⁶ Hoang Tam Phi (cited previously).

At the same time, the data for the period of 2008-2018 provided by the Department of Statistics and Information Technology of the People's Procuracy, shows the situation of overdue detention in 04 stages: investigation - prosecution - trial - enforcement of judgment. Here, the trial phase has the highest number of percentage consistently and as of 2018 this number was 122/140 people (Table 2), this strongly demonstrates the current Court's system inadequacy.



Table 2

In the regulations on emergency custody³⁷⁷, arrested of perpetrators of crimes

³⁷⁷ **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 detention 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 detention 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.

in flagrante³⁷⁸, the capture of suspects and defendants for detention³⁷⁹, the current Criminal Procedure Code does not have any regulations on the time of termination for the 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 have 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 Code³⁸⁰) within 10 days before the expiration date. In this regard, for this problem there are researchers who believe that 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

³⁷⁸ 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.

³⁷⁹ Artical 113 (quoted)

³⁸⁰ 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.

and 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 the 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 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 proceedings³⁸¹.

³⁸¹ Nguyen Ngoc Chi (2014), *Hiến pháp 2013 và việc hoàn thiện biện pháp ngăn chặn bắt, tạm giữ, tạm giam trong tổ tụng hình sự*, VNU Journal of Science: Legal Study, Vol 30, No. 3 (2014), pp.15-23.

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.³⁸²

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

Resolution 49-NQ/TW of the Politburo has stressed 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:

(i). During the investigation phase, the warrant to arrest the accused of 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 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 of 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

Firstly, place accountability upon those who are responsible for conducting proceedings in overdue detention in the procedural stages, especially the pre-trial

³⁸² 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 6th May 2021.

period. Current practice shows that in the trial preparation stage, only has provisions on after accepting the case, the judge presiding over the court session will decide on the application, change or cancellation of preventive measures.

Second, specifying the end of emergency custody; arrest of perpetrators of crimes in flagrante, the capture of suspects and defendants for detention. For example, within 24 hours from the time the person is detained in an emergency or receives the person who is detained in an emergency, if it cannot be proven that such person has committed a crime, he/ she must be released immediately.

Thirdly, 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. Tran Van Do (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 it 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.

REFERENCES

A. Codes, books, journals

1. 2015 Penal Code;
2. 2015 Criminal procedure code;
3. 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;
4. 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;

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*, Lý luận chính trị Publishing House, Hanoi, pp.22;
6. 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;
7. Moritz Birk and associates, *Giám 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);
8. 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;
9. 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;
10. 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 (Monographs)*, National Political Publishing House, Hanoi, pp.173;
11. 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;
12. 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).
13. Vu Cong Giao, Ngo Minh Huong (2016), *Tiếp cận dựa trên quyền con người, Lý luận và thực tiễn (Monographs)*, Vietnam National University Press, Hanoi.

B. Website

14. Resolution No. 49-NQ/TW, <<http://hoiluatgiavn.org.vn/ngghi-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>> accessed 2nd May 2021;
15. The introduction outline on the situation of prevention, combatting and handling acts of torture in Vietnam <<https://stp.thuathienhue.gov.vn/?gd=26&cn=686&tc=5303>> accessed 1st June 2021;
16. 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 6th May 2021;
17. Herbert Packer (1968), *Two Models of the Criminal Process* <<http://my.ilstu.edu/~mgizzi/packer.pdf>> accessed 2nd May 2021;
18. Hoàn thiện các quy định về các biện pháp ngăn chặn trong tố tụng hình sự theo yêu cầu của cải cách tư pháp <<https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/40>> accessed 1st May 2021;
19. Hoàn thiện các quy định của Bộ luật Tố tụng hình sự về biện pháp tạm giam <<https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/274>> accessed 6th May 2021;
20. Về các biện pháp ngăn chặn trong tố tụng hình sự <<http://vks.hagiang.gov.vn/vi/news/Huong-dan-nghiep-vu/Ve-cac-bien-phap-ngan-chan-trong-to-tung-hinh-su-137/>> accessed 3rd May 2021.

EXCESSIVE USE OF FORCE, AND DEATHS IN CUSTODY AS CONSEQUENCES OF LOOPHOLES IN THE NATIONAL LEGISLATION AGAINST TORTURE: THE CASE OF VIETNAM

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Abstract: Vietnam became a state member of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in 2014 and has made many efforts in enforcing the Convention since then. Even so, torture still occurs in the country of which excessive use of force and deaths in custody is one of the concerns raised by the UN Committee against Torture in its Concluding Observations³⁸³ on the Initial Report of Vietnam on the Implementation of UNCAT.³⁸⁴ There are many causes of excessive use of force and deaths in custody in Vietnam, of which the important ones are loopholes in the national legislation against torture.

This paper analyzes selected cases of excessive use of force and deaths in custody recently reported in the Vietnamese state-run media and points out the linkage with discrepancies between Vietnam's UNCAT and relating law. Hence, the authors highlight the need for legislative amendment in Vietnam, including the 2015 Criminal Procedures Code and the 2015 Penal Code (revised 2017), to stop the excessive use of force and deaths in custody in Vietnam and ultimately, to ensure full compatibility with the UNCAT in the coming years.

Keywords: Torture, excessive use of force, death in custody, Vietnam.

INTRODUCTION

Even though freedom from torture is recognized as one of the absolute human rights, unfortunately, torture may occur in any location, especially where there is a

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³⁸³ The Committee against Torture considered the initial report of Viet Nam (CAT/C/VNM/1) at its 1685th and 1688th meetings, held on 14 and 15 November 2018 (see CAT/C/SR.1685 and SR.1688), and adopted the present concluding observations at its 1708th meeting (see CAT/C/SR.1708), held on 29 November 2018.

³⁸⁴ The initial report of VietNam is available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhss%2bE2M8qeF0DtZNhaOp9sRIMDEefLT%2fcQ1j2zdJMTJGDj%2f%2fxl3kS6ZszteFX70qLfl1jup9yUXVftAtC1mHs6UnnGmTRvo0YJUChlZXJlqED3>

widespread climate of violence. Torture, as defined in international law, is “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 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.”³⁸⁵

From this definition, three essential elements constitute torture are: (i) infliction of severe mental or physical pain or suffering; (ii) the consent or acquiescence of the state authorities; (iii) for a specific purpose, such as gaining information, punishment or intimidation. Torture is characterized and distinguished from other forms of ill-treatment by the severe degree of suffering involved. It is, therefore, the most severe form of ill-treatment, which is against human dignity and values protected by the international community.

As mentioned above, torture may take place everywhere. High-risk locations are where interrogation is likely to occur, such as police and gendarme stations and any other place of detention, both in official and unacknowledged places of detention, especially pretrial detention.

The most significant risk of torture and other forms of ill-treatment to the accused is in the initial phase of arrest and detention, even before they have a chance to access to any legal assistance or the court. This risk remains during the investigation process, especially when a suspect is being held in detention from the beginning to its end. Incommunicado detention³⁸⁶ is probably the highest risk factor for torture because it has no external monitoring of the interrogation process. Torture is usually less common in regular prisons for convicted prisoners as the investigation process has been completed. Still, it should be noted that many prisons also hold remand prisoners who are pending trial, as well as sentenced prisoners. Remand prisoners may also be at risk, especially when they are transferred back into the custody of the investigating authorities. The conditions of detention themselves may amount to torture or other forms of inhuman or degrading treatment. Once occurred, not only freedom from torture is violated, but other fundamental human rights may also severely degraded, such as the right to life, right to health, right to liberty and security of person,... The reality has been reflected in recent cases in Vietnam.

³⁸⁵ Article 1(1), UN Convention Against Torture (1984)

³⁸⁶ Incommunicado detention is a form of detention, in which the suspect is detained either without acknowledgement or without allowing them access to anyone, such as their lawyer or family.

1. EXCESSIVE USE OF FORCE, AND DEATHS IN CUSTODY IN VIETNAM: REFLECTION FROM LOCAL MEDIA REPORTED CASES

Freedom from torture, cruel, inhuman treatment or punishment is guaranteed under almost major international and regional human rights instruments all over the world, including the Universal Declaration of Human Rights (UDHR – 1948); International Covenant on Civil and Political Rights (ICCPR – 1966),.... In criminal proceedings, the universal and non-derogable prohibition of torture and other inhuman or degrading treatment or punishment is consequently to be respected at all times, without any exception, even in the direst of circumstances.³⁸⁷ This means that persons who are arrested, detained, or otherwise in the hands of police or prosecuting authorities for purposes of interrogation about alleged criminal activities always have the right to be treated with humanity and without being subjected to any psychological or physical violence, coercion or intimidation.

Unfortunately, during the course of detention, in order to gain “*confessions*”, excessive use of force such as torture or other ill-treatment are sometimes used in many countries, including Vietnam. The UN Committee Against Torture (UN-CAT) recently raised concerns about “reports of the physical and psychological suffering of persons sentenced to the death penalty as a result of the particularly harsh conditions of their detention that may amount to torture or ill-treatment, including solitary confinement in unventilated cells; inadequate provision of food and drink; being shackled round-the-clock; being subjected to physical abuse; such persons often commit suicide and develop psychological disorders as a result.” (CAT, 2018). In practice, in the famous death penalty cases (Ho Duy Hai case) and four other wrongful cases (Nguyen Thanh Chan case, the Nguyen Minh Hung case, and the Han Duc Long case, and Huynh Van Nen case), all the accused claimed that they were all victims of torture conducted by official investigators. Significantly, the latter 04 wrongful conviction cases not only “*shocked Vietnamese society*” (Ngoc Quang, 2014) but also raise a question among the community about the journey of seeking justice as well as the strictness of the legal system in Vietnam. Below we will analyze some of the cases mentioned earlier, which may be considered typical cases for excessive use of force that led to violation of freedom from torture.

The case of Nguyen Thanh Chan (Thanh Nien News)

On the night of 15 August 2003, Nguyen Thi Hoan, born in 1972, was found killed in Me village, Nghia Trung commune, Viet Yen district, Bac Giang province. After investigation, the Bac Giang province’s police agency has accused Nguyen Thanh

³⁸⁷ Article 2, UN Convention Against Torture (1984)

Chan of murder. As a result, he was arrested and detained since 28 September 2003. After that, in both hearings in the first instance by Bac Giang Province People's Court and appeal by the Supreme People's Court, Nguyen Thanh Chan was convicted of murder and was sentenced to life imprisonment. According to the record of the case, at first, Nguyen Thanh Chan confessed his crime, but later, he kept changing his testimony during the investigation and claimed himself innocent. At the beginning of the first instance trial, he also claimed that he had been bowed, beaten, threatened while detaining, and even was forced to practice stabbing straw with a knife so that he could perform again before the court. At the same time, many witnesses could testify for his alibi defence. During his imprisonment in Vinh Quang Prison, Nguyen Thanh Chan and his family continuously filed a complaint to the authority for many years, but to no avail.

On 9 July 2013, the Supreme People's Procuracy investigation agency received a typed petition of more than 200 words from Nguyen Thi Chien, Nguyen Thanh Chan's wife. She briefly stated that her husband was enduring unjust conviction by revealing her knowledge on new significant evidence discovered by her family in June 2013. She urged the agency to re-conduct an investigation to save her husband. On 30 September 2013, an investigation group was sent to Bac Giang Province to verify the information provided by Nguyen Thi Chien and Than Thi Hai (a relative of the family). The clue led the investigation to a new suspect, Ly Nguyen Chung, whose stepmother, Nguyen Thi Lanh, accidentally heard he (Ly Nguyen Chung) told his father (Ly Van Chuc) how he committed the crime in ethnic languages. Being threatened by her husband, Nguyen Thi Lanh could not speak out. In October 2013, the investigation agency persuaded her to tell what she knew by ensuring her safety. The information was later confirmed by Ly Van Chuc, Ly Nguyen Chung's father. Finally, Ly Nguyen Chung turned himself in on 25 October 2013. According to the verdict, on 15 August 2013, Chung, then 15, went to the victim's shop to buy shampoo. After seeing her money box, he suddenly took out a knife and stabbed the woman. He continued to stab her several times, hit her head with empty beer bottles, and suffocated her with a cushion before stealing her two gold rings, the court heard. A day later, he took a bus to Lang Son Province before moving to the Central Highlands province of Dak Lak.

Nguyen Thanh Chan was released in November 2013 after ten years of imprisonment and was compensated with VND 7.2 billion (about US \$ 320,000).

In the case of Nguyen Thanh Chan, "*presumption of guilt*" was applied instead of the presumption of innocence principle, even though the principle was adopted by law at that time. According to Article 10 Criminal Procedure Code of 1988 and

Article 9 Criminal Procedure Code of 2003, no one is considered guilty and subject to punishment until the Court's conviction has been legally effective.

Nguyen Thanh Chan was wrongfully convicted by subjective conclusions of the investigation agency, which were based on insufficient evidence. Besides, other fundamental rights of accused persons in criminal proceedings were also severely violated, such as the right to a fair trial, freedom from torture, freedom from self-incrimination, right of self-defence,.... In this case, Nguyen Thanh Chan was forced to act against himself before the court; for instance, he was made to practice the stabbing while detaining to perform again in the court. Meanwhile, every kind of undue pressure exercised to obtain a statement from an accused person should be considered illegal according to the law. Record from the lawyer also pointed out shortcomings in the investigation process and a criminal proceeding. Still, unfortunately, it was ignored at that time, which violated the right to self-defence of the suspect as well. Consequently, the burden of proof was taken by his family instead of responsible actors. It took as long as more than ten years to clear his name, but after all, nothing can compare with what he and his family had suffered during that time.

The case of Ho Duy Hai (Tuan V. Nguyen)

On 13 January 2008, two female postal workers were found murdered inside a post office in Long An Province, Vietnam. More than two months later, on 21 March, a youth named Ho Duy Hai was arrested, and eight months later, on 28 November, he was sentenced to death by a local court, mainly because of the statement he made while in police custody that he had killed the women. Hai later repudiated the confession, saying it had been beaten out of him during marathon questioning and that he was coerced to write the confession. However, on 29 April 2009, Ho Chi Minh City's appellate court upheld the death sentence.

On 22 November 2019, the Supreme People's Procuracy formally asked for a "Cassation trial" – in effect Vietnam's Supreme Court. However, on 8 May 2020, the 17-member Judicial Committee of the Supreme People's Court upheld Hai's death sentence, effectively denying the petition to the Supreme People's Procuracy.

Since his first trial in 2008, Hai's family and defence lawyer have repeatedly maintained that he was innocent and wrongfully convicted. Indeed, his confession was inconsistent with the evidence. No murder weapon(s) were found. Instead, a knife and a chopping board bought from the local market were displayed as the weapons he had allegedly used. His DNA didn't match the blood found at the crime scene, and no witnesses could testify that he was at the crime scene; evidence indicated that the murderer was left-handed and Hai was right-handed.

For the past 12 years, Hai's case has been a typical example of controversial death penalty cases in Vietnam. The case is also mainly related to the presumption of innocence principle stipulated in Article 31 of the current Vietnamese Constitution. In this case, local courts at all levels have based their judgment on Hai's confession while ignoring all inconsistent evidential facts (Tuan V. Nguyen). Hai's case has also caused controversy about the investigative agency's impartiality and the court in conducting legal proceedings.

The presumption of innocence which imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt, was inadequately applied in the case. *Firstly*, in terms of the burden of proving, the investigation had been misconducted since the very first phases. The conviction was mainly based on Ho Duy Hai's confession, possibly obtained against his will. All the facts that were inconsistent with his confession, such as no murder weapon found in the crime scene, no witnesses, unmatch DNA with the blood found,... were ignored. In principle, with all these pieces of evidence, Ho Duy Hai should be presumed innocent even when he did make a confession of his crime. As pointed out by NA delegate Truong Trong Nghia, the evidence collection process has seriously violated the law. Since the murder weapon was not found, to accuse Ho Duy Hai were displayed weapons he had allegedly used (a knife and a chopping board) were bought from the local market. Preservation and forensic analysis of the evidence were misconducted by ignoring unmatched DNA in the blood found at the crime scene.

Secondly, the impartial application of the presumption of innocence is also caused by insufficient awareness of this principle. Although the presumption of innocence was recognized as a fundamental rule in criminal proceedings, not only in the investigative stage but also in the trial, the accused tends to be proved guilty instead of innocent. At the same time, the fundamental human rights of the accused were violated during the investigation, for instance, the right to remain silent, freedom from torture or other physical punishments,....

The case of Huynh Van Nen (VnExpress)

On 15 May 1998, Huynh Van Nen was arrested for allegedly murdering Le Thi Bong and stealing two of her gold rings in Binh Thuan province. Seven months later, he and nine relatives became suspects in a case known as "*cashew garden*", during which Duong Thi My was murdered in 1993. However, the latter case was dropped as police failed to find conclusive evidence.

Huynh Van Nen was accused of murder in 1998 and was sentenced to life imprisonment. In the following year, Nen was sentenced to two years imprisonment

for damaging property and life imprisonment for murder and robbery. On 23 October 2000, Nen appealed but was rejected by the court a year later. Only after the police found the actual murderer of Bong was Nen acquitted and subsequently released from prison on 22 October 2015, after serving nearly 17 years of his life sentence. After the actual perpetrator was found, Huynh Van Nen was released and compensated for 17 years of imprisonment.

Huynh Van Nen's health has deteriorated, and he has nearly lost sight in one eye, which is consequently caused by torture and abuse in prison. Being cleared his name and compensated with VND18 billion (\$800,000), the suffering he went through was immeasurable. Although the compensation was claimed to include damage to property, physical and mental health and income lost over the 17 years he was imprisoned, it never can return his health.

The case of Han Duc Long

Han Duc Long was accused of child sexual abuse and murder in 2005 and was sentenced to capital punishment. In hearing in both first instance and appeal, he claimed that he made his confession after being tortured while in detention. Finally, in 2017, he was announced to be wrongly convicted and released after 11 years of imprisonment, raising questions about police and investigative agencies' performances. Although the burden of proof is imposed on prosecutorial actors, the investigation process is hardly monitored or reviewed later due to the lack of an effective mechanism. The above cases show that in many criminal cases, the confession made by the accused is considered more important than evidence. The so-called "*presumption of guilt*" is likely to be applied more often than the principle of presumption of innocence. The state of police and prosecutorial misconduct has also been exacerbated by the lack of protection mechanism of human rights in criminal proceedings such as freedom from torture, right to remain silent,....

Death in Custody: the case in Chi Hoa Prison (Tuoitre.vn)

On 6 January 2021, 23-year-old Defendant Duong Quoc Minh was declared to be dead in Chi Hoa Detention Center. According to the official, he protested while police escorted him to work, ran away and threw his head on the ground to die. On 11 February, Chi Hoa Detention Center sent a report to Ho Chi Minh City Police about the death of Duong Quoc Minh, in which, described his death as public order disturbance, died while imprisoned here. Duong Quoc Minh's family said that he was arrested and detained for allegedly violating the law in District 1 in August 2019. On 6 January, they received a message from the Ho Chi Minh City police that Minh had died of suicide and asked his family to retrieve the body to bury. On 8 January, when his family went to the HCM City Forensic Investigation Center, Minh, his body

was in a coffin. Noticing abnormal signs in Duong Quoc Minh's corpse, including bruises on his face, hives, wrists, knees, his family request the police to investigate and clarify the cause of his death.

According to the report of Chi Hoa Detention Center, on 6 January, while prison guards escorted Duong Quoc Minh to work with the No. 1 prison team, which was part of the No. 2 Prison Division, this guy *"has protested, struggled to escape the escort's control, ran away and hit his head on the corridor floor, resulting in injuries."* The prison officials intervened and withheld Minh to take him to the No. 1 prison team. While waiting to enter the room, Minh has signs of fatigue and difficulty in breathing, so he was taken to the Chi Hoa Hospital in the Chi Hoa Detention Center. After that, Minh was taken to Trung Vuong Hospital by the 115 Hospital Emergency Team. However, the doctor from Trung Vuong Hospital diagnosed that Duong Quoc Minh had died before being hospitalized; the cause is unknown. Ho Chi Minh City police have not concluded the incident yet.

The case in Chi Hoa Prison was not exceptional. As being documented, there are 14 cases of death in custody in the period 2010-2014 due to police violence; 4 cases of unexplained death in police custody; 9 cases of death in custody allegedly attributed either to suicide or illness even when visible signs or proof of torture and ill-treatment exist. The actual number of such cases may be much higher in reality. In another case, 17-year-old Do Dang Du reportedly died in custody on 5 February 2015 as a result of severe injuries to the head and body while in custody in Chuong My district, Hanoi, for a *"less serious"* offence, by three of his teenage cellmates who were allegedly instructed with carrying out the assault on Do Dang Du. It is worth mentioning that no conclusion about the responsibilities of prison officers at the end of this case (Committee against Torture, para. 20).

In most of the cases mentioned above, excessive use of force, including torture and other cruel or inhumane treatment, has been used as a "special method" an investigation to speed up the process of seeking the truth in each case and finally to punish crimes. This common practice is partly caused by inappropriate awareness on the issue of a government official, including the polices and prison officers, when they actually assume that by taking all possible methods to find out the truth as soon as possible, they are fulfilling their duties. Moreover, by gaining confession from the accused, the investigation seems to become more and more simple, which also means, the burden of proof is imposed on the accused and their family (for example, the Nguyen Thanh Chan case). Such police and prosecutorial misconduct mainly resulted from the lack of effective mechanisms to monitor and control the activities of judicial bodies.

Besides, detainees are understandably less willing to make allegations of ill-treatment while still in the custody of the investigating forces (pretrial detention). To make it even worse, not every accused may access legal aid at the very first phase when they are arrested. Right to defence counsel is guaranteed to all the accused in all kinds of criminal cases. In case the accused charged with offences punishable by death do not seek the assistance of defence counsel, the investigating bodies, procuracies or courts must request bar associations to assign law offices to appoint defence counsel for such persons or request the Vietnam Fatherland Front Committees or the Front's member organizations to select defence counsel for their organizations' members, according to Art. 76 Criminal Procedure Code 2015. As such, in most serious cases, defence counsel is compulsorily required. If defence counsel is absent, the trial panels must postpone the court sessions. However, access to legal representation in a criminal case in Vietnam has coped with many difficulties in practice. From 1 January 2018 to May 31st 2019, there were 27,868 cases in the whole country, of which 15,796 cases (about 57%) have defence counsel. Among 16,042/27,868 cases that came to final judgment, legal assistants have taken part in 13,292 cases (83%), lawyers have only taken part in 2,750 cases (17%). Although the rate of lawyers who took part in criminal cases has increased compared to previous years, it's still low. (Nguyen Thi Pha, 2019)

The fact that the Constitution has not recognized the right to legal aid may lead to insufficient awareness of this right of both procedure-conducting actors and procedure-participants. The accused may be unaware of their rights to have defence counsel, and procedure-conducting agencies guarantee such rights. Such limitation in the accused's right enjoyment has been derived from the lack of a human rights-based approach in protecting human rights in criminal proceedings. This also caused the poor implementation of related provisions on legal counsel in practice.

Relating to the issue of detention, the time limit for the temporary detention of suspects for investigation shall not exceed 02 months for less serious offences, not exceed three months of severe offences, not exceed four months for very serious offences and especially serious offences. The extension of temporary detention is carried out in accordance with legal provisions.³⁸⁸ Although the new Criminal Procedure Code of Vietnam has marked progress in protecting the right of the accused by decreasing the duration of temporary detention,³⁸⁹ there's no precise mechanism

³⁸⁸ Art.120, 2003 Criminal Procedure Code; Art.173, 2015 Criminal Procedure Code.

³⁸⁹ Comparing to the 2003 Criminal Procedure Code, Criminal Procedure Code 2015 has reduced the extension of temporary detention from 2 times to 1 time for serious offences and very serious offences, from 3 times to 2 times for especially serious offences, hence, decreased total duration of temporary detention for detainees.

to verify the necessity of detention. Meanwhile, detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary (*A v. Australia*³⁹⁰). In the course of such arbitrary and unlawful deprivations of liberty, the detainees are frequently also deprived of access both to lawyers and to their own families and also subjected to torture and other forms of ill-treatment. (OHCHR - 2003) Detention should only be applied in a preventive manner, which means “*the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society—specifically, that they would be likely to commit additional crimes if they were released*”. Preventive detention is also used when the release of the accused is felt to be detrimental to the state’s ability to carry out its investigation. In some countries, the practice has been attacked as a denial of certain fundamental rights of the accused. (Jerry Norton, “*Preventive Detention*”, *The Encyclopedia Britannica*).

It should also be noted that anybody can be a victim of torture, but some groups seem to be more at risk, for example, people who are members of a particular political, religious, or ethnic group or minority. A number of death cases in detention of members of religious and ethnic communities, such as the case of Buddhist Nguyen Huu Tan; Hmong Christian Ma Seo Sung; pastor Ksor Xiem of the Montagnard evangelical church³⁹¹ have raised a question in the state of inequality and discrimination among different groups of detainees. (Committee against Torture, para. 22)

2. DISCREPANCIES BETWEEN THE UNCAT AND CURRENT LEGISLATION OF VIETNAM IN RELATION TO EXCESSIVE USE OF FORCE, AND DEATHS IN CUSTODY

Firstly, freedom from torture is recognized as constitutional rights³⁹² as follows: “*Everyone has the right to physical inviolability and to have their health, honor and dignity protected by law; the right not to be subjected to torture, violence, coercion, applying corporal punishment or any other form of treatment which involves in physical violation or violation of health, honor and dignity*”. In the light of this Article, 2015 Criminal Code amends and supplements the offence of obtaining testimony by duress (Art. 374); offence of ap-

³⁹⁰ *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, available at: <https://www.refworld.org/cases,HRC,3ae6b71a0.html> [accessed 28 June 2021]

³⁹¹ Nguyen Huu Tan was detained and subsequently died while the police alleged suicide, with no independent investigation of the death and whose family was subjected to reprisals from the local police after complaining to the authorities. Ma Seo Sung was arrested and detained by the police and allegedly also committed suicide by hanging, and whose family also received threats of reprisals. Pastor Ksor Xiem of the Montagnard evangelical church died of injuries sustained in police custody; and Montagnard Christian Y Ku Knul died while under arrest and the sign of electric shocks was shown.

³⁹² Art 20 (1) 2013 Constitution of Viet Nam

plying corporal punishment (Art. 373); offence of bribing or coercing another person to give testimony or provide documents (Art. 384); concurrently, still provides offences relating to torture similar to the 1999 Criminal Code (The Socialist of Vietnam, para.10). 2015 Criminal Procedure Code also provides principles of strict prohibition of torture (Art.10). The drafting of the Codes not only illuminated the light of the new Constitution but also showed the willingness of Vietnamese Government in implementation the UNCAT to which Vietnam is a party member. But it should be noted that torture has not been criminalized in a separate provision specifically prohibiting this crime, in particular the amended Criminal Code. In addition, committing acts of torture at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity is not covered adequately in the laws (Committee against Torture, para. 6). These loopholes on definition and criminalization of torture in national legislation do lead to excessive use of force, even deaths in custody in order to obtain testimony by duress.

It's worth mentioning that the absolute character of freedom from torture as well as other of non-negotiable rights have not been defined in both Constitution and law. The 2013 Constitution is the first one that adopted the principle on derogation of rights as follows: "*Human rights and citizens' rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defence, national security, social order and safety, social morality and community well-being.*"³⁹³ As such, the state has the power to restrict all constitutional rights in emergency situations, including freedom from torture and other cruel, inhumane and degrading treatment, that does not comply with international human rights law – specifically, the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights. (Vu Cong Giao, 2016)

Secondly, relating to punishment for the crime of torture and impunity, while taking note that the 2015 Criminal Code has provided punishment frame for crimes at different levels,³⁹⁴ According to Art.27, 2015 Criminal Code, punishment may vary from 5 years of imprisonment for less serious crimes; 10 years for serious crimes, 15 years for very serious crimes, and 20 years for especially serious crimes.³⁹⁵ Accord-

³⁹³ Art 14 (2), 2013 Constitution

³⁹⁴ According to Art.27 2015 Criminal Code, punishment may varies from 5 years of imprisonment for less serious crimes; 10 years for serious crimes; 15 years for very serious crimes; and 20 years for especially serious crimes.

³⁹⁵ According to Art.373 Criminal Code, any person who, in the course of proceedings, trial, or implementing of measures including mandatory attendance at a correctional institution or rehabilitation centre, uses torture or brutally treats or insults another person in any shape or form shall face a penalty of 06–36 months of imprisonment

ing to Art.373 Criminal Code, any person who, in the course of proceedings, trial, or implementing of measures including mandatory attendance at a correctional institution or rehabilitation centre, uses torture or brutally treats or insults another person in any shape or form shall face a penalty of 06–36 months of imprisonment without aggravating circumstances, which means that a person committing acts of torture in correctional and rehabilitation institutions can actually be penalized by as little as six months of imprisonment (Committee against Torture, para. 8). Meanwhile, torture in practice may amount to serious/very serious crimes since it was conducted by government officials who present state power and violate serial basic human rights. Therefore, in this scene, a penalty that is not proportionate to such serious crime may lead to government officials misconduct. Besides, less serious crimes have a statute of limitations of 5 years, while especially serious crimes have a statute of limitations of 20 years, which may encompass acts of torture (Committee against Torture, para. 10).

Thirdly, freedom from torture is recognized as an absolute human right, which means any acts of torture should be completely banned. But according to some regulation, a person who conducted or ordered the torture shall not be prosecuted in the following cases: (i) officers shall bear no responsibility for the consequences of the execution of directions, directives and orders of their superiors, which they have to promptly report to the immediate superiors or higher authority of the order issuers if they have grounds to believe that such orders are unlawful (Law on the People's Public Security Forces; the Law on Viet Nam People's Army Officers and the Law on Cadres and Civil Servants); (ii) accomplice shall not take responsibility for unjustified force used by the perpetrator while accomplices comprise of organizer, perpetrator, instigator or abettor and that a person who has complicity acts or participation in torture-characterized offences and related offences must take criminal responsibility for his/her crime based on nature and degree of participation (Criminal Code). (Committee against Torture, para. 12)

Fourthly, while the right of detainees has been improved much better in recent years through the adoption of the principle of presumption of innocence; the right to remain silent; access to legal counsel,..., not all detainees are able to enjoy fundamental legal safeguards fully in practice (Committee against Torture, para. 16), in particular the case of prisoners of conscience of political prison. Once convicted, they are confined in special "Security Sections" in prisons, where they are isolated and may be treated differently than the general prisoner population. Moreover, some of them could not contact their families or lawyers during being held in detention during the whole investigation process, which amounts to incommunicado detention – the place contains the highest risk of torture (ACAT, Section 1.2). Besides, other vulner-

able groups such as children, women, religious and ethnic communities may be targeted due to their social status, which may need special care in detention in order to avoid torture.

Fifthly, although the duration of temporary detention for detainees has been decreased in total, there is still a potential risk of prolonged pretrial detention, particularly in the case of national security infringements, which may amount to incommunicado detention. Even though the human right of persons deprived of their liberty is guaranteed by law, the more extended detention extends, the higher risk of becoming victims of torture the detainees have to face in practice. In addition, the Criminal Procedure Code does not provide for appeal of pretrial detention decisions, nor does it allow for their legality to be reviewed by a court of law.³⁹⁶

Sixthly, the lack of principle in the inadmissibility of statements made as a result of torture may have a negative impact on the practice of excessive use of force, including torture and cruel, inhuman or degrading treatment. Widespread practice of torture and ill-treatment of the accused with a view to extracting confessions and other information from them. As being documented, from 2010 to 2015, People's Courts had not handled any cases regarding the obtainment of testimony by duress and bribing or forcing another person to give false testimony or provide false documents. Some detained persons are forced to sign statements previously prepared by the relevant state officials as well as to read confessions in public without any allegation investigation of torture and ill-treatment. (Committee against Torture, para. 28) By discarding all confessions possibly made due to torture, excessive use of force conducted by government officers may be excluded.

Seventhly, conditions of detention may constitute torture themselves. Both regulations and fundamental conditions of the detention and custody facilities and prisons have been improved better over the last decades, which is reflected by standards of prisons, detention centres, and custody houses; the quality of clothing, accommodation, living, medical care for prison/detainees (The Socialist of Vietnam, para 178 - 182). However, penitentiary facilities in low conditions that taken altogether such as inadequate sanitary and hygiene facilities; insufficient lighting and ventilation; insufficient quality and quantity of food; lack of physical exercise outdoors; inadequate health care, including poor medical care, negligence, and the deliberate withholding of medical treatment by the medical staff in prisons, non-separation of healthy prisoners from those with contagious diseases, lack of independence of doctors who are employed by the penitentiary authorities; severe overcrowding may amount to

³⁹⁶ Arts. 2, 11 and 16 Criminal Procedure Code

ill-treatment or even torture. In particular, the widespread use of “disciplinary rooms” where prisoners can be isolated in solitary confinement or small groups for up to three months, restricted communication with family; punitive transfers,... may contribute to excessive use of forces by reducing the chance of victims to seek help in the alleged act of torture.

3. ELIMINATING THE EXCESSIVE USE OF FORCE, AND DEATHS IN CUSTODY IN VIETNAM: THE WAY FORWARDS

Becoming a party to 7/9 core international treaties on human rights, including UNCAT has shown the goodwill of the Vietnam Government in fulfilling international commitment in this field. Besides achievements in Nam in the UNCAT implementation process, Viet Nam still faces some difficulties that need to be solved to implement the convention more effectively, such as (i) incomplete legal framework on human rights; (ii) shortages in financial resources; (iii) inadequate awareness and capacities of public officers; (iv) inadequate awareness of the people on the issue of torture (The Socialist of Vietnam, para. 36-40)

To surmount loopholes in the national legislation against torture that lead to excessive use of force, and deaths in custody, Vietnam should follow UN Committee Against Torture’s recommendations selectively, as below:

Firstly, ensure freedom from torture as an absolute human right

Freedom from torture as an absolute human right can not be infringed at any circumstance, even in the state of emergencies, according to Art 14 (2) 2013 Constitution of Vietnam. Therefore, the principle of the absolute prohibition of torture is ensured to be incorporated in legislation and strictly applied in practice. To gain full prohibition of torture, the concept of “torture” needs to be inserted into Criminal Code in compatible with the international law.

Secondly, in terms of legal safeguards against torture, detainees, including those arrested on national security grounds, should be guaranteed to have prompt access to a lawyer of their choice, be promptly brought before a court, be tried in trials that meet international fair trial standards, and not be subject to torture and other forms of cruel, inhuman, and degrading treatment. Furthermore, the use of statements and “confessions” extracted by the use of torture in all trials and legal proceedings must be strictly prohibited. Fundamental legal safeguards enjoyed by detained persons includes the right to be informed of the reasons for the arrest or detention; to contact family members or other persons of their choice about their detention; the right to request and receive a medical examination by an independent doctor; have prompt access to legal counsel or legal aid, and have their detention recorded in a register.

Thirdly, in terms of arrests, police custody and detention: (i) conduct prompt, thorough, and impartial investigations into all cases of injury and death in police custody, including forensic examinations by independent medical professionals, and hold to account any state or non-state actors found to have been directly or indirectly responsible; (ii) end the practice of incommunicado detention and enforced disappearances of detainees by ensuring that information about their whereabouts is made available immediately following their arrest to family, friends, legal counsel and courts.

Fourthly, imposing proportionate punishment for the crime of torture and impunity by (i) ensuring that both the crime of torture and the attempt to commit such a crime are punishable with appropriate penalties that are commensurate with the gravity of their nature, regardless of whether there are aggravating circumstances (Committee Against Torture, para.9); (ii) conduct prompt, thorough and impartial investigations into reports of torture and other human rights abuses by authorities in prisons and detention centres, following up with appropriate legal action, including criminal prosecution, of identified perpetrators of abuses; (iii) establishing impartial mechanisms for prisoners and detainees to submit complaints without the knowledge of correctional officers directly responsible for them, and ensure that complainants are not subjected to punitive reprisals from authorities; (iv) providing compensation and medical treatment to victims of torture and other ill-treatment and their dependents following the law.

To guarantee the strictness of law against the act of torture, the Criminal Code should be amended in order to ensure that there is no statute of limitations for the crime of torture and that all acts of torture may be prosecuted and punished independently of the time that has passed since the crime was committed. The law should also be amended to grant amnesty and pardon is inadmissible when torture offences are concerned. (Committee Against Torture, para.11)

Fifthly, establish an independent mechanism to exercise oversight over the police and other relevant authorities so that there is no institutional or hierarchical connection between the investigators and the alleged perpetrators, and ensure that all persons under investigation for having committed acts of torture or ill-treatment are immediately suspended from their duties and remain so throughout the investigation while ensuring that the principle of presumption of innocence is observed. At the same time, Vietnam should establish a national system to monitor and inspect all places of detention independently and receive complaints, as well as consider accepting access to prisons by the International Committee of the Red Cross.

Sixly, relating to death in custody, all alleged cases of deaths in custody and complaints of excessive use of force must be effectively and impartially investigated in a timely manner. Alleged perpetrators of torture and ill-treatment, and deaths in custody are immediately suspended from duty for the duration of the investigation. Establishing an independent police complaints commission with which citizens can file complaints against the police may contribute to protect the complainant. (Committee Against Torture, para.21).

CONCLUSION

Torture is one of the most horrendous violations of a person's human rights. It is an attack on the very essence of a person's dignity. However, while there is an absolute prohibition on torture under international law, it continues to be widely practised in many parts of the world (OHCHR, 2010), including Vietnam. Remaining loopholes in domestic legislation such as having no definition of torture in national legislation, prolonged and widespread use of pretrial detention, inappropriate investigation on allegations of torture and ill-treatment by public security officers, the conditions of detention do not meet the minimum standards, disproportionate detention of members of religious and ethnic groups, etc, have led to excessive use of force and deaths in custody in practice. To eliminate excessive use of force and ultimately, the act of torture, Vietnam has to fulfil obligations at different levels from taking immediate actions, i.e. banning torture at all types by legislative methods, to progressive realization, i.e. improving conditions of detention step by step due to financial resources. In the way forward to combat torture, non-state actors may also play an important part in advocating against torture as well as raising awareness about torture among society.

REFERENCES

1. Ngoc Quang (2014), 5 vụ án oan nổi tiếng làm chấn động Việt Nam (5 famous injustice cases shocked Vietnam), giaoducnet.vn, 04/08/2014
2. Nguyen Thi Pha (2019), Trợ giúp pháp lý trong tư pháp hình sự (Legal aid in criminal proceedings), <https://trogiupphaply.gov.vn/ngghien-cuu-trao-doi/tro-giup-phap-ly-trong-tu-phap-hinh-su>, last accessed: 14/02/2021
3. Thanh Nien News, Man gets 12 years in decade-long murder case that tests Vietnam's justice system, <http://www.thanhniennews.com/society/man-gets-12-years-in-decadelong-murder-case-that-tests-vietnams-justice-system-49277.html>, last accessed: Feb 13th 2021.
4. Tuan V. Nguyen, Capital Punishment in Vietnam and Ho Duy Hai, Asia Sentinel, 16/5/2020, <https://www.asiasentinel.com/p/capital-punishment-in-vietnam-and>
5. A v. Australia, HRC, Comm. No. 560/1993, 3 April 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>

6. Jerry Norton, "Preventive Detention", The Encyclopedia Britannica, <<https://www.britannica.com/topic/preventive-detention> > accessed May 9th 2021.
7. OHCHR (2003), Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, available at: <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>, last accessed: May 9th 2021, p.161
8. OHCHR, APT and APF (2010), Preventing Torture: An Operational Guide for National Human Rights Institutions, available at: <https://www.ohchr.org/documents/publications/preventingtorture.pdf>, last accessed: May 9th 2021
9. Committee against Torture (2018), Concluding observations on the initial report of Viet Nam, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VNM/CAT_C_VNM_CO_1_33168_E.pdf, last accessed: May 9th 2021
10. Vu Cong Giao & Tran Kien (2016), *Constitutional Debate and Development on Human Rights in Vietnam*, Asian Journal of Comparative Law, Volume 11, Special Issue 2: Special Issue on Vietnamese and Comparative Constitutional Law, December 2016, pp. 235 – 262. DOI: <https://doi.org/10.1017/asjcl.2016.27>
11. ACAT, BPSOS, CAT-VN, CSW, LIV and VNCAT (2018), Report to the United Nations Committee Against Torture for the Examination of the First State Report of the Socialist Republic of Vietnam, joint report for UNCAT's 65th session in Geneva, Nov 12, 2018 – Dec 7, 2018
12. The Socialist of Vietnam (2017), Vietnam 's initial Report on the Implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
13. Vietnamese Constitution 2013
14. Vietnamese Penal Code 2015 (revised 2017)
15. Vietnamese Criminal Procedures Code 2015

COMBATING TORTURE IN VIETNAM: FROM INJUSTICE CASES OF NGUYEN THANH CHAN AND HAN DUC LONG

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Abstract: Combating torture in criminal proceedings is one of the issues to focus on in international human rights law. Vietnam has participated in United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) since 2012. However, Vietnam has had a number of cases considering investigators' use of torture methods to coerce the accused to confess guilt. The cases of Nguyen Thanh Chan and Han Duc Long in Bac Giang Province will be examined in this paper. From these cases, it can be seen that legal and ethical issues in criminal proceedings need to be further improved to combat torture in the resolution process of the criminal cases today.

Keywords: Torture; injustice cases; criminal proceedings; Nguyen Thanh Chan; Han Duc Long.

1. INTRODUCTION

Torture is inhumane treatment and can result in injustice in criminal proceedings. In Vietnam, there have been some recent criminal cases where injustice was alleged by the use of torture in the investigation process and taking the accused's testimony. The cases of Nguyen Thanh Chan³⁹⁷ and Han Duc Long³⁹⁸ revealed that investigators did not collect sufficient evidence and used torture to force the accused to confess guilt, which led to the wrong accused being prosecuted for crimes they did not commit. These cases illustrate the challenges involved in combating torture during criminal proceedings in Vietnam.

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³⁹⁷ Mr. Nguyen Thanh Chan (in Bac Giang Province, Vietnam) was sentenced to life for murder. He was released only in November 2013 after the surrender of the case. By that time he had been in prison for more than 10 years.

³⁹⁸ Mr. Han Duc Long (in Bac Giang Province, Vietnam) was sentenced to death for murder, rape and rape of children. On December 20, 2016, he was released after 11 years of unjustly imprisoned.

2. COMBATING TORTURE IN THE INTERNATIONAL HUMAN RIGHTS LAW AND VIETNAM'S PARTICIPATION

2.1. Combating torture in the International human rights law

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, adopted by the General Assembly of the United Nations on December 10, 1984, under Resolution No. 39/64, came into force on June 26, 1987, after being ratified by 20 countries and June 26 every year is recognized as the International Day to Support Victims of Torture.

The Convention, which built on the principles stated in the UN Charter recognizing the equal and irreversible rights of all members of the human community, was the basis of freedom, justice, and peace in the world and is consistent with other UN legal documents on human rights. UNCAT is an expression of the will of humanity to remove a brutal and inhumane treatment or punishment from life.

Under the provisions of the Convention, 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 piece of 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 1).³⁹⁹ Each State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification for torture (Article 2).⁴⁰⁰ Each State Party, which shall ensure that all acts of torture are offences under its criminal law and the same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture, shall make these offences punishable by appropriate penalties which take into account their grave nature (Article 4).⁴⁰¹

³⁹⁹ United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>, accessed May 5 2021

⁴⁰⁰ United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>, accessed May 5 2021

⁴⁰¹ United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>, accessed May 5 2021

2.2. Vietnam's participation in United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The 1946 Constitution defined for the first time the principle of combating arbitrary acts in judicial activities in Vietnam, "If the judiciary has not yet decided, it is forbidden to arrest and imprison Vietnamese citizen" (Article 11).⁴⁰² Although this provision did not specifically address torture, it was very important to protect human rights in the criminal proceedings and laid the foundation for the implementation of protection against torture and other cruel, inhuman or degrading treatment, or punishment in the resolution process of a criminal case.

Vietnam acceded to UNCAT on November 7, 2013, demonstrating Vietnam's political determination in recognition and enforcement of human rights in accordance with international legal frameworks. After that, on November 28, 2013, a new Constitution was issued (effective from January 1, 2014), in which human rights and human rights protection are clearly stipulated, especially it is clear that "Everyone has the right to (...) not be tortured, violent, persecuted, corporal or any other form of treatment that infringes upon the body, health, offends honor and dignity" (Clause 1, Article 20).⁴⁰³

On that basis, the 2015 Penal Code (amended in 2017), effective from January 1, 2018, and the Criminal Procedure Code 2015 were implemented, with guidelines to ensure and uphold human rights, especially in the field of criminal proceedings.

3. THE CASES OF NGUYEN THANH CHAN AND HAN DUC LONG: LEGAL ISSUES OF COMBATING TORTURE IN VIETNAM

3.1. Overview of the cases of Nguyen Thanh Chan and Han Duc Long

** Overview of the cases of Nguyen Thanh Chan*

On the night of August 15, 2003, a murder happened in Me village, Nghia Trung commune, Viet Yen district, Bac Giang province. The victim was Mrs. Nguyen Thi Hoan, born in 1972. After the police investigation, the Police Department Investigation Bac Giang province instructed police to prosecute the accused and applied detention measures against Mr. Nguyen Thanh Chan (born 1961, residing in Me village, Nghia Trung commune, Viet Yen district, Bac Giang province) from 28 September 2003.

On March 26, 2004, the People's Court of Bac Giang province sentenced Mr. Chan to murder and a life sentence. On July 26-27, 2004, the Supreme Court of Appeal of the Supreme People's Court (in Hanoi) upheld the verdict of the first instance,

⁴⁰² National Assembly, *The Constitution of the Democratic Republic of Vietnam 1946*, https://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=536, accessed April 22, 2021

⁴⁰³ National Assembly, *The Constitution of the Socialist Republic of Vietnam 2013* <https://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=28814> accessed April 22, 2021

not accepting the appeal of accused Nguyen Thanh Chan. Mr. Nguyen Thanh Chan is sentenced to life imprisonment at Vinh Quang Detention Center, Ministry of Public Security. Of note, the case file shows that Mr. Nguyen Thanh Chan confessed and claimed to be the one who killed Ms. Hoan, but his confession was constantly changing, and at the end of the investigation, he began to retract his confession. Mr. Nguyen Thanh Chan appealed the decision and sentence on the basis that the confession was coerced. Many witnesses confirmed the alibi of Mr. Chan. During the penalty execution process, Mr. Nguyen Thanh Chan and his family sent complaints to the competent authority for many years, but to no avail.⁴⁰⁴

On October 25, 2013, Ly Nguyen Chung, who lived with Mr. Chan at the time of the case, confessed to killing Ms. Hoan to steal property. On October 29, 2013, the Investigation Agency of the People's Procuracy was determined to prosecute the criminal case of murder, robbery of property, and prosecute the accused Ly Nguyen Chung for the two above acts. On November 4, 2013, the Director of the Supreme People's Procuracy issued a reopening appeal No. 01/QD-VKSNDTC-V3, proposing to cancel the first-instance and appellate judgment, and suspend the judgment execution against Mr. Chan. On November 6, 2013, the Council of Judges of the Supreme People's Court met and issued a reopening decision No. 18/2013 / HS-TT, cancelling the appellate criminal judgment No. 124 / PTHS dated July 27, 2004, of the Appeal Court of the Supreme People's Court in Hanoi and first instance criminal judgment No. 45/HSST dated March 26, 2004 of the People's Court of Bac Giang province against Mr. Nguyen Thanh Chan and then resulted in the transfer of the file to the Supreme People's Procuracy for re-investigation according to general procedures. On January 25, 2014, the police investigation agency of the Ministry of Public Security issued a decision to suspend the investigation of the accused, and Mr. Chan was officially determined innocent by the procedure-conducting agency.⁴⁰⁵

* *Overview the cases of Hàn Đức Long*

At around 7:00 p.m. on May 16, 2005, Mr. Son and her husband Lieu (from Yen Ly village, Phuc Son commune, Tan Yen district, Bac Giang province) came home from work and found their daughter – Yen, Nguyen Thi Yen (born 2000), was missing. The next morning, Yen's body was found in a field with the indication of rape. After 4 months of investigation, Bac Giang Province Police Investigation Police could

⁴⁰⁴ Minh Tú – Hùng Mạnh – Ngọc Anh, *Looking back on the vindication for Mr. Nguyen Thanh Chan - Term 1: Light at the end of the tunnel* <<https://coquandieutravkstc.gov.vn/nhin-lai-vu-minh-oan-cho-ong-nguyen-thanh-chan-ky-1-anh-sang-cuoi-duong-ham/>> accessed March 24, 2021.

⁴⁰⁵ Duong Minh Kien, "Analysis of the injustice case Nguyen Thanh Chan", *Vietnam Lawyer Journal* (Hanoi, April 2014) 32-33

not identify the suspect, so it decided to suspend the case, and at the same time denounced the crime publicly.

At this time, the family in the same village - Mrs. Ngo Thi Khuyen and her daughter - Mrs. Truong Thi Nam wrote a complaint denouncing Han Duc Long of the rape of both the mother and the child, and also denounced this man as the perpetrator of raping Yen. From this denunciation, the Investigation Police Agency, the police of Bac Giang province arrested Han Duc Long to investigate. During the interrogation process, Han Duc Long confessed to the rape of Mrs. Ngo Thi Khuyen and Mrs. Truong Thi Nam and the child rape, murder of Yen. In early 2006, the Investigation Police Agency, the police of Bac Giang province issued a conclusion proposing the prosecution of accused Han Duc Long on charges of murder, rape, and child rape, and then the People's Procuracy of Bac Giang province issued an indictment against accused Han Duc Long for the above three crimes.

In January 2017, Bac Giang Provincial People's Court brought the case to first instance trial and sentenced Han Duc Long to death for murder and child rape, but the act of raping Mrs. Khuyen and Mrs. Nam was insufficient witnesses and evidence to convict with reason "when performing acts of sexual intercourse with the victims, Mr. Long did not use force and the victims did not call for help, even though the place where the incident happened was near an acquaintance's house"⁴⁰⁶, then the Supreme Court appealed the sentence. After that, Mr. Long continued to file a petition because he was sentenced to death for murder and child rape, so on July 29, 2009, the Council of Judges of the Supreme People's Court (in Hanoi) protested and issued a cassation decision to cancel the two first-instance and appellate judgments to re-investigate from the beginning. After the case was returned for re-investigation, in June 2011, the People's Procuracy of Bac Giang province continued to issue an indictment to prosecute Mr. Long for rape, child rape, and murder. In September 2011, the People's Court of Bac Giang province tried the second first instance and was sentenced to death for murder and child rape again, without rape because of insufficient witnesses and evidence, and then the Supreme People's Court tried the second appellate still to keep the death penalty for Han Duc Long.

After that, Mr. Long's family and defence lawyers continued to claim innocence for Mr. Long, until November 2014, the Council of Judges of the Supreme People's Court's issued a cassation decision to annul both the first-instance and appellate judgments to re-investigate. Due to being unable to find insufficient evidence for criminal prosecution in the process of re-investigation, on December 20, 2016, the People's Procuracy of Bac

⁴⁰⁶ Ngo Ngoc Trai (Lawyer), *An unjust journey for death row inmate Han Duc Long* (Writers Association Publishing, Hanoi, 2019) 32

Giang province issued a decision to suspend the case and suspend the investigation of the accused against Mr. Long on all three crimes of rape, murder, child rape and cancel the measure of detention, release the accused Han Duc Long.⁴⁰⁷

* *The common points of both of the cases*

(i) Both of these wrongful cases happened in Bac Giang province; the case of Mr. Nguyen Thanh Chan in 2003 and the case of Mr. Han Duc Long in 2005. These are two particularly serious cases, so the cases were handled and resolved by the provincial public investigative agency, the investigative agency of the Provincial People's Procuracy, and the People's Court of Bac Giang province, both of these cases were "jointly investigated, prosecuted and tried by a number of agencies and judicial officers in Bac Giang province with the same investigator, same prosecutor, and the same judge"⁴⁰⁸.

(ii) Victims of two cases died, witnesses and evidence of the crime were not clear, and they could not prove the accused's criminal acts. Mr. Chan had been summoned to the police station 15 days after the murder; Mr. Long had been summoned to the police station after nearly 4 months from the date of the murder. Mr. Chan had a water shop near the football field because he was busy helping the investigation agency to be questioned; Mr. Long had fought aggressively with the neighbour's family and was considered to be the perpetrator of the murder. The basis of the charges against the two accused was their confession, but both accused subsequently asserted they were compelled to confess. "The judicial basis of the proceedings was based on the accused's testimony and the judicial authorities judged that the confession was consistent with the traces obtained at the scene"⁴⁰⁹, both were "self-drawn" to map the crime path, re-executed criminal acts, and both were described as "proficient" by the investigative agency.⁴¹⁰

(iii) The legal basis for handling the case is the 1999 Criminal Code and the 1988 and 2003 Criminal Procedure Code. Of note, at this time Vietnam had not acceded to UNCAT, so there were many loopholes in the Vietnamese legal system without clear and strict regulations to protect accused persons from torture in criminal proceedings.

(iv) In the trial court, both complained and reported they were compelled to confess, however, the complaints of both were not considered by the Trial Panel.

⁴⁰⁷ Duc Thuan and Minh Hai, "An uproar of 'death row' apology Han Duc Long: The father of the murdered child spoke up" <<https://vtc.vn/nao-loan-buoi-xin-loi-tu-tu-han-duc-long-bo-chau-be-bi-giet-hai-len-tieng-ar318659.html>> accessed April 20, 2021

⁴⁰⁸ Ngo Ngoc Trai (Lawyer), *An unjust journey for death row inmate Han Duc Long* (Writers Association Publishing, Hanoi, 2019) 150

⁴⁰⁹ Ngo Ngoc Trai (Lawyer), *Ibid*, 149

⁴¹⁰ Ngo Ngoc Trai (Lawyer), *Ibid*, 150

3.2. Legal issues of combating torture in Vietnam from the injustice cases

From the cases of Mr. Nguyen Thanh Chan and Mr. Han Duc Long, there are many legal issues that need to be considered. These include:

- Why did the officer handling the case deliberately use torture in the process to get the testimony of the suspect by the investigating officer?
- What were the provisions of the Vietnamese legal system at the time of the cases to protect accused from torture?
- Why do two cases have similarities in alleging the confessions were coerced?

Firstly, there is a very high risk of applying measures of duress and corporal punishment in the process of taking the testimony of investigators against the accused in the interrogation procedure model.

In the interrogation procedure model, the procedural files are of particularly important value, serving as a basis for the judge or presiding judge to issue a verdict on the accused. In case the increase of evidence and exhibits are not enough to prove the offence, the accused's testimony is considered the only important and only basis for the accusation. This was shown in the cases of Nguyen Thanh Chan and Han Duc Long.

In the case of Mr. Nguyen Thanh Chan, telling the press about the officers who pushed him on the path to pleading guilty, "investigator Tran Nhat Luat, Nguyen Huu Tan, Ngo Dinh Dung, Nguyen Trung Thanh, Doan Van Bien, and prosecutor Dang The Vinh ...took turns interrogating me day and night. At times, Mr. Tam took a knife to threaten me, then Mr. Luat took a hammer and hit me in the head. They read and made me copy my confession form. As for Mr. Vinh, every time I met him, I was afraid that if I didn't sign, I would beat to death" said Mr. Nguyen Thanh Chan.⁴¹¹ Regarding investigator Tran Nhat Luat, "The day I first arrested and detained, every night he came, Mr. Luat called to the room to get a bow and forced me to draw knives. At that time there was only me and him in one room, I didn't know how to draw the knife properly so he was beaten again. I fainted in pain, but he continued to intimidate me. I still remember the night when he took the ginseng bag from his bag to drink without needing water to regain his strength to continue beating and forced me to confess to murder. He also frequently threatened me: "You wouldn't accept me to beat you a death like Mrs. Hoan"" said Mr. Chan⁴¹².

⁴¹¹ Bao Chan, "After the case of injustice Nguyen Thanh Chan: Warning bells and problems remain open", Legal Journal (Hanoi, October 2014) 14

⁴¹² Bao Chan, "After the case of injustice Nguyen Thanh Chan: Warning bells and problems remain open", Legal Journal (Hanoi, October 2014) 14-15

According to Lawyer Pham Ngoc Minh - YouMe Law Firm, the case of Mr. Nguyen Thanh Chan shows the inadequacy of criminal procedure law (the case was accepted and adjudicated according to the 1988 and 2003 Criminal Procedure Code). In fact, the case of “Nguyen Thanh Chan murder” shows that there were documents, objects, and presentations that should be considered as evidence, but had not been fully considered as evidence by the proceeding agency. The law guarantees that documents, objects or representations “in favor” of the accused, must be treated as evidence, given by the accused, accused, or their defence attorney. In addition, given a full and comprehensive review by the proceeding agency (not “ignored”), at least these grounds are sufficient to deny Mr. Chan’s murder and could not lead to the injustice of the case.⁴¹³ According to Lawyer Duong Minh Kien, in the case, Mr. Chan voluntarily “confessed” to benefit from promised reducing criminal liability and the leniency of the law. However, when he was publicly questioned by the Trial Panel at the first instance trial, Mr. Chan immediately appealed⁴¹⁴, this showed the inconsistency in the accused’s own psychology and must have a special reason. Mr. Chan had to plead guilty in the process of taking testimony to then appeal in court.

Similar to the above case, in the case of Mr. Han Duc Long, the case files all show that, in the process of interrogating the accused Long at the investigation stage, the investigation agency of Bac Giang province repeatedly took testimony for the accused to write his own statement, draw a scene map of the road to the crime, in which many times invited the procurator of the People’s Procuracy of Bac Giang province to participate. The prosecutor also directly interrogated the accused Long. The accused made a sincere declaration and asked for the leniency of the law⁴¹⁵. However, when talking to his lawyer, Mr. Long said that “many times he was taken to interrogate on the second-floor room of the investigative agency’s office building and beaten here, many investigative activities took place here, did not in the interrogation room of the prison. That was, the investigation activity did not take place in the interrogation room of the prison for supervision by the prison guards, but took place within the working house of the investigating agency”,⁴¹⁶ therefore during the course of taking testimony, he was beaten with a wooden ruler and clamped his fingers with a pen by the investigator⁴¹⁷; it was so tortured that he thought he would die while in custody,

⁴¹³ Phi Long, *An overview of an unjust sentence in Bac Giang: Returning after 10 years of life imprisonment* <<https://laodong.vn/archived/toan-canh-ky-an-oan-o-bac-giang-tro-ve-sau-10-nam-bi-an-tu-chung-than-706444.lido>> accessed April 17, 2021.

⁴¹⁴ Duong Minh Kien (Lawyer), “Analysis of the case of injustice Nguyen Thanh Chan”, Vietnam Lawyer Journey (Hanoi, April 2014) 34.

⁴¹⁵ Ngo Ngoc Trai (Lawyer), *Ibid*, 31.

⁴¹⁶ Ngo Ngoc Trai (Lawyer), *Ibid*, 152.

⁴¹⁷ Ngo Ngoc Trai (Lawyer), *Ibid*, 64.

“the accused had to confess to having the chance to live in court and tell the truth that he has not committed a crime (...). The accused confessed that the investigator asked to write according to his words, if the accused did not write, the investigator would use the ballpoint pen to prickle the accused’s hand”⁴¹⁸; “when the prosecutor came to work with the accused, the investigators also worked with, and copied the transcript of the investigation and told me to sign the statement” said Mr. Long⁴¹⁹.

From the above two cases, the accused had no other way to prove their innocence except “confess” to live and then go to court for the opportunity to vindicate themselves.

Secondly, the injustice cases of Nguyen Thanh Chan and Han Duc Long occurred and were accepted by the 1999 Penal Code and the 1988 and 2003 Criminal Procedure Code.

According to the provisions of the 1988 and 2003 Criminal Procedure Code, testimony is evidence. Although modern criminology has affirmed: “only people and things that exist in space and time when the crime occurs, there are traces of crime on top of that, allowing people to look at it. How crime happened and who committed the crime and who committed that crime is considered witnesses and evidence”⁴²⁰. In Vietnam, however, for a long time, “the transcripts of testimony have been used to convict, even though the accused refuses in the trial, the original confession of the accused still was used as a pretext to convict”⁴²¹.

Provisions in these two laws have many limitations, especially the lack of provisions to protect the rights of the accused during detention and testimony. The 1988 and 2003 Criminal Procedure Code provided that the responsibility to prove a crime rests with the procedural agency. Also, according to the provisions of the Criminal Procedure Code, participants in the proceedings, agencies, organizations, or any individual can present documents, objects, and present matters related to the case. However, the documents, objects and presentations can only be the evidence when they are submitted to the proceeding agencies, and recognized by these agencies and included in the case files. Thus, the agency conducting the proceedings has the privilege of “ignoring” the “evidence” in favour of the accused in the case file. These provisions have shown the lack of fairness between the subjects in criminal proceedings, and it is necessary to be amended and supplemented to ensure clarification of the objective truth of the case, protection of rights, and the legitimate interests of the suspected criminal, decrease the injustice cases.

⁴¹⁸ Ngo Ngoc Trai (Lawyer), *Ibid*, 267.

⁴¹⁹ Ngo Ngoc Trai (Lawyer), *Ibid*, 84.

⁴²⁰ Ngo Ngoc Trai (Lawyer), *Ibid*, 243.

⁴²¹ Ngo Ngoc Trai (Lawyer), *Ibid*, 84.

Testimony is only used as a basis for deciding the case if the reporter voluntarily and is not subject to torture. To ensure that factor, the report must be witnessed by a lawyer or must record and record the interrogation to ensure that the report is voluntary. Although these shortcomings have been significantly overcome in the 2015 Penal Code (Amended in 2017) and the 2015 Criminal Procedure Code, in theory, it is possible to partially overcome the application of measures of duress, coercion, and corporal punishment in the process of taking the testimony of the accused, such as the process of taking testimony must be supervised by the Procurator, the Lawyer and the interrogation room must have a camera, a recorder, an observation room from the outside, etc. However, in practice, acts of intimidation, coercion, and other torture methods against the accused may be carried out before the accused comes to the interrogation room in order to make coercive pressure for the accused to have to declare exactly as it was suggested before that is completely possible.

Thirdly, in reality, it is difficult to determine the demarcation between the investigators' use of professional methods against the accused and the alleged acts of coercion, corporal punishment, torture, and inhuman treatment.

The case of Mr. Nguyen Thanh Chan happened in 2003, while the case of Mr. Han Duc Long happened in 2005, 2 years apart. Because the same case is particularly serious happening in Bac Giang province, the investigation, prosecution and trial are carried out by a number of agencies, and judicial officers. Two cases were resolved by the same number of judicial officers, the same investigator, the same prosecutor, the same judge, the same sentence style and writing⁴²².

From these two false cases, it shows that the reason for the use of torture to charge the two accused is partly due to the capacity and morality of the investigating officers and prosecutors of Bac Giang province, but at the same time shows the large gaps in the Vietnamese criminal justice system at that time, "making the procedure contains many risks, leading to injustice. The prosecutor's body is also unconscious. They have applied the correct legal process but still cause injustice in the form of doing wrong but do not know",⁴²³ that is the issue of duress, corporal punishment; lack of the original defence attorney's role; the problem is that there is no audio or video recording when interrogating, so when the accused confesses he lacks the basis to record it; the trial status is approved in advance without the basis of the argument at the trial, etc.

Fourthly, the investigation of suspects Nguyen Thanh Chan and Han Duc Long by investigating officers in Bac Giang province was not carried out in the interrogation

⁴²² Ngo Ngoc Trai (Lawyer), Ibid, 134

⁴²³ Ngo Ngoc Trai (Lawyer), Ibid, 168

room of the detention centre but took place in another room without the supervision of administrators of the prison. Therefore, “this is probably the reason why the injustice case in this province is more prominent than other provinces because the interrogation has not been supervised by the administrators of prison”⁴²⁴.

4. CONCLUSION AND RECOMMENDATIONS

In the criminal proceedings, suspects, accused, and accused must be considered a vulnerable group and special measures should be taken to protect their human rights. During the prosecution, investigation, and prosecution phase, they need to apply special protective measures to avoid the risk of torture or inhumane treatment. Therefore, the legal system, especially the criminal procedure law, needs to be perfected in the direction that proof of criminal acts is the responsibility of the authorities; all claims of the accused and the accused are only the reference opinion, not the main evidence, mainly to convict the accused. Therefore, to ensure the human rights of accused persons from being tortured, it is necessary to ensure the right to silence for the accused; stipulating that the accused’s testimony is not evidence; Investigators must participate in the proceedings at court sessions for the Trial panel and lawyers to verify the validity of collected documents and evidence, cross-examine and clarify allegations of persecution and corporal punishment that the accused testifies at the court session; ensure the principle of adversarial proceedings in the trial process.

This fact shows that the Vietnamese legal system in general and the criminal justice law, in particular, has continued to be perfected in the direction of protecting the legitimate rights and interests of accused, victims and the involved legal interests were getting better and better. However, no matter how complete this legal system, there will be shortcomings and gaps, which require individuals and agencies must be fair, integrity and justice, for people in using and applying the law. Because, if it leaves justice, all activities that apply the law, especially in criminal justice, will prosecute and judge the wrong person, wrong crime and lead to injustice. Reality shows that even if using recording and video recording methods, having a private bow room, closely monitored and with lawyers involved, the pressure, or collusion of parts (investigators, supervisors, prosecutors) can still happen and cause psychological and physical pressure before the interrogation to accuse the accused of confessing or being forced to confess guilt according to the script drawn out from before.

So, in addition to perfecting the law, perfecting technical measures to minimize the use of torture to force the accused to confess guilt, the selection, and training of

⁴²⁴ Ngo Ngoc Trai (Lawyer), *Ibid*, 152

the team Judicial officers are really “serving the public interest and justice, absolutely comply with the law, wholeheartedly for fairness, not self-interest for own sake” is especially important, because this is not only a professional measure and public duty but also for human rights.

In addition, the criminal procedure legal system in Vietnam continues to improve in the direction of ensuring independence in proceedings, in order to overcome the situation of “collusion” between prosecutors and investigators in the process, submitting investigation and prosecution, thereby ensuring that the People’s Procuracy performs well the function of supervising judicial activities to prevent the use of investigative officers’ powers in taking testimony for overcoming the situation of torturing the accused.

REFERENCES

1. Bao Chan, “After the case of injustice Nguyen Thanh Chan: Warning bells and problems remain open”, *Legal Journal* (Hanoi, October 2014).
2. Helmut Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sranmek Verlag Publishing House, 2015).
3. Duong Minh Kien, “Analysis of the injustice case Nguyen Thanh Chan”, *Vietnam Lawyer Journal* (Hanoi, April 2014)
4. Phi Long, *An overview of an unjust sentence in Bac Giang: Returning after 10 years of life imprisonment* < <https://laodong.vn/archived/toan-can-h-ky-an-oan-o-bac-giang-tro-ve-sau-10-nam-bi-an-tu-chung-than-706444.lido>> accessed April 17, 2021.
5. National Assembly, *The Constitution of the Democratic Republic of Vietnam 1946*, https://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=536, accessed April 22, 2021
6. National Assembly, *The Constitution of the Socialist Republic of Vietnam 2013* <https://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=28814> accessed April 22, 2021
7. National Assembly, *The 1999 Penal Code* <https://thuvienphapluat.vn/van-ban/Trach-nhiem-hinh-su/Bo-Luat-hinh-su-1999-15-1999-QH10-46056.aspx> accessed May 3, 2021
8. Luong Thi My Quynh (Editor), *Internalizing the Convention against Torture on Human Rights of Accused Persons in Vietnam’s Criminal Procedure Law* (Hong Duc Publishing House, Hanoi, 2017)
9. Duc Thuan and Minh Hai, “An uproar of ‘death row’ apology Han Duc Long: The father of the murdered child spoke up” <<https://vtc.vn/nao-loan-buoi-xin-loi-tu-tu-han-duc-long-bo-chau-be-bi-giet-hai-len-tieng-ar318659.html>> accessed April 20, 2021.
10. Ngo Ngoc Trai (Lawyer), *An unjust journey for death row inmate Han Duc Long* (Writers Association Publishing, Hanoi, 2019).
11. Minh Tú – Hùng Mạnh – Ngọc Anh, *Looking back on the vindication for Mr. Nguyen Thanh Chan - Term 1: Light at the end of the tunnel* <<https://coquandientravkstc.gov.vn/nhin-lai-vu-minh-oan-cho-ong-nguyen-thanh-chan-ky-1-anh-sang-cuoi-duong-ham/>> accessed March 24, 2021.
12. United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>, accessed May 5 2021

TORTURE PREVENTION IN CRIMINAL INVESTIGATION IN VIETNAM

Hoang Ngoc Anh*

Abstract: Vietnam has signed the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on November 7, 2013. It can be said this event is actually a milestone with great meaning, which shows the commitments of the Vietnamese government in the fight against physical and mental tortures on other persons, which are universally proscribed by the international community. In legislative practice and law enforcement in Vietnam, torture prevention has become a concern of the Vietnamese government very early. This article focuses on discussing some issues of law and law enforcement practice on torture prevention in the criminal investigation in Vietnam. At the same time, some solutions are proposed to improve the effectiveness of preventing torture in criminal investigations in Vietnam.

Keywords: Torture prevention, criminal investigation, Vietnam

1. LAW ON ANTI-TORTURE IN THE CRIMINAL INVESTIGATION IN VIETNAM

Vietnamese people had been victims of colonialism and had to pay the price of blood in the history of the struggle for national liberation. Therefore, they definitely understand the value of independence, freedom, and human rights. In the immortal Declaration of Independence that gave birth to the Democratic Republic of Vietnam, President Ho Chi Minh affirmed: "All people are born with equal rights. These include the right to live, to have freedom, and to pursue happiness".⁴²⁵ Throughout the history of the nation, the Communist Party of Vietnam and the State of the Socialist Republic of Vietnam have always consistently maintained the view of protecting and ensuring human rights, particularly the right of not being tortured, cruelly and inhumanly treated. Accordingly, institutionalizing the views of the Communist Party of Vietnam and the State of the

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⁴²⁵ The Declaration of Independence of the United States in 1776, Ho Chi Minh Collections, pp.555, National Political Publishing House.

Socialist Republic of Vietnam, the Constitutions of Vietnam (Constitutions of 1946, 1959, 1980, 1992, 2013) all have regulated the inviolability of the body of citizens. The 2013 Constitution has dedicated a separate chapter (Chapter II) with 36 articles stipulating human rights, fundamental rights, and obligations of citizens, including the right of equality to legal systems, and not to be discriminated in political, civil, economic, cultural, and social life; the right to be protected by law in terms of health, honour, and dignity, not to be tortured⁴²⁶. Especially, the right of not being tortured, treated or punished cruelly and inhumanly is stipulated in Clause 1, Article 20 of the 2013 Constitution. Accordingly, *“Everyone has the right to inviolability of the body; to be protected by law in terms of health, honour and dignity; shall not be subjected to torture, violence, coercion, corporal punishment or any other form of treatment that infringes upon the body, health, honour or dignity”*⁴²⁷.

Along with the provisions of the Constitution, the right of not being subjected to torture or cruel, inhuman or degrading treatment or punishment has been regulated in many other legal documents of Vietnam, especially in criminal legal documents. The issue of anti-torture in criminal investigation activities is of particular interest. Accordingly, the Penal Code 1985 - the first Penal Code of Vietnam - although though did not stipulate specific crimes of torture or any concept of torture, torture acts had been identified as crimes in the Penal Code, including the crime of Using corporal punishment (Article 234) and Forced confession (Article 235). The Penal Code 1999 (amended and supplemented in 2009) continues to regulate these two crimes in Articles 298 and 299. The Penal Code 2015 continues to stipulate two crimes of using corporal punishment and forced confession in Articles 373 and 374. Compared with previous Penal Codes, the crime of using corporal punishment and the crime of forced confession in the Penal Code 2015 is more detailed and more clearly about objective behaviour, as well as corresponding levels of consequences and penalties.

To comprehensively ensure these rights in general, in criminal investigation activities in particular, apart from the Penal Code, other legal documents also contain specific provisions aiming at preventing and punishing acts of a torturous activities in criminal investigations. This is shown clearly in the Criminal Procedure Code (2003 and 2015); the Law on Organization of Criminal Investigation Agencies (2015);⁴²⁸ the Law on Organization of the People’s Procuracy (2014).

First of all, the Criminal Procedure Code (2003, 2015) and the Law on Organization of Criminal Investigation Agencies both stipulate prohibited acts for procedure-conducting persons in the process of investigation, prosecution, trial

⁴²⁶ Dao Tri Uc (2015) 2013 Constitution and principles of respecting and ensuring human rights in criminal proceedings, Legal science, Ho Chi Minh Law University, 2015, No. 03(88), page 03-09.

⁴²⁷ See Clause 1, Article 20 of the 2013 Constitution

⁴²⁸ Before the Law on Organization of Criminal Police 2015, it was the Ordinance on Criminal Investigation 2004

and judgment execution.⁴²⁹ The Criminal Procedure Code 2003 stipulates that “... all forms of coercion and corporal punishment are strictly prohibited”; “... citizens have the right to be protected by law in terms of life, health, honour and dignity; all acts of infringing upon life, health, honour and dignity shall be handled according to law”. The Criminal Procedure Code 2015 has more specific and detailed regulations on this issue, “... it is strictly forbidden to torture, coerce, use corporal punishment or any other form of treatment that infringes upon the body, life, or health. human; Everyone has the right to be protected by law in terms of life, health, honour, dignity and property. Any illegal acts of infringing upon the life, health, honour, dignity and property of an individual or infringing upon the honour, reputation and property of a legal entity shall be handled according to law...”. The Law on Organization of Criminal Procedures 2015 also stipulates 04 groups of prohibited acts in a criminal investigation related to the protection of the rights of arrested, detained and accused persons, which prohibits “Using force for testimony, using corporal punishment and other forms of torture or cruel, inhuman or degrading treatment and punishment or any other form of infringing upon the legitimate rights and interests of the agency, organizations and individuals”⁴³⁰.

In addition, to prevent violations in general and acts related to torture in investigation activities in particular, Vietnam also stipulates the establishment of independent agencies and mechanisms to supervise the activities and the behaviour of the person conducting the proceedings, especially in the activities of interrogating (taking statements of detainees, interrogating the accused). The Constitution, the Criminal Procedure Code 2015, the Law on Organization of the People’s Procuracy 2014, as well as many legal documents in procedural activities, define that “The People’s Procuracy executes the right to prosecute and supervise the activities of investigation agencies; control the legitimacy of acts and decisions of agencies, organizations and individuals in judicial activities”.⁴³¹ Based on these regulations, it is determined that the People’s Procuracy is the competent agency in supervising the criminal investigation activities of the Criminal Investigation Agencies, including supervising activities of interrogating the accused and taking testimonies of temporary detainees. The process of implementing the supervision of the People’s Procuracy, whether in direct or indirect form, is of great significance in preventing, detecting and promptly handling the acts of torture in the criminal investigation.⁴³²

To prevent acts of torture in criminal investigation, especially in the interrogation of the accused, the Criminal Procedure Code 2015 also added provisions on audio

⁴²⁹ See Articles 6 and 7 of the Criminal Procedure Code 2003; Article 10, Article 11 of the Criminal Procedure Code 2015

⁴³⁰ See Clause 2, Article 14 of the Law on Organization of Criminal Police 2015

⁴³¹ Clause 1, Article 107 of the 2013 Constitution

⁴³² See Clause 1, Article 4 of the Law on Organization of People’s Procuracy 2014

recording or video recording in the criminal investigation and the process of interrogating the accused and when receiving denunciations, information on crimes, taking testimonies, confronting and judging.⁴³³

In addition to a system to prevent and punish torture-related acts relating to public officials, Vietnam also pays special attention to ensuring the rights of the accused, in particular the right to defence and the protection of oneself against the risk of torture during the process of investigation. Accordingly, the Criminal Procedure Code 2015 specifically stipulates the right to present testimonies and opinions; detained people, arrested people, persons held in custody, accused, defendants do not have to testify against himself or be forced to admit guilt; to ensure the rights of detainees to meet family members, lawyers, people's advocates, and legal aids... The Criminal Procedure Code also regulated 14 groups of rights of counsels, including the right to meet and question the accused; the right to participate in defence from the time the person arrested, present in activities of confrontation, identification, voice recognition, request to conduct legal proceedings; the right to participate in questioning and debate at the court hearing... The addition and provisions of these rights in the laws are the evidence to show the determination of the State of Vietnam in respecting and protecting human rights, which also to contribute to protecting victims of torture.⁴³⁴

Besides, the Vietnamese legal system also stipulates the right to complain, denounce and receive compensation for material and spiritual damage and restore honour to those who have been wrongly or illegally violated in the process of arresting, prosecuting, investigating, prosecuting, adjudicating and executing judgments. Accordingly, *"Everyone has the right to complain and denounce to competent agencies, organizations and individuals about illegal activities of agencies, organizations and individuals. Competent agencies, organizations and individuals must receive and settle complaints and denunciations. Damage sufferers have the right to material and spiritual compensation and honour restoration in accordance with the law. It is strictly forbidden to take revenge on the complainant or denouncer or to take advantage of the right to complain or denounce to slander, slander or harm others"*⁴³⁵. The persons who are illegally arrested, detained, prosecuted, investigated, prosecuted, tried or executed have the right to receive compensation for material and spiritual damage and restoration of honour. Competent agencies in

⁴³³ See Clause 1, Article 146; Clause 6, Article 183 of the Criminal Procedure Code 2015

⁴³⁴ See: Speech by Senior Lieutenant General Le Quy Vuong, Deputy Minister of Public Security, Head of the Vietnamese Delegation at the Defense Session of Vietnam's 1st National Report on the Implementation of the Convention Against Torture (Committee Against Torture of Vietnam). United Nations, Geneva, November 14-15, 2018)

⁴³⁵ Article 30 of the Constitution 2013

criminal procedure activities that have unjustly committed or caused the damage must compensate for the damage and restore honour and interests to the victim and damage sufferers; the person who caused the damage is responsible for making compensation to the competent authority in accordance with the law.⁴³⁶

2. CURRENT SITUATION OF TORTURE-RELATED CRIMES IN VIETNAM AND CAUSES

According to statistics of Vietnamese authorities, in the five years from 2010 to 2015, the People's Court has accepted and tried 10 cases with a total of 26 defendants for using corporal punishment in criminal investigation with 4 cases, 8 defendants in 2012; 1 case, 2 defendants in 2013; 3 cases, 7 defendants in 2014; and 2 cases, 9 defendants in 2015⁴³⁷. Regarding the crime of forced confession, although there are reports and denunciations about this crime, the People's Court has not yet accepted and judged any case about the crime of forced confession.

From the above data, it can be seen that, in Vietnam, the type of crime of torture in criminal investigation activities brought to trial by the People's Court is only the crime of using corporal punishment. Regarding corporal punishment, the number of cases brought to trial is also low. According to the author, the number of cases of torture crimes in Vietnam handled by the authorities has not yet fully reflected the actual situation of this type of crime. In practice, the situation of the crimes of forced confession and the crime of using corporal punishment maybe be higher. This situation comes from both subjective and objective causes.

a. Objective reasons: Mainly because of the incomplete or limited provisions of the law in Vietnam

Vietnamese law has relatively fully regulated some types of torture-related crimes in criminal investigation activities, as well as regulations on agencies, mechanisms and methods, means of inspection, surveillance to prevent and combat these types of crimes. However, the situation of torture-related crimes in criminal investigation activities in Vietnam (forced confession and using corporal punishment) still occurs, and maybe even more complex than the number that the authorities have shown statistical authorities.

Through studying the reports of the authorities, as well as directly surveying and evaluating in and discussing with functional officers of the Supreme People's

⁴³⁶ See: Speech by Senior Lieutenant General Le Quy Vuong, Deputy Minister of Public Security, Head of the Vietnamese Delegation at the Defense Session of Vietnam's 1st National Report on the Implementation of the Convention Against Torture (Committee Against Torture of Vietnam). United Nations, Geneva, November 14-15, 2018)

⁴³⁷ According to the "First Country Report on the Implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" of the Socialist Republic of Vietnam, 2017

Procuracy (the agency competent to investigate the cases of a torturous nature occurring in criminal investigation activities), the author determines that the crime situation related to torture in criminal investigation activities in Vietnam (Crimes of forced confession and crimes of using corporal punishment) are due to:

Firstly, the provisions of the Penal Code 2015 on the crime of forced confession and the crime of corporal punishment have not yet ensured objectivity and comprehensiveness, and the penalties applied to this type of crime are still inadequate, which reduces the effectiveness of the fight against these types of crime. Specifically:

- The use of legal terms in the law has not yet been ensured. Accordingly, both Article 373 and Article 374 of the Penal Code 2015 do not provide a specific concept of what is a crime of using corporal punishment or forced confession, but they are only specified in the form of a description of the behaviour. However, the description of this behaviour does not in agreement with the name of the article. In Article 373 of the Penal Code 2015, the legislator separates into two acts for using corporal punishment and cruel treatment, humiliating the dignity of others in any form. Thus, is the cruel treatment and humiliation of another's dignity in any form included in the crime of using corporal punishment?⁴³⁸ If it is within the scope of the crime of using corporal punishment, the fact that the legislator separates this behaviour from the use of corporal punishment creates many different views as well as does not ensure the scientific and logical nature of the design of the law. At the same time, the consistency between the name of the article and the specific content/description of the law is not guaranteed. Article 373 stipulates that the offenders who use corporal punishment or cruelly treat others, degrading the dignity of others. Thus, these are two completely independent sides. Accordingly, if it can be proved that a person has committed an act of using corporal punishment or cruel treating, degrading the dignity of another person, it is possible to convict that person under Article 373 of the Penal Code 2015. However, at present, it is not easy to identify acts of brutality and humiliation of other people's dignity because this depends mainly on the subjective consciousness of relevant agencies as there is no specific guiding document, in practice there is often no uniformity in application⁴³⁹.

Similarly, in Clause 1, Article 374 of the Penal Code 2015 about the crime of forced confession, the legislator stipulates those two specific subjects affected by this type

⁴³⁸ Trinh Duy Thuyen (2015) Completing the provisions on the crime of "using corporal punishment" in the Penal Code in the spirit of the Convention Against Torture, Procuracy Journal, No. 21/2015, page 48-52.

⁴³⁹ Hoang Ngoc Anh (2020) Discussing the practical application of the provisions of the crime of using corporal punishment, Procuracy Journal, No. 22/2020, p. 36 – 40

of crime are the interrogator and the person whose testimony is taken. However, according to the provisions of the Criminal Procedure Code 2015, the person being interrogated can only be the accused. The name of the article, in a narrow sense, leads to the understanding that it only affects the subject of the accused, not the subject of the testimony. Because the content of the name of the article has not been specified, there are still inconsistent and inaccurate interpretations of this.

The incompatibility as analyzed above is one of the reasons that makes it difficult to understand and apply the provisions of the Penal Code 2015 on the crime of forced confession and the crime of using corporal punishment in practice.

- Some aggravating details have not been explained for specific applications, which leads to confusion in practice.

In both Article 373 and Article 374 of the Penal Code 2015, the legislator has added a number of new framing circumstances to concretize general circumstances such as causing “serious consequences”, “causing very serious consequences”... in the provisions of the Penal Code 1999. However, some details need to be explained and guided specifically to ensure the accurate application of the law. Specifically:

At Point c, Clause 2, Article 373 of the Penal Code 2015, the details are added: “Using sophisticated and cunning tricks”. However, currently there are many different views of determining what is a sophisticated and cunning trick, while there is no official opinion for general application. Therefore, the practical application of this circumstance depends on the subjective assessment of the procedure-conducting person.

In addition, point d, Clause 2, Article 373 and point c, Clause 2, Article 374 of the Penal Code 2015, the term “the elderly and weak” is used; however, neither the Law on the Elderly nor the Penal Code 2015 defines what the elderly are. This provision also shows the incompatibility of different articles in the Penal Code 2015 that use the term people from full 70 years of age or older...

The Penal Code 2015 basically replaced the term elderly and weak people with people aged full 70 years or older. Therefore, the provisions of Article 374 still keep the term “old and weak” as it does not ensure the synchronization with the entire contents of the Penal Code 2015. Article 2 of the Law on Elderly 2009 also only stipulates the concept of “the elderly”. In subsection 2.4, section 2, Resolution No. 01/2006/ND-HDTP dated May 12, 2006 of the Council of Judges of the Supreme People’s Court guiding a number of provisions of the Penal Code, the elderly is those aged 70 years or older. At point a, subsection 4.1, section 4, Resolution No. 01/2007/ND-HDTP dated October 2, 2007 of the Council of Judges of the Supreme People’s Court guiding a number of provisions of the Penal Code on the statute of limitations

for judgment execution in the case of a person who is 70 years old or older, or who is 60 years old or older, but often falls ill, is exempted from serving the penalty or has the time limit for serving the penalty reduced. Thus, at present, the term “elderly and weak” defined in Article 374 of the Penal Code 2015 still has no specific guiding documents, which causes difficulties in the application of the law.⁴⁴⁰

Secondly, the implementation of the provisions of Clause 6, Article 183 of the Criminal Procedure Code 2015 on audio and video recording in interrogation activities of the accused has difficulties and shortcomings, so it has not been effectively used in reality.

The interrogation of the accused at the detention facility or at the head office of the investigating agency or the agency assigned to conduct a number of investigative activities must be recorded with audio or video, and at the same time, the interrogation of the accused must be recorded. The interrogation of the accused at another place is recorded with sound at the request of the accused or the agency or person competent to conduct the proceedings for the first time, specifically recorded in Clause 6, Article 183 of the Criminal Procedure Code 2015. However, this is a new regulation, so the implementation in practice is still inadequate and has not met the requirements of practice due to the need to prepare both human resources and facilities...

Up to now, the Ministry of Public Security of Vietnam has only piloted audio recording and video recording in criminal proceedings at 45 establishments⁴⁴¹. Therefore, at a general level, it can be seen that the regulations on audio or video recording in interrogation activities of the accused in order to prevent investigators from forcing and using corporal punishment have not been implemented and have not been proved to be effective in practice.

b. Subjective reasons

It can be said that in the process, the investigation stage plays a very important role in collecting and establishing evidence. The system of evidence is the “important source” to prove the presence or absence of a crime, in which, interrogation of the accused plays a key role. However, this is a sensitive and quite complicated operation. Because, for the interrogation to be effective and obtain evidence of high probative value, while complying with the provisions of the Criminal Procedure Code 2015 in investigating activities, investigators must also apply professional measures. However,

⁴⁴⁰ Hoang Ngoc Anh (2021) Discussing the crime of forced confession specified in article 374 of the 2015 Penal Code, Court Journal, No. 09/2021, p. 5 - 9

⁴⁴¹ See: Speech by Senior Lieutenant General Le Quy Vuong, Deputy Minister of Public Security, Head of the Vietnamese Delegation at the Defense Session of Vietnam’s 1st National Report on the Implementation of the Convention Against Torture (Committee Against Torture of Vietnam). United Nations, Geneva, November 14-15, 2018)

the effectiveness of investigative activities depends largely on the skills, expertise, and consciousness of investigators. If the investigation is done inappropriately, it can easily lead to a lot of negative behaviours. Some of the main subjective reasons can be pointed out:

Firstly, investigators and prosecutors have wrongly identified motives and purposes in investigating and prosecuting the offenders, and they want to solve the case quickly to improve their reputation, or because of the pressure of investigation time and “achievement” disease. Therefore, when facing difficulties in collecting evidence, they use coercive measures and corporal punishment to force the suspects of committing a crime to confess in the ways that they want.⁴⁴²

In addition, some investigators are inexperienced in investigative skills and professional ethics. In the interrogation process, they do not know how to effectively combine professional measures and psychological manipulation techniques so that the accused cooperate with the investigators in finding the truth. In such cases, investigators usually only focus on using coercive measures such as intimidation, corporal punishment... to force the accused to confess. In such cases, investigators usually only focus on using coercive measures such as intimidation, corporal punishment, etc. to force the accused to confess. In addition, some investigators still have the idea that “confession is more important than evidence”, so by all means, they will force the accused and interrogators to confess, including forced confession and torture.

Secondly, the agencies conducting proceedings, in general, want to keep their honour and reputation, so when there are acts of coercion or corporal punishment, they are usually handled internally and administratively. When the cases of forced confession and using corporal punishment are brought to trial, the punishment applied is usually very light to deter similar cases in the future.⁴⁴³

Thirdly, the procurators have not performed well and fulfilled their responsibility to supervise the investigation activities of the investigators, especially in the interrogation of the accused. The supervision of interrogation activities is carried out in two forms: direct supervision and indirect supervision. However, the procurators mainly do it through the form of indirect supervision by studying the minutes of interrogation. Therefore, the prevention of using corporal punishment from surveillance activities is not high. It was the chairman of the Law Committee of the XIII National Assembly, Nguyen Van Hien, who told the National Assembly: “In 3

⁴⁴² Duc Minh, forced confession, corporal punishment: more fact than report; <http://plo.vn>; September 12, 2014

⁴⁴³ Linh Thu, forced confession, corporal punishment mainly in criminal cases; <http://vietnamnet.vn>; September 11, 2014

years, there were only 10 cases of corporal punishment brought to trial, of which 90% of the accused was not applied imprisonment. Is that strict enough?"⁴⁴⁴

Fourthly, the quantity and quality of lawyers are still low, and the participation of lawyers to protect the interests of the accused is still very limited. There are also cases where investigators deliberately influence the accused so that the accused give up his intention to invite a lawyer to protect his interests. In some other cases, lawyers were appointed to participate in protecting the interests of the accused but the lawyers did not fulfil their responsibilities. "The participation of lawyers from the very beginning in the proceedings must be a mandatory principle to combat coercion and the use of corporal punishment. Our law also stipulates this issue such as: After being detained for 24 hours or if prosecuted, within 3 days, the lawyer has the right to meet the person held in custody or the accused, but in fact these rights It is almost impossible, except for specified cases such as juvenile cases, sentences with punishments up to the death penalty, only the procedural agencies invite lawyers very early to legalize the procedures and investigation file"⁴⁴⁵

3. SOME SOLUTIONS TO IMPROVE THE EFFECTIVENESS OF PREVENTING TORTURE-RELATED CRIMES IN CRIMINAL INVESTIGATION ACTIVITIES IN VIETNAM

On the basis of determining the causes of the crime situation related to torture in criminal investigation activities in Vietnam, the author proposes some solutions to prevent this type of crime as follows:

Firstly, it is necessary to continue to study, supplement and complete the provisions of the Penal Code 2015 on the crime of forced confession and the crime of using corporal punishment, especially the inadequacies and contradictions as analyzed by the author above. However, in the immediate future, in order for law enforcement agencies in Vietnam to properly perceive and uniformly apply the provisions of the Penal Code 2015 on the crime of forced confession and the crime of using corporal punishment, the competent agencies (Central Judicial Branch of Vietnam). It is necessary to issue guiding documents on a number of new framing details added to Articles 373 and 374 of the Penal Code 2015 without specific guidance.

Secondly, there must be a method to uphold the sense of responsibility, professional ethics, and sense of law observance of the team of investigators and procurators associated with strengthening the inspection and examination complying

⁴⁴⁴ Linh Thu, forced confession, corporal punishment mainly in criminal cases; <http://vietnamnet.vn>; September 11, 2014

⁴⁴⁵ "Anti-forced confession, corporal punishment must be promoted from the human factor" (thanhtra.com.vn)

with working regulations and work procedures; Regularly improve the political and ideological education and the qualifications of law enforcement officers. Focus on educating and fostering investigators and procurators in the sense of responsibility and professional ethics.

Leaders of procedure-conducting agencies at all levels must uphold the sense of responsibility in leading, directing, urging, inspecting and guiding investigators and procurators in order to promptly detect and correct loopholes and shortcomings in arrest, detention, investigation and prosecution; strictly handle violations and resolutely transfer from the prosecution agency individuals who commit serious violations in investigation and prosecution; handle the joint responsibility of the head of the procedure-conducting agency in case of injustice, wrongdoing, coercion or torture.

Thirdly, it is necessary to further strengthen the investigation and supervision activities of the Procuracy, especially interrogation activities.

Both theoretically and practically, it is confirmed that the investigation and supervision activities of the Procuracy play an important role in criminal proceedings in order to ensure that the investigation activities are carried out in accordance with the provisions of the law. In addition, investigative supervision also plays a role in ensuring that all violations and crimes are detected and handled accurately, promptly, quickly and fairly in order to improve the effectiveness of the fight against crimes, maintaining order and discipline of the law. Therefore, in order to prevent crimes in general, crimes related to torture in criminal investigation activities in Vietnam (crimes of forced confession, crimes of using corporal punishment) in particular, it is necessary to further strengthen the investigation activities of the Procuracy, especially supervision of interrogation activities.

In order to do this, on a macro scale, members of the Procuracy at all levels in Vietnam need to be properly and sufficiently aware of the function of supervising the investigation of criminal cases in general, and the cases of abuse of power in using corporal punishment, in particular, is regulated in the 2015 Criminal Procedure Code and the 2014 Law on Organization of the People's Procuracy. The Procuracy needs to focus on thoroughly solving theoretical problems such as the nature of investigation activities., scope of supervision of investigative activities, methods of monitoring investigation activities...; the relationship between the functions of exercising the right to prosecute and control the activities of criminal cases in general, cases of corporal punishment, and cases of forced confession in particular..

Fourthly, the authorities, especially the police, need to widely implement the provisions of Clause 6, Article 183 of the Criminal Procedure Code 2015 on audio and video recording in interrogation activities.

- Continue to train the officers working on the investigation to understand and unify the perception of audio recording or video recording; using, preserving and storing audio or video recording results in the course of the investigation, prosecution and adjudication.

- Localities and units take the initiative in formulating implementation plans suitable to the actual conditions of each locality or unit; in which clearly delineates cases where sound recording or video recording is required. Along with that, it is necessary to take advantage of resources to urgently renovate and build new interrogation rooms with audio recording or video recording equipment at the headquarters of the unit, providing appropriate technical equipment.

Fifth, it is necessary to focus on developing a team of lawyers in sufficient quantity and quality to ensure the good performance of the role of defence counsels in criminal proceedings, and at the same time, raise the society's awareness of the position and role of lawyers in providing legal advice and assistance in general, and defending the accused in particular. Whereby:

In summary, it can be said that anti-torture in criminal investigation is a common trend in countries around the world. Vietnam is a member of the Convention against Torture, and at the same time, it needs to ensure the effective implementation of commitments to protect human rights and citizens' rights. So it is necessary for Vietnam to improve the effectiveness of combatting torture-related crimes in criminal investigation activities. Though the current situation of torture-related crimes in Vietnam is not too serious, but as discussed above, not many cases of these crimes had been handled. Thus, the Vietnamese government and relevant agencies need to enhance the quality of their activities related to combating acts of forced confession and corporal punishment. To combat all acts of forced confession and corporal punishment in accordance with regulations of the Constitution and legal documents, it is important to continue studying and perfecting the relevant legal provisions in the fight against forced confession and corporal punishment, as well as propose practical solutions to prevent and combat them.

REFERENCES

1. Vietnam's 1st National Report on the Implementation of Convention against Torture, Ministry of Public Security (2015).
2. Dao Tri Uc (2015) 2013 Constitution and principles of respecting and ensuring human rights in criminal proceedings, Legal science, Ho Chi Minh Law University, 2015, No. 03(88), page 03-09.
3. Trinh Duy Thuyen (2015) Completing the provisions on the crime of "using corporal punishment" in the Penal Code in the spirit of the Convention Against Torture, Procuracy Journal, No. 21/2015, page 48-52.

4. Hoang Ngoc Anh (2020) Discussing the practical application of the provisions of the crime of using corporal punishment, *Procuracy Journal*, No. 22/2020, page 36 - 40
5. Hoang Ngoc Anh (2021) Discussing the crime of coercion specified in article 374 of the Criminal Code 2015, *Procuracy Journal*, No. 09/2021, page 5 - 9
6. Socialist Republic of Vietnam (2017), First Country Report on the Implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment human.
7. Senior Lieutenant General Le Quy Vuong, Deputy Minister of Public Security, Head of the Vietnamese Delegation, Speech at the Defense Session of the First National Report of Vietnam on the Implementation of the Convention Against Torture (Committee Against Torture) of the United Nations, Geneva, November 14-15, 2018).
8. <https://thanhtra.com.vn/phap-luat/hoan-thien-the-che/Chong-buc-cung-nhuc-hinh-phai-phat-huy-tu-chinh-yeu-to-con-person-78770.html>
9. <https://plo.vn/thoi-su/chinh-tri/buc-cung-nhuc-hinh-thuc-te-nhieu-hon-bao-cao-495472.html> "The bow, corporal punishment: reality more than reports"
10. <http://vietnamnet.vn>; On September 11, 2014, Linh Thư, *Bức cung, nhục hình chủ yếu trong án hình sự*
11. <https://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/79/299> "Crime of coercion, Crime of using corporal punishment – Actual situation and complete solutions to improve efficiency in protecting the rights of suspects, accused and defendants in Vietnam"

CHALLENGES IN INVESTIGATING ACCUSATION OF TORTURE AND DURESS IN VIETNAM

Hoang Dinh Duyen*

Abstract: The accusation of torture and duress in prosecution has the sign of the offence “Use of torture,” or “Obtainment of testimony by duress.” An indication of injury or death is not an obligatory element of these crimes. The practice shows that these crimes are only convicted by consequence, such as death, serious injury, or wrongful conviction. The allegation of accused people, their relatives are hard to investigate and verify. The main reason is that only one source of evidence comes from the denunciation of the accuser without other sources; therefore, the investigation authority does not open an investigation. Applying some measures such as strengthening the application of technology in prosecution, tape-recording, and video recording when taking testimony are some of the initiatives to prevent torture and duress and enhance the efficiency of investigating an accusation of torture duress.

Keywords: investigation, accusation, torture, duress, Vietnam.

1. PROVISIONS RELATING TO INVESTIGATING AN ACCUSATION OF TORTURE AND DURESS

1.1. Provisions in the Criminal Code

The terminology “torture” and provisions anti-torture is stipulated in the Constitution 2013 (Article 20), Criminal Procedure Code 2015 (Article 10), Law on Enforcement of Custody and Temporary Detention 2015 (Article 4 and 8), Law on the Organization of Criminal Investigation Agencies 2015 (Article 14). The Criminal Code 1999 did not conceptualize this term and regulate precisely. However, every action with the nature of torture constituted a crime, such as applying corporal punishment (Article 298), forcing evidence or testimony (Article 299), bribing or coercing other persons to make false declarations, or supplying false documents (Article 309). Furthermore, acts of a brutal nature can also be criminally prosecuted for crimes such as murder (Article 93), causing death to people in the performance of official duties (Article 97), forced suicide (Article 100), threatening to murder (Article 103), inflicting injury on or causing harm to the health of other persons while performing official duty (Article 107), ill-treating other persons (Article 110), humiliating other persons

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(Article 121), illegal arrest, custody or detention of people (Article 123), insulting or assaulting commanders or superiors (Article 319), humiliating or applying corporal punishment to subordinates (Article 321), ill-treating prisoners of war and/or enemy deserters (Article 340).

The Criminal Code 2015 (amended and supplemented in 2017) has expanded the subjects and acts and increased the level of punishment for acts related to torture, which are more consistent with the concept of torture specified in the convention and Vietnam's actual conditions, especially in articles: Article 373 (use of torture), Article 374 (obtainment of testimony by duress) and Article 384 (bribing or forcing another person to give testimony or provide documents).

A new point in Vietnamese law allows the selection and application of case law in a trial. Applying case law in Vietnam is a new step, contributing to the uniform and flexible application of the law, especially in the field where there may be different interpretations, such as human rights law and related law. Regarding torture. The Chief Justice of the Supreme People's Court issued Decision No. 220/QĐ-CA dated April 6, 2016, and Decision No. 698/QĐ-CA dated October 17, 2016, on the publication of case precedents.

- The offence "Use of torture" is provided in Article 373, the 2015 Criminal Code, amended 2017 having new points in comparison with Article 298 in the 1999 Criminal Code.

+ Consider the brutal treatment or insulation as an element of this crime to encompass the mental torture.

+ Expand the scope of criminal offenders using torture as any person in prosecution, judgment execution, or during mandatory attendance at a correctional institution or rehabilitation centre.

+ Concretize circumstances aggravating criminal liability and add a new clause (clause 4) to aggravate criminal liability for death with a penalty of 12 to 20 years imprisonment or life imprisonment.

- The offence "Obtainment of testimony by duress" is provided in Article 374, the 2015 Criminal Code, amended 2017 having new points in comparison with Article 299 in the 1999 Criminal Code:

+ Expand the scope of criminal offenders: Not only competent persons in taking testimony from the accused and defendant in a criminal case but also persons who interrogate witnesses, victims, or persons with related interests or obligations.

+ Using the term "interrogated person" instead of "person being questioned" is compatible with the 2015 Criminal Procedure Code provisions regarding taking a statement from witness and victim.

+ Concretize circumstances aggravating criminal liability, including use of torture or brutal treatment, insulating interrogated person; adding a new clause (clause 4) to aggravate criminal liability with a penalty of 12 to 20 years imprisonment or life imprisonment if one of the following cases is found: the suicide of the interrogated person; wrongful conviction of an innocent person; omission of a severe crime or severe crime.

1.2. Provisions in the Criminal Procedure Code about processing offence denunciation related to the use of torture and duress

Denunciations related to torture and duress are a source of offence processed following the 2015 Criminal Procedure Code provisions. To be more specific, the accusation needs to be received and resolved promptly and legitimately according to the Criminal Procedure Code.

Receiving reports and denunciations about crime: The investigation agency must organize 24/24 criminal duty. Procuracy at all levels must organize 24/24 professional duty to fully receive all reports of criminal denunciations, including allegations about torture and duress (including reporting crimes on the mass media); classify and immediately transfer to the competent authorities for settlement. The reception place must be located conveniently, with a signboard showing the agency's name and widely announced for everyone to know.

Agencies tasked to investigate, such as police of communes, wards, townships, police stations, must arrange officers directly to receive reports of criminal denunciations. There are allegations of torture and duress. Other agencies and organizations, when there are allegations of torture and duress, must assign recipients.

Allegations of torture and duress received through the post, telephone service, or other means of communication must be recorded in the receipt. Suppose individuals directly denounce allegations of torture and duress, or representatives of agencies or organizations come to report the news. In that case, they shall make a record of receipt and record them in the reception book. The reception can be audio or video recorded.

After receiving allegations of torture and duress, the investigation agency must conduct classification within 24 hours from the date of receipt. In case of allegations of torture and duress under their jurisdiction, they shall be handled according to regulations. If there is a basis for determining that the allegations of torture and duress do not fall under the jurisdiction of their respective agencies, immediately forward the denunciations to the competent investigating agency for settlement within more

than 24 hours since there is a basis to determine. If the transfer is not possible, it must be notified by the fastest form of contact to the competent investigation agency.⁴⁴⁶

Settlement of allegations of torture and duress: Within 03 days from the date of receipt of allegations of torture and duress, the Head of the investigation agency directly dictates and assigns investigators and investing officers under the authority to accept, resolve or issue a decision to assign the Deputy Head of the investigation agency to organize, direct the acceptance, settlement and notify in writing to the competent Procuracy. For allegations of torture and duress, after being received, the elements of the crime are clear and have enough basis to prosecute criminal cases. The investigation agency shall issue a decision to initiate the criminal case following the 2015 Criminal Procedure Code.

At the end of the process of settling denunciations, criminal reports, and criminal case initiation proposal, the investigation agency must issue one of the decisions, which is the decision not to prosecute a criminal case; Decisions to prosecute criminal cases or decisions to suspend the handling of criminal information when there is the basis for suspension.

1.3. Provisions in Law on Organization of Criminal Investigation Bodies

Law on Organization of Criminal Investigation Bodies provides prohibited acts in criminal proceedings to protect the accused and arrested persons: “Forcing persons to give testimonies, applying corporal punishment and forms of torture or barbarous and inhuman treatment, penalties or humiliation or any acts infringing upon the legitimate rights and interests of agencies, organizations, and individuals”.

Authority to settle denunciation relating to the use of torture and duress in criminal proceedings is entitled to the Investigating Office of the Supreme People’s Procuracy and Central Military Procuracy.⁴⁴⁷

The Investigating Office of the Supreme People’s Procuracy investigates allegations of torture and duress related to officers working at Investigation Agency, People’s Court, People’s Procuracy, enforcement agency, and competent persons implementing judicial activities if a crime is under the People’s Court’s jurisdiction.

The Investigating Office of the Central Military Procuracy investigates allegations of torture and duress that are under the Military Court’s jurisdiction.

When a case involves both a defendant or a crime falling under the jurisdiction of the Military Court and simultaneously under the jurisdiction of the People’s Court, the adjudication authority shall be exercised:

⁴⁴⁶ Joint circular No. 01/2017/TTLT-BCA-BQP-BTC-BNN&PTNT-VKSNDTC 2017.

⁴⁴⁷ Article 30 Law on Organization of Criminal Investigation Bodies 2015.

In case the case can be separated, the Military Court shall try the defendants and criminals under its jurisdiction; The People's Courts adjudicate defendants and criminals within its jurisdiction. If the case cannot be separated, the Military Court shall hear the whole case.

2. MEASURES TO INVESTIGATE DENUNCIATION RELATING TO TORTURE AND DURESS

In order to investigate allegations of torture and duress, the investigating agency needs to clarify these issues: whether or not the torture employed, the time, place, and other circumstances related to the act of torture and duress; Who is the one who conducts the acts; deliberate or involuntary; capacity to bear criminal responsibility; purpose, dynamic; circumstances that mitigate or aggravate criminal liability and personal characteristics of suspects and defendants; the nature and extent of damage caused by the criminal acts; the cause and conditions of the crime; other circumstances related to the exemption from criminal liability and penalty⁴⁴⁸.

To clarify these issues, the investigating agency would conduct these matters to collect and assess the evidence.

- *Take testimony*: After receiving the denunciation, the investigating officers take testimony from a tortured person and alleged persons, including Investigator, Investigating Officer, Prosecutor, witnesses.

According to regulations, investigators and investigating officers must explain to the person taking testimony about their rights and obligations in accordance with the Criminal Procedure Code before taking testimonies. Officers also have to ask the relation between interrogated persons and the accuser, the accused, and other facts about the identity traits of these people.

For the witness, when taking testimony, the Investigators ask witnesses to present or write honestly and voluntarily what they know about the case before interrogating. When finding that investigators' testimonies are not objective or illegal, the Prosecutors may take testimonies from witnesses.

At the end of taking testimony, investigators and investigating officers who record the statement must read the written record to the witnesses and their representatives (if any) and explain their right to supplement and comment on the record. Additional ideas and comments of these people are written in the record. In case of not accepting the supplement, the reason must also be specified in the record. Witnesses and investigators sign the record together. If the witness or representative (if any) does not sign the record, the investigator shall clearly state the reason and

⁴⁴⁸ Article 85 Criminal Procedure Code 2015.

invite the witness to sign the record. If witnesses are illiterate, investigators shall read the record out in the presence of witnesses. The record bears the signature of witnesses and the fingerprint of illiterate persons.

To ensure objectivity when taking testimonies and the results of taking testimony, officers need to have an audio and visual record. In this case, when the testimony is taken, the witness must be informed. In the end, the audiotape must be replayed. The content of the testimony must be recorded so that the investigator and the witness must listen together and sign the written record.

- *Confiscate related objects and documents*: Confiscate objects and documents through a search of a body, residence, workplace, area, vehicle, document, item, mail, telegraphy, postal package, and electronic data. Seize mails, phones, telegraphs, electronic data. Documents and objects are examined and identified to determine the extent to which they are related to the act of torture or corporal punishment.

- *Solicit expert assessment*: Based on the initial testimony of the relevant persons, the Investigation Agency requests forensic examination to determine the cause of death; injury assessment to determine the victim's physical disability; inspect traces to determine how the victim's body is harmed, examine documents and materials; convert electronic data into readable, audible documents, inspect the integrity of documents on images, sound assessment, thereby determining the content and development of the incident.

- *Conduct experimental investigation*: by reproducing a crime scene, replaying acts, situations, or other facts of a particular event, and by performing other experimental activities deemed necessary in order to inspect and verify documents and acts significantly to solve the case. An experimental investigation requires measurements, photographs, video recordings, sketches. Results of the experimental investigation shall be specified in writing⁴⁴⁹. This measure can assess the statement of the victim, the accused, and the witness: whether the accused could use torture and duress, whether the witness can hear the victim from a specific distance.

There are two ways to carry out an experimental investigation: reproducing and replaying.

Reproducing: Based on the testimony of the accused, temporarily arrested person, witness, the investigating agency allows them to witness a crime scene as they stated in order to provide objective conclusion about their statement as well as the documents, facts collected.

Replaying: Based on the gathered documents, facts, and investigative hypothesis, investigating body replays acts, situations, or other facts of a particular

⁴⁴⁹ *ibid.*

event to perform necessary experimental activities to identify the possibility and the level of torture, duress, then conclude the documents and investigative hypothesis objectively.

There are different types of experimental investigation:

Experimental investigation to determine the ability to perceive a particular event or phenomenon: This process is conducted to examine the audiovisual ability of a particular participant in the proceedings for a specific episode or phenomenon related to torture and corporal punishment to conclude the objectivity of their testimony. When organizing this kind of investigative experiment, it is necessary to reproduce the conditions and circumstances of conducting experiments to the maximum extent with the conditions and circumstances when the event or phenomenon occurred in the past, including two types of primary conditions: objective and subjective factors.

Experimental investigation to determine the ability to perform a particular act, a particular task: This type is conducted when the content of the participants' testimonies (usually of the detainee or the accused) about the behaviour, the facts they claim, and the subjective and objective conditions of these acts—provided that the experiment is conducted to the maximum extent with the conditions and circumstances claimed, including both the objective and the subjective factors.

Experimental investigation to determine the likelihood of an event or phenomenon: An investigative agency organizes an experiment on an event or phenomenon under certain conditions and circumstances to determine whether the phenomenon can happen? What are the cause and manner? Is it consistent with the collected documents or the investigative hypotheses set forth? These procedures aim to determine the cause, the evolution of the incident, the phenomenon to have a basis for dictating the direction of the investigation.

- *Identification:* This measure aims to identify the similarity of difference between the objects and the old version to verify the offender and proofs. Investigators may present persons, photos, or items to witness testifies, suspects, or defendants for identification. The identified object includes: The main object is the object to be identified concerning the torture incident; a Similar object is an unrelated object that voluntarily participates in the identification, has an appearance similar to the main object, and identifies with the primary objective to ensure objectivity. If a similar subject is a human being, that person must be of the same sex, similar to the main object in height, skin colour, and age. If it is an object, the object must be of the same type, close to the main object in size and colour.

*Steps of identification*⁴⁵⁰: Before carrying out identification, investigators must notify the same-level Procuracy of the conduct of identification to appoint Prosecutors to participate in the inspection of identification. Investigators must ask identifiers in advance about facts, traces, and features by which they can identify.

The pre-inquiry gives identifiers time and conditions to recall details, traces, and characteristics of the object that they have perceived before. This is the basis for checking and evaluating their testimony after the identification has ended and also to determine whether identification is necessary or not.

Suppose an identifier is a person under the age of 18. In that case, the Investigator must, before the identification proceeding, notify their counsel, representative, or advocate of their legitimate rights and interests.

If there are witnesses or the victim is an identifier, the Investigator must, before conducting identification, explain to them the responsibility of refusing or evading statements or deliberately giving false statements. This step must be written in the record.

There must be at least three externally identical persons, photos, or items to be identified, except for identifying corpses. On the contrary, if few or many people, photos, or objects are taken out, the identification will not be objective.

During the identification process, the Investigator can not pose suggestive questions. After an identifier has confirmed that a person, object, or photograph has been shown for identification, Investigators ask them to explain what traces or features they have based on to confirm that person, thing, or picture.

At the end of the identification, the investigator must make a record. The record clearly states the identifier's identity and health status and those identified for the identification; characteristics of objects or photos shown for identification; statements and presentations of the identifier; light conditions when performing identification.

- *Confrontation*: If testimonies from two or several persons come into conflict despite various investigative measures implemented, investigators shall conduct a confrontation. They are conducting confrontations to clarify the contradictory details of the previous testimony, thereby determining the truthfulness of the testimony between two or more people to find out the truth. At the beginning of the confrontation, investigators shall inquire into the mutual relationship of attendees before asking about facts to be clarified. Investigators may raise additional questions to each attendee after listening to the confrontation. During the confrontation, investigators can present relevant evidence, documents, and items. Attendees may question each other. Their questions and answers shall be reduced to writing.

⁴⁵⁰ Article 190 Criminal Procedure Code 2015.

Attendees' previous statements shall be restarted only after the attendees in the confrontation complete their depositions.⁴⁵¹ In short, investigators only conduct the confrontation when the case meets two conditions: (1) there are contradictory details of testimony between two or many persons; (2) other measures are already carried out, but the contradict was not resolved. Therefore, the confrontation is the ultimate investigating measure⁴⁵² to assess the statements.

3. CHALLENGES IN INVESTIGATING DENUNCIATIONS OF TORTURE AND DURESS

From 2011 to 2015, the Ministry of Public Security received 24 reports and denunciations related to torture, harassment, and corporal punishment. They have solved 16 cases, and they are dealing with 08 cases. Meanwhile, from 2010 to 15/6/2016, the Supreme People's Procuracy received 82 reports and denunciations of crimes with harassment and corporal punishment signs. They have issued a decision to prosecute a criminal case for 15 denunciations/25 defendants and decided not to prosecute a criminal case for 51 denunciations. Currently, they are verifying 16 reports. From 2011 to 2015, the court only accepted and tried the first instance of 10 cases of using torture, no case of duress⁴⁵³. The number of cases could be much higher than the figure reported.⁴⁵⁴

Over the past time, there have been many reports and denunciations that have been checked, verified with no signs of the crime of torture, duress like the case of Mr. Nguyen Duc Thang, in Phu Ninh, Phu Tho province denouncing the police department of the police of Dong Anh district, Hanoi city for beating and forcing Mr. Thang to confess his crime; the case of Mr. Nguyen Van Nam in Xuan Truong, Nam Dinh denounced Mr. Sy, Duy, and several officials from the Xuan Truong district police of beating and forcing his bow to convict him resists law enforcement officers.

The practice of adjudicating criminal cases in the past time shows that in many cases, the accused testified that during the investigation process, he was threatened,

⁴⁵¹ 'Đổi chất trong Bộ luật Tố tụng hình sự năm 2015' (*hinhsu.luatviet.co*) <<https://hinhsu.luatviet.co/doi-chat-trong-bo-luat-to-tung-hinh-su-nam-2015/n20161028120823468.html>> accessed 5 May 2021.

⁴⁵² 'Nhận Thức và Áp Dụng Biện Pháp Điều Tra Đối Chất Trong Việc Điều Tra Giải Quyết vụ Án Hình Sự | VIỆN KIỂM SÁT NHÂN DÂN TỈNH LẠNG SƠN' <<https://vienkiemsatlangson.gov.vn/nghien-cuu-phap-luat/1875/nhan-thuc-va-ap-dung-bien-phap-dieu-tra-doi-chat-trong-viec-dieu-tra-giai-quyet-vu-an-hinh-su#.YJKuXi8RpQI>> accessed 5 May 2021.

⁴⁵³ PLO.VN, '5 Năm, Xét Xử 10 vụ Dùng Nhục Hình' (*PLO*, 17 January 2017) <<https://plo.vn/content/NDIxOTEx.html>> accessed 5 May 2021.

⁴⁵⁴ Đức Minh, 'Bức cung, nhục hình: Thực tế nhiều hơn báo cáo' (*PLO*, 12 September 2014) <<https://plo.vn/thoi-su/chinh-tri/buc-cung-nhuc-hinh-thuc-te-nhieu-hon-bao-cao-495472.html>> accessed 8 July 2021.

beaten, coerced. However, he could not bring out any evidence. It is hence usually not accepted by the trial panel.⁴⁵⁵

When investigating allegations of torture in judicial activities, with some difficulties in collecting documents and evidence:

Occurred in particular circumstances: The act of harassment, torture is difficult to detect, hard to prove, and difficult to handle because, in investigation activities, we can not always supervise investigating officers in proceedings. Procedures for taking the testimony of an emergency arrest person and temporary detainee are carried out by investigators and investigating officers only. The early days of arrest are a sensitive time. It is hence straightforward to use torture and duress.

In many cases, the defendants denounce that they were tortured and brutally treated. However, they can not bring out any evidence to prove. Similarly, in Mr. Chan's case, he was forced to testify, but he could not demonstrate in front of the trial.⁴⁵⁶ Because it happened in exceptional circumstances, only the investigator and the person being tortured were in the prison or detention house. Infliction of bodily harm leaves no physical disability. We can not verify the truth from both the accused and the investigator since there are no injuries.

Difficulty in collecting physical traces to determine the torture incident: In the cases brought to the prosecution, the trial uses corporal punishment to the victim's death over the past time. If the victim is injured, recovered, and does not have physical traces such as tools and means related to the torture allegation, it will be difficult to prove the torture incident.

The "Murder" case happened on 15/8/2003 in hon Me, Nghia Trung commune, Viet Yen district, Bac Giang. Mr. Nguyen Thanh Chan said: "Before beating me, they all drank alcohol, their faces were red, their hands were hammered nails or knives, their eyes were red, I was scared." "Investigator L. asked, "If you do not confess, I will let you die." Another investigator beat me and forced me to repeat the movements from the prison to conduct experimental scene," said Mr. Chan⁴⁵⁷. This is the testimony of Mr. Nguyen Thanh Chan. In addition, there is no other document to prove. Therefore, the Investigator and Procurator of Mr. Nguyen Thanh Chan's case

⁴⁵⁵ 'Số vụ việc bức cung, nhục hình có thể nhiều hơn các vụ án đã khởi tố' (*Báo Điện tử Đảng Cộng sản Việt Nam*, 11 September 2014) <<https://dangcongsan.vn/phap-luat/so-vu-viec-buc-cung-nhuc-hinh-co-the-nhieu-hon-cac-vu-an-da-khoi-to-266873.html>> accessed 8 July 2021.

⁴⁵⁶ VnExpress, 'Ông Nguyễn Thanh Chấn mô tả việc bị ép cung' (*vnexpress.net*) <<https://vnexpress.net/ong-nguyen-thanh-chan-mo-ta-viec-bi-ep-cung-2906391.html>> accessed 5 May 2021.

⁴⁵⁷ Nguyễn Thanh Chấn: Trước khi đánh đập tôi, họ đều uống rượu' (*ZingNews.vn*, 17 November 2013) <<https://zingnews.vn/zingnews-post369627.html>> accessed 5 May 2021.

were not prosecuted, tried for “use of torture” or “taking testimony by duress,” but convicted “negligence that results in serious consequences.”⁴⁵⁸

The victim does not report as soon as the torture happens: If the victim does not die, it takes a long time, usually when the case is brought to trial, that the victim reports the torture. At this time, the injuries have recovered. It is difficult to collect relevant official documents, vehicles, and objects and identify witnesses.

The victim can not identify: Because the proceedings occur in a unique circumstance, in a short period (emergency arrest in 3-6 days) with many investigators taking testimony, the victim can not remember precisely then identify the officer had the acts of torture and duress. The collection of evidence hence becomes challenging through identification measures.

Testimony of witness, person present where the torture appeared: Since the torture and harassment happen in prison or detention centre, collecting evidence relating to torture and duress is impossible. It is also difficult to gather facts with great demonstrate value.

Testimony of the accused and victim: In almost all wrongful conviction cases, the defendants argue that they are tortured and brutally treated during the investigation process. Nevertheless, their statement is only legitimate when it is compatible with other objective evidence. Unfortunately, there is no other evidence matching the testimony relating to torture and harassment.

Audio and video recording when taking testimony: The regulation that provides the audio and video recording when taking testimony is enacted 01/01/2018. This treaty is applied nationally since 01/01/2020. According to this provision, taking testimony from the accused has to be audio and video recorded at the prison or detention centre. This obligation is an essential measure to fight against torture, harassment in criminal proceedings and also a source to prove the use of torture.

Nevertheless, audio and video recording are not obligatory in case of emergency arrest or temporary detainee. These cases become a sensitive gap where torture and harassment could happen.

Additionally, the record only starts when the investigators or investigating officers push the button and note the writing timeline.⁴⁵⁹ The torture or harassment could occur before the record started or at the pause of the whole process. The audio

⁴⁵⁸ News VietNamNet, ‘Vụ án oan ông Chấn: Điều tra viên, kiểm sát viên lĩnh án’ (VietNamNet) <<https://vietnamnet.vn/vn/phap-luat/ky-su-phap-dinh/vu-an-oan-ong-chan-dieu-tra-vien-kiem-sat-vien-linh-an-353416.html>> accessed 5 May 2021.

⁴⁵⁹ Joint Circular No. 03/2018/TTLT-BCA-VKSNDTC-TANDTC-BQP 2018.

and video recording thus hardly constitutes eminent evidence in demonstrating the use of torture and duress.

The result of expert examination: If the victim does not die, the victim will report the torture incident after a while. At this point, the injury has healed; seizing tools, means, objects, and seized documents are insufficient grounds for conducting expertise. Therefore, the assessment results are not enough to determine that there is a torture incident.

The result of identification: In fact, there are many cases where the accuser fails to identify the person who committed the torture because the incident happened a long time ago, in a particular environment. There are also cases where the victim can identify the person who has committed the act of torture. Due to the long working process, the accuser can identify the accused person. Suppose there are no documents or other evidence. In that case, the identification results are not enough to determine that there is a torture incident.

The result of confrontation: When there are contradictory details in statements of persons with relevant interests or obligations, investigating body needs to conduct confrontation. Practice shows that the result of confrontation can not resolve the contradiction between these persons. Therefore, authorities do not have enough evidence to verify which testimony is accurate and objective.

4. SOLUTIONS TO ENHANCE THE EFFICIENCY OF INVESTIGATION RELATING TO TORTURE AND DURESS

- Amend relevant regulations

Although investigation proceedings are the most sensitive time to occur torture, provisions stipulate issuing defence notice for the counsel are delayed comparing the whole proceedings. Therefore, we need to amend regulations to assure the presence of the counsel at the first meeting with the investigating body in case of emergency arrest, temporary detainee. This is a crucial measure to prevent torture and duress in criminal proceedings.

Furthermore, we need to improve provisions to abolish taking testimony by duress under any form. Simultaneously, evidence coming from torture or duress would not be appropriate to prosecute in every proceeding phase.⁴⁶⁰

Audio and video recording are obligatory in case of emergency arrest. Act flagrantly. The record has to start when investigators meet the accused. The end of the record does not depend on the timeline in writing.

⁴⁶⁰ 'Sự Hài Hòa, Tương Thích Của Pháp Luật Việt Nam Với Công Ước Chống Tra Tấn (UNCAT)' <<http://lyluanchinhtri.vn/home/index.php/dien-dan/item/1183-su-hai-hoa-tuong-thich-cua-phap-luat-viet-nam-voi-cong-uoc-chong-tra-tan>> accessed 5 May 2021.

Transfer the authority to investigate allegations of harassment and corporal punishment related to officers in the People's Procuracy to The Investigating Security Office of the Ministry of Public Security. To ensure the impartiality of prosecutors in investigating allegations of anti-torture in the People's Procuracy, thereby improving the effectiveness of investigating charges against torture.

Developing case law with the offence "use of torture" and "taking testimony by duress" is significant. This tendency contributes to incorporating and enhancing flexibility in law enforcement, especially in areas with different commentaries such as human rights or law on torture.

- Strengthen the application of technology in investigating

Reinforce the application of information technology to criminal investigations to improve the effectiveness of criminal investigations and enhance the capacity of transparent and democratic investigation agencies.

Implement audio and video recording regulations synchronously when interrogating suspects at offices of investigating agencies and detention centres. Accordingly, if there is no audio or video recording equipment available, the interrogation of suspects is prohibited at detention centres. Investigators and investigators must not turn off or stop audio and video recording devices while interrogating the accused. The interrogation session must stop when interrogating the accused or having trouble with audio and video recording equipment. Audio and video record data of the interrogation session assure data integrity, entirely stored on the server system to ensure safety and confidentiality.

- Measures in terms of code of conduct, infrastructures

The People's Public Security strictly implement the Circular 126/TT-BCA dated December 1, 2020, of the Ministry of Public Security on the implementation of democracy in investigation activities of the people's police in order to tighten discipline, improve morality, responsibility, manners as well as professional qualifications of investigators in the course of performing duties, to combat general law violations, and combat torture and corporal punishment in the process of solving criminal cases in particular. Serious implementation will reduce the number of investigating officers and investigators and violate the law to be penalized for infringing upon judicial activities. Improving professional qualifications, skills, political and ethical bravery of investigators, heads, and deputy heads of investigation agencies and people participating in investigation activities will protect the law, preserving and enhancing the reputation of the People's Public Security.

Increase investment in facilities, equipment, and means, promoting training and fostering investigation skills, improving bravery for investigation officers and investigators of the Investigating Office of the Supreme People's Procuracy. Thereby, we can improve the investigation capacity of the Supreme People's Procuracy in

investigating crimes under its jurisdiction in general and investigating allegations of harassment and corporal punishment in criminal proceedings in particular.

Concentrate resources on investment and upgrade the custody rooms, detention centers, and prisons; increased application of technology in custody and temporary detention enforcement is a factor ensuring safety in custody and temporary detention and supervising the detention process of arrested persons and temporary detainees.

REFERENCES

1. 'Đổi chất trong Bộ luật Tố tụng hình sự năm 2015' (*hinh-su.luatviet.co*) <<https://hinh-su.luatviet.co/doi-chat-trong-bo-luat-to-tung-hinh-su-nam-2015/n20161028120823468.html>> accessed 5 May 2021.
2. Đức Minh, 'Bức cung, nhục hình: Thực tế nhiều hơn báo cáo' (*PLO*, 12 September 2014) <<https://plo.vn/thoi-su/chinh-tri/buc-cung-nhuc-hinh-thuc-te-nhieu-hon-bao-cao-495472.html>> accessed 8 July 2021.
3. 'Nguyễn Thanh Chấn: Trước khi đánh đập tôi, họ đều uống rượu' (*ZingNews.vn*, 17 November 2013) <<https://zingnews.vn/zingnews-post369627.html>> accessed 5 May 2021.
4. 'Nhận Thức và Áp Dụng Biện Pháp Điều Tra Đối Chất Trong Việc Điều Tra Giải Quyết vụ Án Hình Sự | VIỆN KIỂM SÁT NHÂN DÂN TỈNH LẠNG SƠN' <<https://vienkiemsatlangson.gov.vn/nghien-cuu-phap-luat/1875/nhan-thuc-va-ap-dung-bien-phap-dieu-tra-doi-chat-trong-viec-dieu-tra-giai-quyet-vu-an-hinh-su#.YJKuXi8RpQI>> accessed 5 May 2021.
5. PLO.VN, '5 Năm, Xét Xử 10 vụ Dùng Nhục Hình' (*PLO*, 17 January 2017) <<https://plo.vn/content/NDIxOTEx.html>> accessed 5 May 2021.
6. 'Sự Hải Hòa, Tương Thích Của Pháp Luật Việt Nam Với Công Ước Chống Tra Tấn (UNCAT)' <<http://lyluanchinhtri.vn/home/index.php/dien-dan/item/1183-su-hai-hoa-tuong-thich-cua-phap-luat-viet-nam-voi-cong-uoc-chong-tra-tan>> accessed 5 May 2021.
7. VnExpress, 'Ông Nguyễn Thanh Chấn mô tả việc bị ép cung' (*vnexpress.net*) <<https://vnexpress.net/ong-nguyen-thanh-chan-mo-ta-viec-bi-ep-cung-2906391.html>> accessed 5 May 2021.
8. 'Số vụ việc bức cung, nhục hình có thể nhiều hơn các vụ án đã khởi tố' (*Báo Điện tử Đảng Cộng sản Việt Nam*, 11 September 2014) <<https://dangcongsan.vn/phap-luat/so-vu-viec-buc-cung-nhuc-hinh-co-the-nhieu-hon-cac-vu-an-da-khoi-to-266873.html>> accessed 8 July 2021.
9. 'Vụ án oan ông Chấn: Điều tra viên, kiểm sát viên lĩnh án' (*VietNamNet*) <<https://vietnamnet.vn/vn/phap-luat/ky-su-phap-dinh/vu-an-oan-ong-chan-dieu-tra-vien-kiem-sat-vien-linh-an-353416.html>> accessed 5 May 2021.
10. Criminal Procedure Code 2015.
11. Criminal Procedure Code 2015.
12. Joint circular No. 01/2017/TTLT-BCA-BQP-BTC-BNN&PTNT-VKSNDTC 2017.
13. Joint Circular No. 03/2018/TTLT-BCA-VKSNDTC-TANDTC-BQP 2018.
14. Law on Organization of Criminal Investigation Bodies 2015./.

THE ROLE OF THE PEOPLE'S PROCURACY OF VIETNAM IN THE PREVENTION OF AND FIGHT AGAINST ACTS OF TORTURE AND OBTAINMENT OF TESTIMONY BY DURESS

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Abstract: The prevention of and fight against acts of torture and obtainment of testimony by duress is a specific activity to achieve the noble goal of protecting human rights. Vietnam's judicial system has undergone many reforms and is continuously taking steps toward the goal of protecting justice and human rights. The People's Procuracy of Vietnam is an independent organ performing the functions of prosecution and judicial supervision. Through its activities, the People's Procuracy of Vietnam actively participates in the prevention of and fight against torture and obtainment of testimony by duress in legal proceedings.

The following article introduces the role of the People's Procuracy of Vietnam in the prevention of and fight against torture and obtainment of testimony by duress through specific activities such as exercising the right to prosecution, supervising the course of the investigation, prosecution, trial, detention and enforcement of the judgment.

Keywords: *The People's Procuracy of Vietnam; prosecution; judicial supervision; torture, obtainment of testimony by duress*

1. THE PEOPLE'S PROCURACY OF VIETNAM – A UNIQUE ORGAN EXERCISING THE RIGHT TO PROSECUTION AND JUDICIAL SUPERVISION

According to Vietnamese law, the People's Procuracy of Vietnam (PPs) is an independent organ in the State apparatus, exercising the right to prosecution and supervision of judicial activities. The duty of PPs is to safeguard the law, human rights, citizenship rights, the socialist regime, the interests of the State, and the lawful rights and interests of organizations and individuals, thus contributing to ensuring the strict and unified observance of the law."⁴⁶¹

The function of exercising the right to prosecution is an activity of the PPs in criminal proceedings in order to make a state accusation against the offender. This function is performed throughout the process of dealing with crime reporting and denunciation; requesting for prosecution and during the course of prosecution,

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⁴⁶¹ Article 107, The 2013 Constitution of the Socialist Republic of Vietnam

investigation and trial of criminal cases. Having the power of public prosecution, the PPs shall conduct specific activities as follow: requesting prosecution; annulling the decision to prosecute or not to prosecute an illegal case; approving or disapproving the decision to prosecute the suspect of the Investigation Agency or the agencies assigned to conduct investigation; directly prosecuting the criminal case or the suspect as prescribed by the Criminal Procedure Code; making decision or approval of the application, change or annulment of measures to restrict human rights and citizenship rights in the process of dealing with crime reporting and denunciation, requesting for prosecution and in the course of the prosecution and investigation as prescribed in Criminal Procedure Code, etc.

By exercising the right to prosecution, the PPs ensures that all perpetrators of criminal acts of torture and obtainment of testimony by duress are detected, investigated, prosecuted and brought to trial in a timely, lawful and rigorous manner with correct judgment of crime and criminal; no proceedings is conducted against the innocent and no crime and criminal is omitted; at the same time, ensuring that no one is illegally prosecuted, arrested, taken into temporary detention or custody and restricted human rights and citizenship rights.

General supervision is a unique function of the PPs in Vietnam. Initially with the principle of organizing State power in a centralized manner, all State power is concentrated in the hands of the People represented by National Assembly, the body exercising the supreme State power. With such principle, it is very difficult to have a mutual control and restrain among the legislative, executive, and judicial organs since the National Assembly executes supreme supervision. The PPs is a system established to help the National Assembly exercise such supreme supervision. For such reason, the PPs performs a widely general supervision in all fields (operations of state agencies, enterprises, and individuals). However, at present, the principle of organizing State power has certain changes, in which State power is unified with assignment, coordination and control among the legislative, executive and judicial organs. For such change, the general supervision function has changed, for which the PPs no longer supervises all activities of State agencies, enterprises and individuals. From 2001 until now, it has only focused on judicial supervision.

Judicial supervision is a function of the PPs to supervise the legitimacy of acts and decisions of State agencies, organizations and individuals in judicial activities. In criminal proceedings, the function of juridical supervision includes supervising the handling and settlement of crime reporting and denunciation, request for prosecution, the prosecution, investigation, trial and enforcement of criminal judgments. When

performing the function of judicial supervision, the PPs has the right to request agencies, organizations and individuals to conduct judicial activities in accordance with the law, provide case file and documents for the PPs to inspect the legitimacy of acts and decisions in judicial activities; the right to directly supervising, verifying and collecting evidence to clarify violations of law by agencies, organizations and individuals in judicial activities; protesting against Court judgments or decisions that violate the law; advising on acts and decisions of the Court that violate the law, etc.

Through judicial supervision, the PPs has the responsibility to ensure that all criminal acts of torture and obtainment of testimony by duress are detected, charged, investigated, prosecuted and brought to trial in a timely and lawful manner with correct judgments of crime and criminal; ensuring no proceedings is conducted against the innocent and no crime and criminal is omitted; ensuring that all judicial activities strictly comply with the provisions of law. In order to well perform such function, the PPs can use specific power, in particular: 1. The PPs can detect and promptly suspend the wrongful acts of persons conducting legal proceedings or those with authority in judicial activities to ensure the correctness of activities performed by judicial agencies. For example, upon detecting signs of the unfairness of an investigator, judge or jury member, the Procurator can request competent authority to change the officials involved in the proceedings to ensure the objectiveness of the investigation and adjudication. 2. The PPs can request officials with authority in criminal investigation, adjudication and judgment enforcement to perform necessary acts prescribed by law to ensure the correctness in the performance of their official duties. For example, when assigned to investigate a specific case, the Procurator can exercise the right to requesting the Investigator to expand the scope of crime scene examination, collect more evidence, etc., to make the investigation of the case sufficient and correct, at the same time avoid the misconduct of the Investigator (intentionally falsifying the case dossiers or failing to collect sufficient evidence for the case proceedings etc., which may result in the acts of torture and obtainment of testimony by duress). 3. The PPs may detect the causes leading to the acts of torture and obtainment of testimony by duress and request relevant agencies and organizations to take necessary actions to limit such causes.

Unlike the Investigation Agency and Court, which only participate in a certain stage of the proceedings, the PPs is the only organ that can participate in the entire proceedings (from the time the case is initiated and investigated until its prosecution, trial and judgment enforcement). It shows a particularly important role and position of the PPs in preventing and fighting against acts of torture and obtainment of testimony by duress - both as an enforcement agency and supervision agency over the

implementation of the Convention⁴⁶² (through the function of judicial supervision). Such a role is reflected in specific activities of the PPs as prescribed by law.

Despite the fact that there are still some controversies over the judicial supervision function of the PPs, mainly whether the judicial supervision of the PPs is necessary and appropriate. A point of view states that the function of supervising judicial activities of the PPs should be abolished since it is believed that the PPs by its nature is a supervisory organ assigned to carry out the said supervision, which is within the scope of its function of supervising the observance of the law assigned by the National Assembly and reported to the National Assembly. However, at the same time, the PPs is also assigned to carry out the "traditional" judicial activities of the Prosecutor office, which is to exercise the right to prosecute and investigate certain types of crimes.

The PPs presents itself as a judicial supervision organ and at the same time a judicial organ. Therefore, it is necessary to transform the PPs into Prosecutor Office and strengthen its responsibility in investigation activities, etc.⁴⁶³ Another point of view states that the judicial supervision of the PPs is necessary to ensure that judicial activities are strictly and uniformly implemented in accordance with the law. Accordingly, Prof. D.Sc. Dao Tri Uc believes that "the sole subject matter of judicial rights is Courts and Judges, and judicial activities does not mean judicial rights. Judicial activities involve in many other activities within the scope and orbit of judicial rights to exercise the juridical rights, etc."⁴⁶⁴ Accordingly, Prof. D.Sc. Dao Tri Uc believes that the system of the PPs in Vietnam is incorporative since it functions as a power supervising organ with the role to protect human rights, citizenship rights and the law, etc. but its activities are mainly within the scope of exercising judicial rights, most typically criminal jurisdiction; hence, the PPS can be identified in two roles as a power supervising organ and as an organ participating in the exercising of judicial rights⁴⁶⁵. There are also point of views raising concerns on ensuring the

⁴⁶² Section C, The First National Report on "Implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" in 2017 by the Socialist Republic of Vietnam.

⁴⁶³ Assoc.Prof. Ph. D Bui Xuan Duc, Mechanism to control judicial activities - Current issues and reform directions, Legislative Research Journal, No. 18/2012

⁴⁶⁴ Prof. D.Sc Dao Tri Uc, The function of supervising judicial activities of the PPS – Requirements, challenges and solutions in the new period, Scientific conference "Some theoretical and practical issues on the organization and operation of the PPS over 60 years of establishment and development", pg.122, Hanoi, 2020.

⁴⁶⁵ Prof. D.Sc Dao Tri Uc, The function of supervising judicial activities of the PPS – Requirements, challenges and solutions in the new period, Scientific conference "Some theoretical and practical issues on the organization and operation of the PPS over 60 years of establishment and development", pg.123-124, Hanoi, 2020

judicial independence when the PPs participates in the proceedings with the role of judicial supervision. Although there are many different views, in fact until present, the PPs is still performing said function. Particularly in the fight against the acts of torture, the PPs through judicial supervision can be said to make a remarkable contribution to the prevention of and fight against torture.

In fact, the PPs has issued regulations to prevent and combat the acts of torture through its activities in order to effectively ensure the protection of human rights and citizenship rights, especially the rights of persons arrested, taken into temporary detention, the suspects and the defendants specified in the Criminal Procedure Code; and to raise the awareness and responsibility of leaders and officials, especially the Procurators who directly supervise the investigation of criminal cases, temporary detention, custody and criminal judgment enforcement in the implementation of the Convention Against Torture. On June 18, 2015, the Supreme People's Procuracy issued an Implementation Plan of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (issued together with Decision No. 384/QD-VKSTC-V8 dated June 18, 2015 of the Chief Procurator of the Supreme People's Procuracy) (Plan 384). The Plan aims to ensure that the PPs actively implements the United Nations Convention against Torture and the Implementation Plan of the Convention Against Torture approved under the Prime Minister's Decision No. 364/QD-TTg dated March 17, 2015 within the scope of the PPs' functions, duties, power and responsibilities. The PPs continues to conduct and coordinate to conduct studies of relevant provisions of the Criminal Procedure Code to better ensure human rights, especially the rights of persons who are arrested, held in temporary detention, the suspects and the defendants; to effectively exercise the right to prosecution and supervision of judicial activities, especially the supervision of the investigation of criminal cases; at the same time strengthen the coordination between the PPs at all levels with ministries, sectors and localities, especially with Investigation Agencies at all levels in implementing the Convention against Torture and the Prime Minister's Plan .

To implement the said Plan, the PPs has taken following actions: propagating and disseminating the law on prevention of and fight against torture and the content of the Convention against Torture in the People's Procuracies sector; internalizing the law and improving the effectiveness of the law application to meet the requirements of the Convention; ensuring the human forces and resources to implement the Convention and taking other necessary actions for the implementation of the Convention such as: applying measures to improve the effectiveness of the exercising the right to prosecution and supervision of the investigation, temporary detention or

custody and criminal judgment enforcement to protect human rights, especially the rights of the persons who are arrested, held in temporary detention, the suspects and the defendants; strengthening inspection, examination, supervision and settlement of complaints and denunciations in the public justice to ensure the rights of the participants in the proceedings; reviewing relevant regulations and assessing the conditions of detention facilities to propose remedial measures.

2. THE PEOPLE'S PROCURACIES PREVENTS AND FIGHTS AGAINST THE ACTS OF TORTURE AND OBTAINMENT OF TESTIMONY BY DURESS THROUGH SUPERVISING THE HANDLING OF CRIME-RELATED INFORMATION, THE INVESTIGATION AND PROSECUTION OF CRIMINAL CASES

Prosecution activities are carried out right at the receiving and handling of crime reporting and denunciations, requesting for prosecution and throughout the proceedings to ensure that there is no impunity and that innocent people are not wrongly prosecuted. In particular, the PPs make sure that the receiving and handling of crime reporting and denunciations on crimes of torture and obtainment of testimony by duress are conducted in accordance with the order and procedures prescribed by law. The objectives of the PPs is to ensure that the Investigation Agency (IA), especially the IA under the Supreme People's Procuracy (SPP), only apply measures in accordance with the provisions of the law to examine, verify and handle crime reporting and denunciations.

During the period of 2010 - 2016, the PPs (the IA under the SPP) received and collected a total of 7222 denunciations on violations and crimes, classified and handled 6997 denunciations on violations and crimes (accounting for 96.9%). Among a total of 740 crime denunciations under the handling scope of the IA under the SPP, there are 82 denunciations on crimes with signs of torture and obtainment of testimony by duress. The PPs has finished examining, verifying and issuing a decision to prosecute 15 cases; finished examining, verifying and issuing decision not to prosecute 51 cases; made other handlings and recommendations for handling, preventing violations and crimes for 12 cases.⁴⁶⁶

From 2016 to 2018, the IA under the SPP accepted 31 denunciations of acts related to the use of torture (none of which relates to the obtainment of testimony by duress). Of which, 25 denunciations, accounting for 80.6%, have been handled. In details, the IA issued decisions to prosecute 06 criminal cases; issued decisions

⁴⁶⁶ Document No. 1640a/VKSTC-C1 of the SPP dated October 20, 2016, providing information and data of the period 2010-2016 on cases relating to the acts of coercion and torture to serve for the preparation of Viet Nam's first national report on the implementation of the United Nations Convention against Torture.

not to prosecute 14 cases; suspended 04 cases for verification; transferring 01 case to competent authority for settlement, on-going checking and verifying 06 cases.⁴⁶⁷

Thus, with the handling of denunciations related to the acts of torture, the PPs has shown close supervision over acts of torture and obtainment of testimony by duress, preventing and avoiding the violations of human rights by investigation agencies in the performance of their official duties.

During the investigation stage of cases of torture and obtainment of testimony by duress, the PPs is responsible for supervising the activities of Investigators (especially those of the IA under the SPP) to avoid illegal acts or misconducts in the investigation activities, especially in the following activities: prosecuting, or not prosecuting a criminal case; prosecuting the suspect; arresting, holding in temporary detention and application of other preventive measures against the suspect; terminating or temporarily suspending the investigation of the case and terminating or temporarily suspending the investigation of the suspect; changing preventive measures against the suspect.

During the period from 2010 to 2016, the IA under the SPP accepted a total of 15 cases with 25 suspects for investigation; of which, the agency has finished the investigation, transferred the case dossiers to the SPP for prosecution request of 12 cases with 23 suspects; terminated 02 cases with 02 suspects; temporarily suspended 01 case with 0 suspect.⁴⁶⁸

From 2016 to 2018, the IA under the SPP has accepted and prosecuted 07 cases with 10 suspects for the crime of "Using torture". 06 cases with 09 suspects, accounting for 85.7%, have been handled, of which the agency has finished the investigation and requested for the prosecution of 04 cases with 08 defendants, temporarily suspended the investigation of 01 case, terminated investigation due to exemption of criminal responsibility of 01 case with 01 suspect, on-going investigation of 01 case with 01 suspect.⁴⁶⁹

⁴⁶⁷ Document No. 1640a/VKSTC-C1 of the SPP dated October 20, 2016, providing information and data of the period 2010-2016 on cases relating to the acts of coercion and torture to serve for the preparation of Viet Nam's first national report on the implementation of the United Nations Convention against Torture.

⁴⁶⁸ Document No. 1640a/VKSTC-C1 of the SPP dated October 20, 2016, providing information and data of the period 2010-2016 on cases relating to the acts of torture and obtainment of testimony by duress to serve for the preparation of Viet Nam's first national report on the implementation of the United Nations Convention against Torture.

⁴⁶⁹ Document of the SPP-C1 dated August 25, 2018, providing and updating information and data related to the Report on the Implementation of the United Nations Convention Against Torture.

Among the cases of torture and obtainment of testimony by duress investigated, prosecuted or whose investigation and trial supervised by the PPs, there are some typical cases drawing great concerns from the public. For example, on September 19, 2017, the IA under the SPP decided to prosecute a criminal case on the crime of using torture resulting in the death of the suspect Vo Tan Minh (born in 1982, residing in Tan Tai Ward, Phan Rang – Thap Cham City, Ninh Thuan Province) in the afternoon of September 8, 2017;⁴⁷⁰ or the case on October 24, the IA under the SPP has informed the investigation conclusion No. 17/VKSTC-C6 (P4) on October 23, 2014 to 6 suspects accused of “using torture” and “Irresponsibility causing serious consequences” occurred at Tuy Hoa City Police, Phu Yen province.⁴⁷¹ For this case, according to the investigation conclusion, when conducting investigation activities on May 13, 2012 at the General Investigation Department - Tuy Hoa City Police (Phu Yen province), Nguyen Than Thao Thanh, Nguyen Tuan Quang, Nguyen Minh Quyen, Pham Ngoc Man, Do Nhu Huy, used rubber batons to hit the suspects many times, especially Nguyen Than Thao Thanh hit Ngo Thanh Kieu in the head (the suspect born in 1982, residing in My Thuan Ngoai village, Hoa Dong commune, Tay Hoa district, Phu Yen province). The suspect accused of burglary was arrested in 312T project co-investigated by Tuy Hoa City Police and the Public Security Crime Investigation Department under Phu Yen Provincial Police. As a result, Ngo Thanh Kieu died from a traumatic brain injury.

After the IA concludes the investigation, the PPs will conduct a comprehensive study of the case file to determine whether the accusation constitutes a crime; and whether necessary evidence collected by the IA is sufficient to prove the criminal acts of the suspects; whether there are sufficient documents on relevant issues for the correct settlement of the case, particularly the causes of the crime, the aggravating and mitigating factors for the suspects, etc. If the investigation is incomplete, the PPs shall return the file to the IA for further investigation on unclarified issues. Procurators are also responsible for using their expertise to request Investigators to carry out necessary activities within the prescribed jurisdiction to conduct a proper investigation, not to initiate proceedings against the innocent, but also not to tolerate impunity.

During the trial period of cases on torture and obtainment of testimony by duress, the PPs supervises and requests the People's Court to bring the case to trial within the time limit prescribed by law, avoiding prolongation in settlement of the case.

⁴⁷⁰ Author Cong Thu, <https://baotintuc.vn/phap-luat/khoi-to-vu-an-hinh-su-ve-toi-dung-nhuc-hinh-khien-mot-bi-can-tu-vong-20170919193226875.htm> accessed on June 5th

⁴⁷¹ <https://baotintuc.vn/phap-luat/truy-to-6-bi-can-trong-vu-dung-nhuc-hinh-danh-chet-nguoi-20141024191142053.htm>, dated Oct 24th, 2014, accessed on June 1st, 2021

The PPs participates in questioning, impeachment, and arguments at the trial. On such a basis, the PPs makes an accusation of the offender before the People's Court. Through the litigation, the Procurator not only proves the defendant's criminal acts but also clarifies the motive, purpose, method, means, cause and context of the crime, helping the Court to make a correct and lawful judgment. The PPs also clarifies and requests the Court to consider aggravating and mitigating factors for each defendant's criminal liability in order for the Court to give proper sentence based on the nature and gravity of the crime, taking into consideration of the defendant's role in the accomplice and the defendant's family members; thus, actively serve for the education of the defendants and general education and prevention of the crime. At the same time, the Procurator also analyzes and identifies the causes and conditions that give rise to the crime so as to recommend relevant agencies and organizations to take remedial measures to eliminate the root causes and conditions of the crimes, which has great effects in preventing acts of torture and obtainment of testimony by duress in investigating, prosecuting and adjudicating criminal cases.

Especially in settlement of criminal cases in general, the close supervision in the handling of crime information, investigation and trial is the most effective tool for timely detection of the acts of torture and obtainment of testimony by duress, collusion between the offenders in order to request the IA to make prosecution if there are signs of such crimes.

During the period from 2010 to 2016, the total number of claims for damage caused by torture and obtainment of testimony by duress in the investigation of cases of torture was 05 claims. By the end of the investigation, the amount of compensation for the victim or the victim's family is 441,450,000 VND and the amount of voluntary or agreed support is 1,359,608,984 VND.⁴⁷²

Thus, with its constitutional function, the PPs plays a great role in preventing and fighting against crimes of torture and obtainment of testimony by duress committed by persons having authority over the investigation, prosecution, trial and judgment enforcement. The presence of the Procurators in the activities of judicial agencies is always a reminder for public officials of the obligation to comply with the law when performing their official duties, which helps to prevent negative acts or irresponsibility and negligence in performing their duties. At the same time, thanks to the participation in judicial activities, the Procurators

⁴⁷² Document No. 1640a/VKSTC-C1 of the SPP dated October 20, 2016, providing information and data of the period 2010-2016 on cases relating to the acts of coercion and torture to serve for the preparation of Viet Nam's first national report on the implementation of the United Nations Convention against Torture.

can promptly detect violations in the performance of official duties or signs of intentional violations by public officials who are currently serving in the judicial field, so as to request proper remedy to such violations and weaknesses or to prevent it right from the beginning.

3. THE PPS FIGHTS AGAINST CRIMES RELATED TO TORTURE AND OBTAINMENT OF TESTIMONY BY DURESS THROUGH PROSECUTION OF CRIME AND CRIMINAL

In Vietnam law, the term “torture” and the prohibition on torture are stipulated in 2013 Constitution (Article 20), the 2015 Criminal Procedure Code (Article 10), Law on Enforcement of Custody and Temporary Detention 2015 (Articles 4, 8), Law on Organization of Criminal Investigation Agencies 2015 (Article 14). However, the 2015 Penal Code, amended and supplemented in 2017 does not specify a specific crime for torture and does not introduce the definition of “torture”. However, all torture-characterized acts are defined as criminal acts and are specified in the crime of using torture (Article 373), crime of obtainment of testimony by duress (Article 374), crime of bribing or forcing another person to give false testimony or provide untruthful documents (Article 384). Acts of torture nature may also be prosecuted for penal liability for crime such as murder (Article 123); crime of manslaughter by a law enforcement officer in performance of his/her official duties (Article 127); crime of coercing suicide (Article 130); crime of threat of murder (Article 133); crime of deliberate infliction of bodily harm by a law enforcement officer in performance of his/her official duties (Article 137); crime of abuse (Article 140); the crime of insults to another person (Article 155); crime of illegal arrest, detention or imprisonment of a person (Article 157); crime of assaulting companions (Article 398); crimes of maltreatment of prisoners of war (Article 420).

Compared to previous provisions, the 2015 Penal Code has expanded the subjects, acts and increased the level of punishment for acts related to torture, which is more commensurate with the definition of torture prescribed in the Convention against Torture and better suits the practical context in Vietnam, especially in Article 373 (crime of using torture), Article 374 (crime of obtainment of testimony by duress) and Article 384 (crime of bribing or forcing another person to give false testimony or provide untruthful documents). For crimes related to torture, the role of the PPs in the prosecution stage of such crimes is to ensure that the criminal acts and the offenders are brought to trial in a timely, lawful and rigorous manner with correct judgments of crime and criminal, ensuring no proceedings is conducted against the innocent and no crime and criminal is omitted; at the same time, ensuring that no one is illegally prosecuted, arrested, taken into temporary detention or custody and restricted human rights and citizenship rights..

During this stage, the Procurator is responsible for receiving and fully examining the case file from the agencies in charge of the investigation, examining the documents in the case file including minutes of arrest for a flagrant offence, Minutes of evidence collection, etc., inspecting the handover and receipt of investigation results, supervising the application of preventive and coercive measures, examining the quantity and condition of evidence to make a basis for further handling. The Procurator cross-checks the content of the documents with the investigation conclusions, examines the evidence to see which ones have been listed and returned by the IA; which are assigned to specialized agencies for management, which have been destroyed or returned to their owners, etc. At the same time, the Procurator shall examine and evaluate the evidence and request competent investigation agencies to supplement necessary documents and evidence, directly interrogate the suspects, take testimonies of participants, and take other investigative measures if necessary. By the end of this stage, the Procurator shall draw up a draft of the indictment or decision to terminate or temporarily suspend the case, settle the request to return the file for further investigation by the Court and the Draft to issue the decision to return the file for further investigation to the IA when the file is returned to the PPs by the Court or when the PPs deems it necessary to return the file for further investigation, and to issue a decision on handling of evidence, etc.

Thus, the PPs conducts the prosecution of the crime and criminal on torture and obtainment of testimony by duress, in other words, perform specific tasks prescribed by law to check the legitimacy and basis of all acts performed by competent investigation agencies throughout the proceedings to ensure the decisions of the PPs are accurate and objective, making the criminal prosecution correct and lawful.

With its specific function, over the years, the PPs has conducted the prosecution to request the Court, within its competence, to bring to trial the offenders of crimes of torture and obtainment of testimony by duress, contributing to enhancing the trust of the people in judicial agencies, typically the case of "Using torture" in Tuy Hoa city police station, Phu Yen province (of which the victim is Mr. Ngo Thanh Kieu). In detail, during the investigation and verification of a burglary case, Tuy Hoa City Police, Phu Yen province has kept Mr. Ngo Thanh Kieu at the headquarters for investigation as said person is suspected to get involved in the burglary. Some Investigators from Department of Police Investigation of Tuy Hoa City Police, Phu Yen Province hit Mr. Ngo Thanh Kieu, causing many injuries to him and resulting in his death. The PPs has prosecuted the case to the Court and on September 12, 2016, the Superior People's Court in Da Nang sentenced the defendant, Nguyen Than Thao Thanh (former junior lieutenant, scout of Tuy Hoa Police Department) 5 years in prison; Nguyen Minh Quyen (former major, vice-captain of the Reconnaissance

Unit under Public Security Criminal Investigation Department, Phu Yen Provincial Police) 2 years and 6 months in prison; Pham Ngoc Man (former senior lieutenant) 2 years and 3 months in prison; Nguyen Tan Quang (former major) 2 years in prison but given a suspended sentence; Do Nhu Huy (former lieutenant) 1 year in prison but given a suspended sentence for crime of "Using torture"; sentenced Le Duc Hoan (colonel, former deputy head of Tuy Hoa City Police) 9 months in prison, but given a suspended sentence for the crime of "Irresponsibility causing serious consequences".

However, there still exists shortcomings in the PPs' prosecution of crimes related to torture and obtainment of testimony by duress, affecting the quality of operation of the PPs. For example, the investigation request of the PPs is too general and sketchy, which may lead to the return of the case file for re-investigation, prolonging the proceedings; The case of infringing upon public justice, especially acts of torture and obtainment of testimony by duress, which are serious and complicated in nature, drawing special concern from the public and causing public anger is still in a large number. It results in many wrongful cases lasting for a decade such as the case of Nguyen Thanh Chan, Huynh Van Nen, etc. due to unclear assignment of authority on investigation; or the Procurator still shows weaknesses in performing their official duties such as studying the documents carelessly, failing to master the provisions of the law, resulting in the prolongation of many cases due to the need to change the prosecution decision because of wrong crimes, especially for 02 crimes of torture and obtainment of testimony by duress. The case of "Obtainment of testimony by duress" occurred in 2013 at the police station of Soc Trang province is an example. According to the conclusion No. 17 dated October 23, 2013 of the IA under SPP, in the case where Mr. Ly Van D residing in Tran De district, Soc Trang province was murdered, a number of officials conducting legal proceedings in Soc Trang were found to commit serious violations. Of which, 02 investigators of Soc Trang provincial police, Captain H and Major Q, used handcuffs to cuff the hands of the suspects to the iron frame of the office window then punched and kicked the suspects. Said two policemen also used rubber baton to hit the suspects many times, forcing these non-criminal suspects to confess that they had killed Mr. D. The IA under SPP requested prosecution against the 2 defendants for the crime of using torture and said prosecution was approved by the SPP. After transferring the file to the Court, the file was returned for additional investigation since there were grounds to believe that the two defendants committed the crime of obtaining testimony by duress. Other shortcomings may come from the Prosecutor's neglect in supervising the crime scene examination; consequently, the PPs is unable to detect that the investigation agency has omitted some factors related to the case, such as collecting traces, determining the direction and size of traces, the formation of the traces, etc. There are also some cases where crime scene examination

was done carelessly, causing important evidence to be omitted, especially for the case of crimes of torture and obtainment of testimony by duress; the offenders are experienced in removing traces and creating fake scenes.

4. THE PPS FIGHTS AGAINST TORTURE AND OBTAINMENT OF TESTIMONY BY DURESS THROUGH THE SUPERVISION OF TEMPORARY DETENTION, CUSTODY, MANAGEMENT AND EDUCATION OF PERSONS SERVING IMPRISONMENT SENTENCES, AND SUPERVISION OF JUDGMENT ENFORCEMENT

In temporary detention, custody, management and education of persons serving imprisonment sentences, the PPs supervises the observance of the law by public officials serving detention facilities and prisons.

In which, the Procurator shall supervise whether the admission or release of persons held in temporary detention or custody and persons serving imprisonment sentences at detention facilities and prisons are accompanied by legally effective orders or decisions from the competent authority or not; whether the facilities abide by the time limit for temporary detention and custody, or enforcement of prison sentence.

The PPs also supervises the observance of the law in the case where the wardens of detention facilities and prisons propose to temporarily suspend the serving of prison sentences, reduce the term of imprisonment or special amnesty; and in the case where the People's Court issues decisions to temporarily suspend the serving of prison sentences, reduce the term of imprisonment, or release prisoners ahead of time, etc., for persons serving prison sentences.

The PPs also supervises the organization and management in detention facilities and prisons to ensure the strict observance of the law on the classification of subjects, organization of detention and imprisonment, and prevention of prison break, facility damage, obtainment of testimony by duress, using torture, collusion between the offenders and violations of the discipline of the facilities; supervises the guarantee of life, honour, dignity and property as well as the practice of diet, clothing, accommodation, study, working, resting, cultural and sports activities, medical treatment and other benefits prescribed by the law of persons held in emergency custody, custody, temporary detention, serving prison sentences. In addition, for criminal cases in general, close supervision of detention and imprisonment is the most effective way to timely detect crimes of obtainment of testimony by duress, using torture, collusion between the offenders to request the investigation agency to make prosecution when there are signs of such crimes.

Furthermore, the PPs supervises the issuance of decisions on judgment enforcement by competent Court to ensure timely enforcement of judgments made by competent authorities. The timely arrest and enforcement of prison sentences for persons convicted of crimes relating to torture, obtainment of testimony by duress,

collusion between the prisoners, most of whom are former officials with authority in judicial agencies, not only ensures that the legally effective judgments of the Court are strictly enforced, but also avoids the provoke of negative public opinion such as there is a covering up, tolerating or mere formality punishment for these persons.

Over the past years, the PPs at all levels, especially Department 1A and Department 6, have strictly implemented periodical supervision and unscheduled supervision to promptly detect violations in the temporary detention, custody and management and education of the offenders. In the past 5 years, the PPs at all levels have conducted 75 inspections at detention facilities where persons infringing upon public justice are held; 104 periodical and unscheduled inspections at detention facilities, 35 inspections at criminal judgment enforcement agencies. The PPs at all levels always closely supervises the decision-making on judgment enforcement and organization of the criminal judgment enforcement; the delay, temporary suspension and termination of the enforcement of prison sentences; the exemption or reduction of the term of imprisonment; cases where the judgment enforcement is delayed or omitted, ensuring the proper observance of the law; closely supervises the enforcement of suspended sentences, community sentences (non-custodial) at commune-level People's Committees; strengthens direct supervision on criminal judgment enforcement at judgment enforcement agencies and prisons, ensuring the strict observance of the law on management and education of sentenced persons.

Through the supervision of temporary detention and custody, management and education of persons serving prison sentences and supervision of judgment execution, the PPs detects, investigates and prosecutes acts of torture and obtainment of testimony by duress. There are cases with fatal consequences, such as cases of using torture occurred at the detention facilities of Phan Rang - Thap Cham City Police, Ninh Thuan province; the case at Long Hoa Prison under General Department VIII of the Ministry of Public Security; the case at Thanh Xuan Prison under the Ministry of Public Security and the case at the Detention House of District 11 Police, Ho Chi Minh City, etc. All of the above cases were promptly prosecuted, arrested and detained for punishment in accordance with the law.

5. THE PPS FIGHTS AGAINST TORTURE AND OBTAINMENT OF TESTIMONY BY DURESS THROUGH DIRECT INVESTIGATION OF SUCH CRIMES AND CRIMES RELATED TO THE MANAGEMENT OF DETENTION AND IMPRISONMENT WHERE THE OFFENDERS ARE OFFICIALS, CIVIL SERVANTS OF INVESTIGATION AGENCIES, DETENTION FACILITIES AND PRISONS

According to the provisions of Article 31 of Law on Organization of Criminal Investigation Agencies in 2015 and Article 163 of the 2015 Criminal Procedure Code,

the IA under the SPP has the authority to conduct investigations on crimes of infringing upon public justice in general, crimes of torture and obtainment of testimony by duress in particular, in which the offenders are officials and civil servants of Investigation bodies, People's Courts, People's Procuracies, judgment enforcement agencies and persons having authority to conduct judicial activities if such crimes are within the jurisdiction of the People's Court. Therefore, the IA under the SPP has specialized authority in the direct investigation of crimes of torture and obtainment of testimony by duress and crimes related to the management of detention and imprisonment where the offenders are officials, civil servants of investigation agencies, detention facilities and prisons. Thus, the activities of the PPs in conducting direct investigation of such cases will contribute to detecting and lawfully prosecuting correct crime and criminal, ensuring no proceedings is conducted against the innocent and no crime and criminal is omitted, in another words, actively participating in the fight against crimes related to torture and obtainment of testimony by duress and collusion between the offenders.

Over the past years, facts showed that the PPs has actively participates in the investigation of crimes of torture and obtainment of testimony by duress and crimes related to the management of detention and imprisonment where the offenders are officials, civil servants of investigation agencies, detention facilities and prisons; and detected many cases, one of which is the case of three former officers of Long Hoa prison using rubber baton to beat a 17-year-old inmate.⁴⁷³ Or another typical case is during the investigation and filing of a murder case occurred on July 5, 2013 in Dai An 2 commune, Tran De district, Soc Trang province, Investigator, Major Nguyen Hoang Quan and Investigator, Captain Trieu Tuan Hung of Police Investigation Agency under Soc Trang Provincial Police, used torture against Mr. Tran Van Do, Mr. Thach So Phan, and Mr. Khau Soc to force them to confess that they had participated in the murder of Mr. Ly Van Dung. The PPs has detected, prosecuted, directly investigated and clarified the said offence and brought it to the Court. On October 7, 2015, the People's Court of Soc Trang province sentenced Nguyen Hoang Quan 1 year and 6 months in prison; Trieu Tuan Hung 2 years in prison, etc.

One of the effective measures to prevent and fight against the acts of torture and obtainment of testimony by duress in judicial activities taken by agencies conducting criminal proceedings is the use of audio and video recording during the investigation, prosecution and trial of criminal cases. According to experts, the audio and video

⁴⁷³ Author Hoang Nam, <https://vnexpress.net/ba-cuu-can-bo-trai-giam-linh-an-3993053.html>, dated Oct 17, 2019, accessed on June 1st 2021

recording of the interrogation also provides a means to monitor the persons in charge of conducting criminal proceedings. Such means helps to avoid acts of torture and obtainment of testimony by duress, at the same time ensuring objectivity and reliability of the process, which may also serve as evidence of the accusations.⁴⁷⁴

Also, according to Attorney Ton That Ho Nghi, a significant provision added to the Criminal Procedure Code is the obligation to record the interrogation by audio and video means. However, the audio and video recording is done by humans (by investigating agencies or detention agencies); as a result, the process and implementation method may be affected if investigation agencies lack objectivity and fairness. The PPs play a very important role in ensuring that the agencies conducting legal proceedings strictly implement such obligation when participating in interrogation⁴⁷⁵ and in ensuring the implementation of audio and video recording of the competent Investigation Agency; the correct order and procedures for direct audio or video recording of the interrogation and taking testimonies of the suspects in the course of investigation and prosecution; the strict observance of the law in keeping, storing and using of audio or video records, avoiding possible acts of torture and obtainment of testimony by duress.

With specialized function, the PPs both supervises the audio and video recording and directly conducts audio and video recording during interrogation and taking testimony. It serves as a basis for the PPs to effectively fight against torture and obtainment of testimony by duress; at the same time, promptly detect such crimes in the course of investigation, prosecution and trial for timely handling in accordance with the law. However, the audio and video recording by the PPs encounters certain difficulties involving the capability of officials and procurators when using machines, recording techniques, etc.; technical means and equipment used for audio and video recordings, such as image and voice receiver, video recorder, server, other technical means and equipment used for audio and video recording; or specialized room for audio and video recording at the headquarters of the PPs (such room should be designated to fully meet all the requirements of venue, light, safety and is equipped with technical means and equipment used for audio or video recording in good quality, etc.). All said necessary conditions are still a challenge in the process of implementing such obligations.

⁴⁷⁴ Opinion of Ph.D Vo Thi Kim Oanh, Author Ai Nhan, <https://tuoitre.vn/chong-buc-cung-nhuc-hinh-oan-sai-quan-trong-la-nguoi-thuc-hien-1017139.htm>, dated Dec 09, 2015, accessed on Jun 1st 2021

⁴⁷⁵ Opinion of Attorney Ton That Ho Nghi, Author Ai Nhan, <https://tuoitre.vn/chong-buc-cung-nhuc-hinh-oan-sai-quan-trong-la-nguoi-thuc-hien-1017139.htm>, dated Dec 09, 2015, accessed on Jun 1st 2021

Other activities of the PPs to prevent and fight against crimes of torture and obtainment of testimony by duress in judicial activities include:

Over the past years, the PPs has carried out a number of specific plans and activities to effectively prevent and fight against the acts of torture and obtainment of testimony by duress such as disseminating and strictly implementing the Convention Against Torture; applying information technology in propagating and disseminating basic contents of the Convention Against Torture and Vietnam's laws on prevention of and fight against torture, and at the same time prohibiting investigators and investigation officers from committing acts of torture or other cruel, inhuman or degrading treatment or punishment; strictly implementing regulations to ensure the right to defense of the accused; protecting the legitimate rights and interests of the victims and litigants in the proceedings in order to reduce the occurrence of torture and obtainment of testimony by duress; coordinating with the Ministry of Public Security and the Ministry of National Defense in promulgating Circular No. 03/2018/TTLT-BCA-VKSNDTC-BQP guiding the order and procedures for audio or video recording, using, keeping and storing audio or video records in the course of investigation, prosecution and adjudication; or participating in the Project on audio and video recording in the course of prosecution, investigation and trial chaired by the Ministry of Public Security, etc. At the same time, within the scope of its function and responsibilities, the PPs have consulted and proposed to implement the recommendations of the United Nations Committee against Torture to Vietnam. In particular, the IA under the SPP should strengthen the detection and expansion of investigation in crimes under their jurisdiction, especially for particularly serious cases with accomplices; continue to detect, investigate and strictly punish acts of torture or other cruel, inhuman or degrading treatment or punishment (torture and obtainment of testimony by duress) by officials of judicial agencies; continue to strictly implement the Convention against Torture and the Plan to implement the Convention against Torture approved under Decision No. 364/QĐ-TTg dated March 17, 2015 of the Prime Minister within the scope of duties, power and responsibilities of the PPs; at the same time, continue to strictly implement the provisions of the Constitution, the 2015 Penal Code, the 2015 Criminal Procedure Code and guiding documents on ensuring the lawful rights and interests of the accused (which states that persons who are arrested, detained, held in custody, charged with criminal case, investigated, prosecuted or tried have the right to defend themselves or ask for service from a lawyer or another person; that the right to defense of the suspects or the defendants and the right to protect the legitimate interests of the litigants shall be guaranteed) in order to ensure a systematic, scientific and lawful investigation,

not to omit any criminals and not cause injustice to the innocent; strictly implement regulations on the right to defense of the accused, protection of the legitimate rights and interests of victims and litigants during the proceedings to avoid acts of torture and obtainment of testimony by duress. In particular, the IA under the SPP has strictly notified relevant parties in the case of arresting the accused for temporary detention; notification of defence request, etc. to ensure full legal rights of the accused and the suspects in accordance with the provisions of the 2015 Criminal Procedure Code.⁴⁷⁶

With its specialized function, the PPs plays an important role in the implementation of the Convention Against Torture. The PPs ensures that measures to prevent and fight against torture in judicial activities are strictly implemented. Such measures are concretized by specific activities to implement the Convention in the People's Procuracies system, such as ensuring strict implementation of the provisions of the Constitution, the Penal Code, the Criminal Procedure Code, Law on Enforcement of Custody and Temporary Detention, Law on Criminal Judgment Enforcement and guiding documents on ensuring the lawful rights and interests of the accused (which states that persons who are arrested, detained, held in custody, charged with criminal case, investigated, prosecuted or tried have the right to defend themselves or ask for service from a lawyer or another person; and that the right to defense of the suspects or defendants and the right to protect the legitimate interests of the litigants shall be guaranteed); implementing the Project on audio and video recording in the course of prosecution, investigation and trial chaired by the Ministry of Public Security and Circular No. 03/2018/TTLT-BCA-VKSNDTC-BQP guiding the order and procedures for audio or video recording; using, keeping and storing audio or video records in the course of investigation, prosecution and adjudication; timely detecting, investigating, and strictly punishing the acts of torture and obtainment of testimony by duress by officials of judicial agencies⁴⁷⁷; at the same time, ensuring the implementation of measures to restore the rights of victims of torture such as the right to complaint, denunciation, suing, compensation of damage or other support rights.

6. THE PPS'S LIMITATIONS IN THE PREVENTION OF AND FIGHT AGAINST ACTS OF TORTURE AND OBTAINMENT OF TESTIMONY BY DURESS AND CAUSES.

Besides achievements, the prevention and combatting of acts of torture and obtainment of testimony by duress by the PPs also has certain limitations to be timely

⁴⁷⁶ Document No. 419/VKSTC-C1 dated Jan 28 2019 on " Giving opinion on the proposal of implementing recommendations of United Nations Committee against Torture"

⁴⁷⁷ Document of the SPP-C1 dated August 25, 2018, providing and updating information and data related to the Report on the Implementation of the United Nations Convention Against Torture

overcome in order to ensure the effectiveness of the PPs's operation in combating said unlawful acts. For example, there are some crimes for which the handling authority is unidentified and such crimes are still overlooked; there are still cases where the identification of the type of crime is not accurate; the PPs faces difficulties in soliciting forensics and using forensics results in its activities, or difficulties in ensuring necessary conditions for interrogation activities of the accused, etc. The above limitations are caused by:

1. The policy, criminal law, and criminal procedure law, specifically: The Criminal Procedure Code does not provide specific regulations on the means, content, time of issuance, and the legal value of the investigation request made by the PPs during the exercising of the right to prosecution and supervision of the case investigation. In addition, the Criminal Procedure Code has not yet provided a provision to enable the PPs and Procurators to play the main role in the investigation, deciding on the collection of evidence for accusations and clearance of accusations; being in charge of the filing of the case and deciding on the termination of the investigation. There is also no specific provision on whether the PPs and the Procurators only preside over the investigation prescribed by criminal procedure without interfering with the investigation work of the Investigation Agency and the Investigators, which is an important issue in the fight against torture and the acts of obtainment of testimony by duress during the settlement of the case.

2. The nature of said crimes: for cases of torture and obtainment of testimony by duress where the offenders are officials of judicial agencies, the tricks of the crimes are very sophisticated and difficult to be discovered. The defendants themselves are knowledgeable of the law, capable of providing testimony that can protect themselves. The evidence is very few and difficult to collect. Therefore, in fact, important evidence in many cases cannot be collected (especially material evidence at the crime scene), and only the testimony of the victim is available. It causes many cases to come to a standstill, leading to the failure to initiate the prosecution and there exists a high possibility of impunity.

3. The organization and management of the PPs: The qualifications and expertise of a number of Procurators are still limited and unable to meet the practical requirements during the handling of cases relating to torture and obtainment of testimony by duress. The Procurators fail to properly identify the characteristics of crimes committed by judicial officers, the factors constituting the crimes to evaluate the gravity of the criminal acts, and the ability to analyze, summarize and evaluate evidence is not comprehensive. They fail to clarify the nature of the cases, provide

accurate grounds and arguments to defend his/her point of view, leading to limitations and mistakes in settlement of the case.

In addition, the PPs still encounters difficulties in implementing the function of investigation in the current context. Most of the Investigators of the PPs have a background in procuracy with a lot of experience in solving criminal cases, but they are not provided with professional training on investigation expertise and some others are mobilized from other forces, mainly former officials of the police sector. The implementation of working regimes, salary scale, allowances and other remunerations have not yet met the needs of officials, which may affect their performance at work. Meanwhile, the investigation shows that most of the offenders are officers in judicial agencies with a profound understanding of the law, utilizing a lot of tricks against the investigation agency, and having broad social relationships, which may affect the investigation process. For said factors, Investigators of the PPs are required to possess the strong political will and professional expertise, and requirements on their working conditions should be fully met in order to ensure the effectiveness of the mentioned work.

4. The regimes to ensure effective implementation: the PPs (Investigation Agency under the PPs) still encounters many difficulties related to the regimes to ensure the effectiveness of investigation activities for cases of torture and obtainment of testimony by duress. Despite conducting the criminal investigation in accordance with the law, the PPs is not yet provided with sufficient mechanism and supporting measures to fully achieve the effectiveness of the said activity, specifically: The PPs has no armed force to support judicial activities; no specialized department for criminal forensics techniques. The facilities and means of work of the IA under the SPP and the PPS at all levels, still fails to meet the practical requirements in the current period despite being paid attention. This is also a factor affecting the quality and effectiveness of the handling of the cases related to torture and the obtainment of testimony by duress. The supporting equipment is not fully provided for the PPs's operations such as cameras and audio recorders, despite being provided but failing to meet the high requirements, other means of information technology necessary for the work of the PPS, etc.

CONCLUSION

According to the provisions of the Penal Code, the persons committing the acts of torture and obtainment of testimony by duress are persons having authority to conduct legal proceedings such as Procurators, Investigators, investigation officers, and officers of Detention Facilities. Said persons are prescribed to have responsi-

bilities and power in taking testimonies and interrogating the denounced persons, victims, witnesses, the suspects and the defendants to settle the case. The acts of obtainment of testimony by duress may occur at detention facilities, interrogating and taking testimony wards of investigative agencies, the People's Procuracies and other agencies assigned to conduct a number of investigative activities. For the act of using torture at detention facilities, the offenders may differ from those obtaining testimony by duress, who are only the persons directly conducting the proceedings and enforcing the judgment. The offenders of torture crime also include persons in charge of detention facilities such as officers of detention facilities or prisons, persons responsible for escorting the arrested or the detained, the suspects or the defendants.

Since the offenders of these crimes are mainly persons knowledgeable in law and experienced in crime investigation and handling, the tricks used to cover up criminal acts and to erase the traces of crimes are very sophisticated. Additionally, there is normally no or few witnesses and the crimes are only known to the victims and the offenders. The acts of torture and obtainment of testimony by duress easily lead to the act of Murder and the act of intentionally causing injury in the course of carrying out judicial activities. Therefore, functioning as a law enforcement organ, exercising the right to prosecution and supervision of judicial activities (participating in all stages of the proceedings), the PPs has the best conditions (in terms of legal qualifications, enforcement apparatus) to fight against the acts of torture and obtainment of testimony by duress in the course of investigation, prosecution and trial of criminal cases. Through criminal charge, supervision of the investigation and trial of the case, direct investigation and prosecution, the PPs promptly detects the acts of torture and obtainment of testimony by duress to make proper punishment in accordance with the law; at the same time, promptly verify, clarify and decide whether or not there occurs the acts of torture and obtainment of testimony by duress to avoid harming the innocent.

Therefore, to effectively implement the Convention against torture in the system of the People's Procuracy, that the requirements for creating favorable conditions in terms of legal corridors, human forces and implementation regimes, etc., be set out and implemented is important for the PPs to effectively conducts the prevention of and fight against torture and obtainment of testimony by duress in the course of investigation, prosecution and trial of criminal cases.

REFERENCES:

1. The 2013 Constitution of the Socialist Republic of Vietnam.
2. The 2015 Criminal Code (amended and supplemented in 2017).

3. The 2015 Criminal Procedure Code.
4. The First National Report on "The Implementation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" in 2017 by the Socialist Republic of Vietnam.
5. Assoc.Prof.Dr. Bui Xuan Duc, Mechanism to control judicial activities - current issues and reform directions, *Legislative Research Journal*, No. 18/2012.
6. Author Hoang Nam, <https://vnexpress.net/ba-cuu-can-bo-trai-giam-linh-an-3993053.html>, dated Oct 17th 2019, accessed on June 1st 2021.
7. Author Cong Thu, <https://baotintuc.vn/phap-luat/khoi-to-vu-an-hinh-su-ve-toi-dung-nhuc-hinh-khien-mot-bi-can-tu-vong-20170919193226875.htm> accessed on June 5th 2021.
8. Opinion of Attorney Ton That Ho Nghi, Author Ai Nhan, <https://tuoitre.vn/chong-buc-cung-nhuc-hinh-oan-sai-quan-trong-la-nguoi-thuc-hien-1017139.htm>, dated Dec 9th 2015, accessed on Jun 1st 2021.
9. Opinion of Ph.D Vo Thi Kim Oanh, Author Ai Nhan, <https://tuoitre.vn/chong-buc-cung-nhuc-hinh-oan-sai-quan-trong-la-nguoi-thuc-hien-1017139.htm>, dated Dec 9th 2015, accessed on Jun 1st 2021.
10. Prof. D.Sc Dao Tri Uc, The function of supervising judicial activities of the PPs – Requirements, challenges and solutions in the new period, Scientific conference "Some theoretical and practical issues on the organization and operation of the PPs over 60 years of establishment and development", Hanoi, 2020.
11. The Supreme People's Procuracy, Document No. 1640a/VKSTC-C1 of the SPP dated October 20 2016, providing information and data of the period 2010-2016 on cases relating to the acts of torture and obtainment of testimony by duress to serve for the preparation of Viet Nam's first national report on the implementation of the United Nations Convention against Torture.
12. Document of the SPP-C1 dated August 25, 2018, providing and updating information and data related to the Report on the Implementation of the United Nations Convention Against Torture.
13. The Supreme People's Procuracy, Document No. 419/VKSTC-C1 dated Jan 28 2019 on "Giving opinion on the proposal of implementing recommendations of United Nations Committee against Torture".

THE ROLE OF THE LAWYER TO DEFEND ACCUSED DISABLED PERSONS AGAINST TORTURE IN VIETNAM

Nguyen Ngoc Lan* and Le Thi Diep**

Abstract: The rights of persons with disabilities (PWD) to access the justice system is provided for in clause 1, Article 13 of the 2007 United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) (CITATION). Accordingly, all member states must protect people with disabilities and their ability to access the judicial system effectively and on an equal basis with others by providing procedural and age-appropriate convenience, thereby enabling persons with disabilities to participate directly or indirectly in all legal proceedings. As with other human rights, person with disabilities also have inviolable rights set forth in the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) (CITATION).

Over the 15 past years, since 2005 to implementation the resolution 49-NQ/TW, dated June 2, 2005 on the judicial reform strategy up to 2020, and the Decision No. 364/QĐ-TTg dated March 17, 2015 of the Prime Minister to approving the implementation plan of the CAT Convention with the judicial reform process, and as a member of the aforementioned UN Conventions, Vietnam has promoted the development of its legal system by researching and establishing an internalization of the UN conventions. In order to ensure the rights of persons participating criminal proceedings, and particularly the rights of defendants who are disabled people Vietnam has incorporated the CRPD and CAT into the Criminal Code (CITATION), the Criminal Procedure Code, and other relevant judicial legislation. The 2015 Criminal Procedure Code (CITATION) has provisions which guarantee the right to defense of person with physical weaknesses, person with mental impairments, as well as the rights of the lawyers to act as defenders for the accused or defendants who exhibits physical and mental weakness. In recent years, there are still torture violations in many provinces of Vietnam. Some cases represent signs of injustice related to the use of torture, forced bowing, and corporal punishment.

With this paper, the authors focus on analyzing the 2007 CRPD, the 1984 CAT, the provisions of the 2015 Criminal Procedure Code, the 2015 Criminal Code, and other legislation related

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to the role of the lawyer in regards to defense of accused persons with disabilities to prevent and control torture in Vietnam.

Thus, the authors wish to point out the limitations of these issues, the causes of limitations in the provisions of the Vietnamese law and the practical implementation of the provisions of Vietnamese laws on the role of the defending lawyers under the framework of the right to access the justice system of persons with disabilities in criminal proceedings. Thereafter, the authors offer a number of solutions to implement the role of lawyers when defending accused disabled persons and the prevention and control of torture in Vietnam.

Keywords: lawyer, persons with disabilities, Vietnam

1. THE REGULATION OF PERSONS WITH DISABILITIES IN THE CONTEXT OF INTERNATIONAL IMPLEMENTATION AND VIETNAMESE LAW

Persons with disability are persons have one or more physical or mental deficiencies which, therefore, cause a significant and long-term impairment of the ability to perform everyday tasks. Under the Anti-Disability Discrimination Act of the British Parliament (CITATION), a disability lasting less than 12 months is not normally considered a disability, unless it is continuous thereafter. As for the American Disability Act of 1990 (ADA), a person with a disability has a physical or mental impairment that significantly affects one or more important activities in life (CITATION). As classified by the World Health Organization (WHO), there are 3 levels of attenuation: defective, handicapped, and disabled, where the term “defect” refers to the loss or abnormality of a physical/psychological body structure (CITATION). The term “handicapped” refers to the impairment of normative functions as a consequence of the defect. “Disability” refers to the adversity or disadvantage of a person with a disability due to the impact of the surrounding environment on his or her ability to carry out daily tasks. According to the International Organization for People with Disabilities, people with disabilities are considered disabled due to a lack of opportunities to participate in social activities and lead a life like other members of society.⁴⁷⁸

According to Article 1 of the Convention on the Rights of Persons with Disabilities, PWDs include “*persons with permanent physical, mental, intellectual, or sensory disabilities that, when interacting with various barriers, may be detrimental to their full and effective participation in society on an equal basis with others*” (CITATION). Thus, the definitions of PWDs mostly refer to the ability to fully participate in society, a disability is not only a physical deficiency, but also a lack of opportunity to integrate into society. This convention is consistent with all people, not just those people with disabilities. Vietnam has ratified most of the important human rights conventions, including

⁴⁷⁸ Nguyen Thi Bay, Majoring in Human Rights Law (master thesis), VNU Law Faculty, 2013.

the CRPD. Defining PWDs, the Law on People with Disabilities of Vietnam, 2010, provides: “Persons with disabilities by definition of this Law are those who have impairment of one or more parts of their body, or functional impairment, which are shown in different forms of disability, and may cause difficulties in work, daily life and learning”.⁴⁷⁹

According to the National survey on people with disabilities in Vietnam, conducted by the General Statistics Office, Vietnam has about 6.2 million people with disabilities, accounting for 7.06% of the population; of which 58% are female, 28,3% are Children (CITATION). It might also be pertinent to note that 28% out of the said percentage of PWDs account for people with extreme disabilities. These PWDs are direct beneficiaries of Vietnam’s social welfare policy.⁴⁸⁰ By the end of 2019, nearly 3 million PWDs had been granted a certification of disability.

Furthermore, the disability rate tends to increase with age and the rate of disabled females is higher than disabled males (CITATION). Among the six socio-economic regions of Vietnam, the regions with the highest disability rates are the North and South-Central Coast, while the Southeast and the Central Highlands are the lowest. The disability rate in rural areas is 1.5 times higher than that in urban areas (CITATION).

People with disabilities are classified into different levels of disability (as defined in Article 3 of Decree No. 28/2012/ND-CP detailing and guiding the implementation of the Law on People with Disabilities in Vietnam), accordingly: i) Particular severe disability : As people with disabilities lead to complete loss of their function, self-control or make them unable to move, to dress, to keep personal hygiene and to complete other everyday tasks without other people to watch, to help and to take care completely; ii) Severe disability: People suffering from serious impairments are those whose impairments lead to partial loss or deficiency of their functions, self-control or make them unable to move, to dress, to keep personal hygiene and to complete other everyday tasks without other people to watch, to help and to take care of; and iii) Light disability: This category encompasses those not belonging to the two categories mentioned above.

As an integrative legal framework, the CRPD addresses many aspects of society, providing an important legal basis for countries to develop policies to protect and provide equal recognition for PWDs before the law. Article 12 of the CRPD states:

“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

⁴⁷⁹ Clause 1, Article 2, Law on People with Disabilities in Vietnam, 2010.

⁴⁸⁰ The national survey on people with disabilities 2016 of General statistics office (2018).

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent, and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

Comparable, Article 13 of CRPD regulates the right to access to justice of PWDs:

"1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. To help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

Thus, we can confirm that the CRPD has specifically recognized equal rights of PWDs before the law as having equal rights to access the judicial systems, just as non-disabled people do. In social development situations, PWDs are one of the most vulnerable groups to face difficulties in terms of inclusivity. Therefore, the CRPD expressed the need to establish favourable conditions for PWDs, especially in regards to equal access to the judicial system.

Moreover, access to the justice systems by PWDs is also systematically guaranteed through the justice implementing system, based on the those who work in the judicial sector; criminal judgment enforcement must have legal knowledge, professional qualifications, and skills. All actions or behaviours of people who work in the judicial domain must be fair and objective, for the transparency of justice.

Concretizing the CRPD, Vietnam has legalized the rights and obligations of PWDs in Article 4 of the Law on People with disabilities, which states that PDWs have the legal right to: i) to participate on an equal basis in social activities; ii) to live independently and integrate into the community; iii) to enjoy exemption from or reduction of certain contributions to social activities; iv) To provide with healthcare, functional rehabilitation, education, vocational training, employment, legal assistance, access to public facilities, means of transport, information technology and cultural, sports, tourist and other services suitable to their forms and degrees of disability; v) Other rights provided by law. These provisions have basically ensured their compatibility with the provisions of the CRPD. In terms of access to justice, The Law on Legal Aid stipulates that PWDs have the right to get legal aid and other rights in accordance with the law (CITATION). For example, protection of the right to defend the accused in general as well as accused PWDs is provided for by the 2015 Vietnam Criminal Procedure Code; this Code provides that any accused person may exercise the right to defend themselves, and to have their defence counselled, or be appointed, by the competent procedural authorities.

For PWDs, the point b clause 1 Article 76 of the 2015 Criminal Procedure Code states: *“persons facing charges and not capable of defending themselves due to physical defects; those with mental disabilities or those under 18 years old, the procedural authorities shall appoint defense counsels for that person”*. And in the Clause 2 this Article has regulated that the competent procedural authorities must demand or ask suitable organizations to assign defence counsels for the person who is regulated within Clause 1 of Article 76, under the pretence of: *“i) a bar association assigns a law firm to appoint defense counsels; ii) a governmental legal aid center appoints a legal assistant or lawyer to defend persons qualified for legal aid; iii) the committee or affiliations of Vietnam Fatherland Front appoint people’s advocate(s) for their personnel who face charges”*.

In addition, the Criminal Code also contains provisions to ensure that PWDs are people with special attention by State/Government, protect special policies when they participate in criminal proceedings as the accused in a case. For example, the accused is entitled to extenuating circumstances of criminal liability or to be released from prison before a conditional period. Under point p Clause 1 Article 51 of Criminal Code 2015, if an offender has a serious or extremely serious physical disability, it would act as a mitigating factor of penalties of the offender; or point dd Clause 1 Article 66 which states that persons with severe disabilities are one are such cases to be considered for released from prison before a conditional period (when all conditions are met as prescribed by law). Furthermore, Article 21 The Criminal Code 2015 states that a person who commits an act that is dangerous to society and is suffering from

a mental disease or another disease that causes him/her to lose his/her awareness or control of his/her behaviours is exempt from criminal responsibility.

However, when comparing the concept of PWDs under the law on people with disabilities and the concept of PWDs in the CRPD, it is evident the scope of regulations regarding PWD in the Law on Criminal Procedure 2015 and Criminal Code 2015 amended and the supplemented version in 2017 are not consistent. Similar inconsistencies can be found between the provisions of the 2010 Law on Persons with Disabilities and the provisions of Criminal Code 2015. The term “mental impairment, mental disability”, “intellectual disability”, “physical weakness”, “mental weakness” has not been clearly defined by the 2010 Law on Persons with Disabilities or the 2015 Criminal Procedure Code. This leads to an inconsistent understanding in the application and enforcement of the law, which also means that PWDs in future cases may be disadvantaged, unable to access justice when applicable, and that law enforcement has the inconsistent understanding of applying the law. Besides these issues, we cannot clearly distinguish the terms “intellectual disability”, “mental disability”, and “mental defect”, and how they are intended to be understood; according to the point Art 4 of the Law on Persons with Disabilities, intellectual disability and mental disability are cases entitled to legal aid; however, “mental weakness” is not mentioned or defined.

Thus, there is no consensus about cases of disability with the right to legal aid between the Law on Persons with Disabilities 2010 and those with disabilities that have the right to defend (designate defence) according to the Criminal Procedure Code 2015. According to Article 2 of the Law on Legal Aid 2017, “legal aid” refers to the provisions of legal services free of charge aid individuals in accordance with the law, contributing to the assurance of human rights and citizenship in the access to justice and equality before the law. Therefore, these are issues that need to be specifically researched, guided, and answered by competent authorities to ensure the process of law, its application, and enforcement in the case of PWDs participating in the criminal justice system.

2. THE ROLE OF THE LAWYER TO DEFEND ACCUSED DISABLED PERSONS AGAINST TORTURE IN VIETNAM

Defense counsels - Lawyers:

We would like to present more content on the concept of “Defense counsels” before clarifying the content of the role of the lawyers when defending accused PWD against torture.

In practice, the identity and roles of lawyers, defence counsels, and jurists (the people who research and practices in the field of law) are sometimes confused. Therefore, there is some ideation that lawyers are jurists and are trained more in

professional skills, join Bar associations, and are thereby recognized as a lawyer to practise professionally in litigation, legal advice, or both⁴⁸¹. Others may define lawyers as “...a person who relies on the law to defend for the litigant before the court”⁴⁸², or “... professional defence activists and work in the Bar association”⁴⁸³.

The above definitions are simple and incomplete understandings, not based on any specific criteria or conditions as prescribed by law to distinguish between lawyers, jurist, or defence counsels. The cause of this confusion and inconsistency, on the one hand, is the lacking development of the legal system in general and the underdeveloped judicial profession in Vietnam in particular. On the other hand, the translation of the term related to a foreign language is inaccurate and inconsistent.

Therefore, we believe the relevant functional agencies such as the Vietnam Bar Federation, Bar associations, Legal Aid centres of the provincial level and competent procedural authorities at all levels must promote the dissemination of laws, such as those on legal aid and lawyers. This way, people can access the legal system, including judicial assistance and legal aid, ensuring legitimate rights and benefits participating in criminal proceedings as defendants.

In Vietnam, a person who wants to become a lawyer must satisfy the requirements of good health, loyalty to the Fatherland, compliance with The Constitution and The Law, have good ethical qualities, have a Bachelor of Laws degree, attend and graduate from a law training course, pass the law practice internship, pass the law transfer exam to have a Lawyer’s Certificate, register to join a bar association to get a lawyer’s card. Thus, the criteria and conditions for becoming a lawyer are fundamentally different from those of jurist. Jurists do not require all of these conditions to be met; they only need knowledge of the law.

With the standards and conditions in the law for a person to become a lawyer, Vietnam State requires very high and very strict standards for the lawyers, especially in the current period when The Party and The State is focusing on judicial reform, improving the quality of people working, with judicial and legal support. The criteria and conditions required to be appointed as procurators and judges are specified in the law on organization of the People’s Procuracy 2014 (CITATION) and the Law on Organization of the People’s Court 2014 (CITATION), the standards to be recognized as lawyers are also strictly regulated by the Law on Lawyers.

⁴⁸¹ The government coordinating council on Law dissemination and education (2011); Lawyer and the Law on Lawyers in Vietnam, Law propaganda issue No 4, part 1, Hanoi, p2

⁴⁸² Institute of Linguistics (1997), “Vietnamese Dictionary”, Danang publishing House, Danang, p.570

⁴⁸³ Vo Khanh Vinh (editor) (2014), Scientific commentary of the Criminal procedure code, people’s public Security Publishing House, Hanoi, p.129

A person who is allowed to practice law must meet conditions in Article 10 and 11 of Law on Lawyers: “i) Vietnamese citizens who are loyal to the Fatherland, observe the Constitution and law, have good moral qualities, possess a law bachelor diploma, have been trained in the legal profession, have gone through the probation of legal profession and have good health for law practice and ii) possess a law practice certificate and join a bar association. The condition of a law practice is the professional requirement (have a law bachelor diploma, complete a lawyer training course, and complete the exam of a lawyer training program). This regulation is consistent with the professional practice specified by the Law on Lawyers in many other countries.⁴⁸⁴

With the above provisions, we can understand: *The Lawyers is a title in the judicial field, only those who are qualified to practice law in accordance with the law to practice in legal proceedings and legal consult or represent outside of the proceedings for individuals, organizations, and other legal services.*

Lawyers or other person can become defenders of the accused in criminal cases when they are asked by the accused, the Criminal Procedure Code collectively calls them “*defense counsels*”. According to the Criminal Procedure Code 2015, defence counsels are “*lawyers, representatives of persons facing charges, people’s advocates, and legal assistants for charged persons given legal aid*”⁴⁸⁵. With strict standards, conditions, and procedures for selection and appointment to become a lawyer, as well as the professional practice, quality, and efficiency of lawyers in recent years, lawyers have affirmed their position and role in society. Deploying the spirit of the Politburo’s Resolution No 49-NQ/TW dated 02 June 2005 on the Judicial Reform Strategy to 2020, especially the implementation of Decision No 1072/ QD-TTg dated 5 July 2011 of the Prime Minister approves the Strategy for the development of the Lawyer profession until 2020, the number of Lawyers in Vietnam has developed strongly in quantity and quality. By the end of 2020, Vietnam had 15,107 lawyers, an increase of 1,248 lawyers from 2019⁴⁸⁶. Many lawyers have affirmed their qualifications, expertise, and confidence in participating in national and international legal services.

⁴⁸⁴ The government coordinating council on Law dissemination and education (2011); Lawyer and the Law on Lawyers in Vietnam, Law propaganda issue No 4, part 1, Hanoi, p13

⁴⁸⁵ Clause 2 Art 72 The Criminal Procedure Code 2015

⁴⁸⁶ Conference summarizing activities in 2020 and direction of activities in 2021 of Vietnam Bar Federation, dated December 27, 2020 (<https://www.liendoanluatsu.org.vn/post/h%E1%BB%99i-ngh%E1%BB%8B-t%E1%BB%95ng-k%E1%BA%BFt-t%E1%BB%95-ch%E1%BB%A9c-ho%E1%BA%A1t-%C4%91%E1%BB%99ng-n%C4%83m-2020-v%C3%A0-ph%C6%B0C6%A-1ng-h%C6%B0%E1%BB%9Bng-ho%E1%BA%A1t-%C4%91%E1%BB%99ng-n%C4%83m-2021>)

In criminal proceedings, defense counsels act as lawyers asked for by the accused or by competent procedural authorities to participate in the proceedings to defend the accused and assist in legal issues to protect their legitimate rights and interests, thereby contributing to protecting the justice of the law, protecting socialist legislation. The proportion of lawyers participating in defence activities is not high, approximately 13% to 14% of defendants accused in criminal cases, including cases requested to defend by proceedings agencies, are defended by lawyers⁴⁸⁷. However, the lawyers still have a particularly important position and role as an “exculpatory representative”, ensuring legitimate rights and interests for the accused in criminal cases, especially for PWDs, because most of these cases are the defence counsels assigned to defend the accused. The lawyer has some of the following characteristics:

i) a defence lawyer is a person who is sought by the accused to defend or requested by the competent procedural authority to defend. Lawyers, like other subjects that comprise defence counsels, are persons who become defenders only when they meet all the conditions specified by the law and are asked to defend by the accused or by competent procedural authorities

ii) defence lawyers, as well as other entities that act as defence counsels, must go to the competent procedural authority to seek defence, or make a requested to competent procedural authorities to register as the defence, and must be accepted by the agency or person competent to conduct legal proceedings.

iii) Defense lawyers are different from other subjects who are considered defence counsels, who meet the standards, conditions, and professional skills requirements prescribed by the Law for Lawyers. When participating in legal proceedings, defence lawyers use professional skills to provide arguments and evidence to prove innocence and relieve the criminal liability of the accused, as well as to help the accused to legally protect their legitimate rights and interests.

iv) Defense lawyer has a legal status, has separate rights and obligations, regardless of the rights and obligations of the accused person.

v) Defense lawyers participating in the proceedings have no rights and interests related to the case, but the activities of defence counsels during proceedings are aimed at protecting the legitimate rights and interests of the accused person.

The role of the lawyer to defend accused disabled persons against torture in Vietnam

i) During the participation in the criminal proceeding, defence lawyer acts as a law professional, knowledgeable in the law and with professional legal skills which

⁴⁸⁷ Lê Thị Diệp, “Rights and obligations of defense lawyers in the stage of criminal investigation” master thesis, academy of Social Sciences, Vietnam, Hanoi, 2019, p.51.

help the accused gain confidence that their case will be resolved quickly, impartially, and objectively (i.e., the matters related to their crimes will be justified or mitigated as much as possible). As an exculpatory representative, through their legal powers, lawyers participating in criminal proceedings contribute to the resolution of the case in an objective, comprehensive and lawful manner which eliminates the tyranny of criminal proceedings, avoids infringement of the legitimate rights and interests of accused persons, and demonstrates innocence or mitigates criminal liability of the accused.

ii) The presence of a defense lawyer in the criminal proceedings contributes to the full and honest interrogation, avoiding a result of harassment and corporal punishment against the accused; with the process of resolving criminal cases, the activities of defence lawyers in the proceedings will assist agencies and individuals with criminal procedural competence, immediately seeing the shortcomings and violations that need to be promptly supplemented and overcome.

iii) Defense lawyers, through their defence activities, help agencies and persons with criminal procedural competence to understanding the reality of cases, crime, offender, motive, and purpose, in order to make procedural decisions (investigation conclusions, indictments judgments or decisions of the court) which are grounded, lawful, and meet requirements of legal education.

In addition, with their obligations, defence lawyers participate in criminal proceedings, together with agencies and persons with criminal procedural competence to contribute to the protection of legal justice and the socialist legislation, building the trust of citizens in the strictness of the law. From that, raising awareness of law observance, actively and effectively participating in the fight against crime, and contributing to maintaining social security and safety.

Article 15 of CRPD states: i) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, in particular, no one shall be subjected without his or her free consent to medical or scientific experimentation; ii) State Parties shall take all effective legislative, administrative, judicial, or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman, or degrading treatment or punishment,

As acting State Parties of the International Covenant, Vietnam has actively and proactively built and perfected the legal system, including the judicial laws, The Criminal Procedure Code 2015, and Criminal Code 2015, to protect the consistency between legal documents in the country, internalizing the convention's provisions in accordance with Vietnam's legal policies, ensuring compatibility with international conventions. In particular, the Criminal Procedure Code 2015 has comprehensively

amended and supplemented the Criminal Procedure Code 2003, in which the rights of accused persons or defendants in criminal proceedings are ensured to avoid torture and corporal punishment in the process of custody, investigation, prosecution and adjudication. Additionally, accused persons of physical weakness, or persons with mental deficiencies are guaranteed the right to a defence in case their representative or relative does not invite the defender, so the competent procedural authorities must appoint a defence counsel for them (Article 76 of the Criminal Procedure Code 2015). In this case, the defence lawyer is appointed by the competent procedural authority to defend the accused person with disabilities (has physical weakness, or mental defect). The defence lawyer will be a companion to the accused person with disabilities in the proceedings of the criminal cases, affirming the defendant's rights. The defendant must be protected by the competent procedural authorities by the Criminal Procedure Code; to ensure they are not subjected to harassment, corporal punishment, or affected by methods of investigation, prosecution, and adjudication against the law.

In order to protect the rights of defendants who are persons with disabilities in criminal cases, defence lawyers have the rights specified in clause 1 Article 73 of the Criminal Procedure Code 2015, which states: *“(a) Meet and inquire about persons facing charges; (b) Be present during the extraction of statements from arrestees and temporary detainees or the interrogation of suspects, and question arrestees, temporary detainees and suspects with the consent of individuals authorized to acquire statements or conduct the interrogation. After authorized individuals end a session of statement extraction or interrogation, defense counsels may raise questions to arrestees, temporary detainees and suspects; (c) Engage in the activities of confrontation, identification, recognition of voice and other investigative activities as per this Law; (d) Be informed by competent procedural authorities of timing and location for taking statements or interrogating, and schedule and venue for other activities of investigation as per this Law; (dd) Read the records of legal proceedings, in which they have participated, and decisions on legal procedure against persons whom they defend; (e) Request the replacement of persons given authority to institute legal proceedings, expert witnesses, valuers, interpreters and translators; and request the changes or termination of preventive and coercive measures; (g) Petition for legal proceedings according to this Law; for summoning of witness testifiers, other participants in legal procedure or authorized procedural persons; (h) Gather and present evidences, documents, items and request; (i) Inspect, assess and confer on relevant evidences, documents and items and request authorized procedural persons to check and evaluate such; (k) Request competent procedural authorities to collect evidences, add or repeat expert examinations or reevaluate property; (l) Read, transcribe and photocopy documents from case files related to their activities of pleading upon the end of investigations; (m) Engage in debates and questioning sessions in court; (n) File complaints about competent*

procedural authorities and persons' decisions and legal proceedings; (o) Lodge appeals against the Court's judgments and rulings if defendants are less than 18 years old or have mental or physical defects as per this Law."

In addition, to avoid the fact that the accused person with disabilities can be harassed or punished in the process of resolving cases, the Criminal Procedure Code 2015 also stipulates that the interrogation and extraction statements must be recorded by sound or sound and visual means.

Clause 6 Article 183 of the Criminal Procedure Code 2015 states: "*Suspect interrogation at a detention facility or the office of investigation authorities or units assigned to investigate shall be recorded by sound or sound-and-visual means. Suspect interrogation at various places shall be recorded by sound or sound-and-visual means at the requests for the suspect or competent procedural authorities and persons*". Clause 5 of this Article also regulates the responsibilities of investigators, investigation officers, procurators and checkers, whereby extorting statements and/or torturing suspects shall incur criminal liabilities as per the Criminal Code. This regulation is stated in detail within Article 373 and 374 of The Criminal Code 2015 of Vietnam. With this regulation, the Criminal Code of Vietnam has internalized and ensured domestic law compatibility with the Convention against Torture and other Cruel, inhuman, or degrading treatment or punishment 1984. Article 4 of this convention states: "*(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture; (2) Each State Party shall make these offences punishable by appropriate penalties which consider their grave nature.*"

In the process of defending accused PWDs, to ensuring the rights of defendants according to the Criminal Procedure Code, defence lawyers should always accompany the accused or defendants in order to ensure the rights of person with disabilities, while at the same time preventing the accused from being taken advantage of, being harassed, enduring corporal punishment, or other illegal methods of investigation. Defence lawyers also have an important role to play in ensuring criminal policies match with the Criminal Code 2015, specifically: commit to a leniency policy according to the provisions of Article 3 of the Criminal Code 2015; Mitigating factors criminal liability under Article 51 of the Criminal code 2015, and specified at point p clause 1 Article 51 of this law which states "*The offender has a serious physical disability or extremely serious physical disability*", thus establishing criminal policies towards accused persons with disabilities under 18 years of age, and other criminal policies for defendants with disabilities as part of the general provisions of the Criminal Code 2015.

The above provision of the Criminal Procedure Code 2015 shows that defence lawyers play a particularly important role when defending disabled people, especially in ensuring the rights of defendants in the process of resolving cases, as well as the prevention of harassment, corporal punishment or other illegal investigation measures against defendants. Therefore, this provision ensures that criminal policies are useful for defendants and accused in general, as well as disabled defendants, whereby the law is applied and administered by competent procedural authorities.

3. SOLUTIONS AND RECOMMENDATIONS

From the above analysis, we propose some solutions to enhance the role of lawyers in criminal cases, especially the role of lawyers in defence of accused persons with disabilities in criminal cases, and propose additional solutions to improve legal provisions, ensuring legal rights and interests of persons with disabilities to participate in criminal cases as defendants:

i) Strengthen the dissemination of legal information to raise people's awareness of the role of lawyers in criminal proceedings and influence people to trust the legal services of lawyers. Information on the role of the lawyers should be directed to provinces and areas that people have little access to legal aid and services.

ii) Raise awareness for proceeding agencies and defence counsels about PWDs, and improve skills of working with PWDs, to further ensure the rights of PWDs in criminal cases.

iii) Lawyers and law-practising organizations should strengthen the implementation of free legal counselling and legal aid for people in general, PWDs, and poor people who cannot access legal aid services, but still wish to receive legal aid.

iv) Lawyers must improve their awareness, training and fostering of legal knowledge, law practice skills in ensuring the provision of quality and effective legal services.

v) Government agencies should amend the provisions in Article 76 of the Criminal Procedure Code 2015 on cases where the right to defence is guaranteed (designation of defence) and Article 3 - Law on People with Disabilities 2010 regarding the types of disabilities, to protect the consistency of the term "people with physical and mental impairments" with the regulations in the Article 76 of the Criminal Procedure Code 2015.

vi) Fully implement the provisions of the CRPD, especially specific provisions such as Article 12 on equal recognition before the law, Article 15 on freedom from torture or cruel, inhuman, or degrading treatment or punishment.

vii) Vietnam must establish the Committee on the Rights of PWDs or a National Committee to implement the relevant legal convention. The implementation of the convention requires not only the right laws and policies, but also the financial resources and the ability to enforce those laws and policies.

viii) In accordance with the provisions of the CRPD, and in accordance with the provisions of the Law on Legal Aid, in Article 2 of the law on legal aid, “*Legal aid means the provisions of legal services free of charge to legally-aided persons in a legal aid-related case in accordance with this Law, contributing to the assurance of human rights and citizenship in the access to justice and equality before the law*”. At point d Clause 7 Article 7 of the Law on Legal Aid 2017, people with disabilities are one of subjects liable to receive free legal aid. The law, regardless of whether people with severe or mild disabilities are entitled to legal aid, states that every person with a disability is entitled to legal aid. Therefore, we believe that the competent authorities should clearly stipulate in Article 76 of the Criminal Procedure Code the appropriate legal aid for PWDs whose defendants in criminal cases are persons with physical or mental defects, and guaranteed the right to defend. These provisions and amendments would thereby create favourable conditions for agencies and persons who are competent to conduct legal proceedings to agree on awareness and application of the law. Thus, ensuring the rights of people with disabilities in criminal cases.

REFERENCES

International documents

1. Andrew byrnes (2015), *From Exclusion to Equality Realizing the rights of person with disabilities*, United nations.
2. The Convention on the Right of Person with Disabilities (CRPD), Training Guide, https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf.
3. UN-DESA, OHCHR, IPU (2007). *From Exclusion to Equality: Realizing the rights of persons with disabilities (Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol)*, <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>
4. The convention against Torture and other cruel, inhuman, or degrading treatment or punishment 1984
5. The Vietnamese documents
6. The Criminal Code 2015
7. The Criminal Procedure Code 2015
8. The Law on people with disabilities
9. Law faculty VNU, Hanoi (2010), *Human Rights: A collection of general comments/recommendations of the United Nations Conventions Committee*, People’s Public Security Publishing House.

10. Hanoi Law University (2011), *Text book on Law on Persons with disabilities*, People's Public Security Publishing House.
11. Nguyen Thi Bay, Majoring in Human Rights Law (master thesis), VNU Law Faculty, 2013.
12. The government coordinating council on Law dissemination and education 920110; Lawyer and the law on lawyers in Vietnam, Law on propaganda issue No 4, part 1, Hanoi, p.2
13. Institute of Linguistics (1997), "Vietnam Dictionary", Danang publishing house, Danang, p.570
14. Vo Khanh Vinh (editor) (2014), *Scientific commentary of the criminal procedure code*, people's public security publishing house, Hanoi, p.129
15. Le Thi Diep, *Rights and obligations of defense lawyers in the stage of criminal investigation*" master thesis, academy of Social Sciences, Vietnam, Hanoi, 2019, p.51
16. The national survey on people with disabilities 2016 of General statistics office (2018).
17. <http://www.molisa.gov.vn/vi/Pages/chitiettin.aspx?IDNews=26029>
18. Conference summarizing activities in 2020 and direction of activities in 2021 of Vietnam Bar Federation, dated December 27, 2020
19. <https://www.liendoanluatsu.org.vn/post/h%E1%BB%99i-ngh%E1%BB%8B-t%E1%BB%95ng-k%E1%BA%BFt-t%E1%BB%95-ch%E1%BB%A9c-ho%E1%BA%A1t-%C4%91%E1%BB%99ng-n%C4%83m-2020-v%C3%A0-ph%C6%B0%C6%A1ng-h%C6%B0%E1%BB%9Bng-ho%E1%BA%A1t-%C4%91%E1%BB%99ng-n%C4%83m-2021>

THE FALLACY OF TORTURE AND THE TICKING BOMB SCENARIO

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Abstract: Debates about torture are ubiquitous. Its harms have long been proved beyond doubts. And yet, it is not surprising to learn that torture is widely practised throughout the world despite legal formalists have given all they can to put an end to this practice. The prevalence of this phenomenon is partially owed to the reason that it is extremely difficult to grasp an exact definition of torture, even though a lot of scholarly effort has been channelled. To that end, this paper will shed light on the dynamics of torture. In examining the universal definition of this phenomenon, this paper will point out that any attempt to wrap words around torture can be problematized. The definition will be broken down to have a see-through of all internal elements of torture. This line of analysis is insightful to probe the unique wrongness of this phenomenon. Torture is wrong at all levels. It violates personal autonomy and societal trust, and –what inherently makes it crowd out from other heinous crimes is that– it destroys the victim’s agency. The TBS presents the justification for an urgent use of torture for the greater good; however, it is based on the consequentialist fallacy that under strained pressure, the tortured would talk. In fact, it is not the victim but torture is talking. If allowed, torture is like an epidemic spreading widely. Certainly, we do not want to live in a society constructed by torture.

Keywords: Torture; Moral philosophy; Personal autonomy; Societal trust; Destruction of agency; The ticking bomb scenario.

I. INTRODUCTION

Debates about torture never get old. One does not need to be a rocket scientist to know that torture is terrible. Also, it is unsurprising to learn the fact that torture is committed throughout the world despite legal formalists have moved heaven and earth to put it to an end. It is claimed that 79 out of 155 countries that have adopted the UN Convention Against Torture (CAT), are violating it.⁴⁸⁸ This practice in part stems from the fact that it is extremely difficult to grasp an exact definition of torture. Moreover, grappling with the ubiquity of this practice, some even argue for one or some legal exceptions to the total prohibition of torture in emergency cases, allowing

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⁴⁸⁸ Lauren Glenmere, *Torture, Asian and Global Perspectives*, Volume 03, No. 06 (2014) p. 28, at https://issuu.com/humanrightasiasia/docs/torture_v3_n6_web (last visited 5 Jul 2021).

state officers to use torture as a last resort to cater to the greater good.⁴⁸⁹

This paper will first expound on the definition of torture. By referring to the universal definition of this practice, it shows that any attempts to condense torture into words could be problematized. The definition is broken down to have a see-through of all elements within torture for a better understanding of this practice. This breakdown analysis is helpful to examine the (im-)moral traits of torture, and insightful to capture the uniqueness thereof. Section three deals with the unique wrongness of torture. It follows Wisnewski's chain of thought arguing that pains, violations of trust and autonomy contribute largely to the core wrongness of torture, however, fail to capture the evil nature of this practice. What makes torture crowd out from other heinous crimes is its aim to destroy the victim's agency. This moral uniqueness is further examined in light of the ticking bomb scenario (TBS) in which torture is seen as a morally justifiable means to secure the greater good. Before unpacking the arguments, it is never the objective of this paper to completely solve the TBS dilemmas. Instead, it tries to articulate the moral essence of torture and the imperatives facing those considering torture as a possibility in the face of exceptional situations. This would help provide the starting point for any prospective moral and philosophical inquiries on the absolute prohibition of torture.

II. THE UNIQUE WRONGNESS OF TORTURE

A. The Definition of Torture

The line between torture, coercion, and manipulation, or whether such techniques as sleep and sensory deprivation, isolation, or prolonged questioning should count as forms of torture, is seemingly very blurry.⁴⁹⁰ To capture the notion of torture, it must be premised upon the evil nature of such practice. In addition, for a better understanding of torture, I shall draw a line to show the distinction between this practice and other ill-treatment.

Article 1 of the CAT proudly reads:

"... 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

⁴⁸⁹ See e.g., Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss* (2003) 48 *New York Law School Law Review* p. 275, 277; Alan M. Dershowitz, *Is it Necessary to Apply Physical Pressure to Terrorists and to Lie about it?* (1989) 23 *Israel Law Review* p. 192, 200.

⁴⁹⁰ David Sussman, *What's Wrong With Torture?* (2005) 33 *Philosophy and Public Affairs* 1, 2005, p. 1.

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."

Accordingly, torture contains four elements: (i) severity of pain or suffering; (ii) inflicted with intent; (iii) for a purpose; and (iv) the involvement of, or acquiescence by, a state official.⁴⁹¹ To have a full and better understanding of torture, I will break down each element to show that to amount to torture, all those four elements must be met at the same time. The breakdown analysis happens to be very helpful and insightful for the next section, where I examine the moral aspect of torture.

First of all, pain is not necessarily a bad thing to have. As a part of evolution, sometimes undergoing pain is beneficial and positive for a human being, for example, childbirth giving, tooth removal. Furthermore, the level of pain of someone varies without any fixed standards for assessment. As a result, any attempt to quantify how much pain would amount to torture, appears unrealistic and implausible. Secondly, infliction of pain or other distress is committed intentionally and purposefully. While one might accidentally kill, one cannot accidentally torture. I might intentionally inflict a pain on someone for example punching a guy in the face, however, it is not considered as torture. In addition, it is required that torturers and victims are placed in a distinctive kind of social setting and relationship to one another.⁴⁹² Consent of victims plays a vital part in this case to justify the morality of the act. The autonomy of victims is violated. The victim of torture is powerless to shield herself and unable to put up any real moral or legal resistance to the perpetrator.

Thirdly, the perpetrator uses torture as a tool to achieve his aim. His purpose might be to satisfy his pleasure, terrorize or punish victims, impel them to make a confession or gather intelligence. Last but not least, all the acts are committed by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity.

In jurisprudence, torture might be confused with other forms of ill-treatment. The European Court of Human Rights tends to consider torture as distinct in two ways. First, the Court recognized that deliberate inhuman treatment causes very serious and cruel suffering.⁴⁹³ In addition, the Court endorses the CAT's approach to

⁴⁹¹ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008) p. 28.

⁴⁹² David Sussman, *supra* n 4, p. 6.

⁴⁹³ *Ireland v. United Kingdom*, 1978, para. 167.

torture by stressing the purposive element of torture.⁴⁹⁴ However, it is claimed that the Court still seemingly relies on the severity of suffering as the decisive criterion and this approach obfuscates the differentiation.⁴⁹⁵

In contrast, it is argued that purpose ought to be a distinguishing element, as follows:

“The decisive criteria for distinguishing torture from [cruel, inhuman and degrading treatment or punishment] may best be understood to be the purpose of the conduct and the powerlessness of the victim rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.”⁴⁹⁶

The emphasis on powerlessness points out that subjection to torture presupposes in a circumstance the victim is under the total control of torturer.⁴⁹⁷ Torture constitutes a calibrated level of suffering beyond that of any form of ill-treatment. Furthermore, pain or suffering matters but the way and context in which such pain or suffering is endured is the key factor. Hence the purposive element approach to torture gives a better and more accurate understanding of this phenomenon.

The CAT’s definition appears to capture all the proponents of torture, however, still tags along with a number of loopholes. Firstly, it emphasizes the involvement of states, but puts aside the accountability of individuals committing torture. Secondly, it is contended that from a historical and philosophical viewpoint, any attempt to define torture seemingly fails to address it adequately.⁴⁹⁸ Torture has been practised in too many divergent ways, and in too many wildly different circumstances. In other words, today torture is far different and subtle from ancient version due to a number of changes, for example, the advancement of technology. Besides, for the philosopher, a failure to achieve the account that ‘covers all cases of what is to be analyzed is traditionally the gold standard of explanation’, is a failure to provide any worthwhile account at all.⁴⁹⁹

Torture has gone all the way from barbarous acts to more sophisticating methods to terrorize and humiliate its victims for a wide range of aims as stated above. An

⁴⁹⁴ *Selmouni v. France*, 1999, para. 98; *Kismir v. Turkey*, 2005, para. 129.

⁴⁹⁵ Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (OUP 2014) p. 4.

⁴⁹⁶ UNCHR, ‘Report of the Special Rapporteur: Manfred Nowak’, para. 39.

⁴⁹⁷ *Ibid.*, para 39; David Sussman, *Defining Torture*, 37 *Case Western Reserve Journal of International Law* 225, 2006, p. 227.

⁴⁹⁸ Jeremy Wisnewski, *Understanding Torture: Contemporary Ethical Debates* (EUP 2010) p. 5.

⁴⁹⁹ *Ibid.*

evident example is the extensive practice of torture under Bush administration. In a memo by the Office of Legal Counsel, it is claimed that waterboarding does not inflict any severe physical pain or suffering on the subject, but 'simply is a controlled acute episode, lacking connotation of a protracted period of time generally given to suffering.'⁵⁰⁰ Notably, waterboarding is used repeatedly at any time for a long period. It is unarguable that this practice evidently causes the psychological trauma for detainees who were its victims.⁵⁰¹ This kind of trauma tends to relive the assault in victims' minds and make them suffering later on, even when waterboarding ends.

This example is to reiterate that our current understanding of torture is resilient and elastic. Emphasis on one element of torture may lead to a misconception of such practice, for example pain should not and cannot be understood in a uniform manner. Otherwise, it makes room for torture to brew. As astutely observed by Wisnewski, "In the moral and sentimental universe, nothing may be torture, and, with a slight shift of perspective, everything may be torture."⁵⁰² The metaphor indicates that torture constantly evolves in different forms, and no single definition can cover all of its evilness and wrongness.

B. The Immoral Face of Torture

Then what is morally special about torture? Before answering this question, one needs to understand the nature of this practice. Torture definitely is morally incompatible with any civilized values.

Studying pain, as pointed out in section one, shows us that pain is not always a bad thing. Pain is wrong only when it is made into suffering. Deliberate infliction of suffering and pain is tremendously abhorrent to most people's perception, especially to liberals.⁵⁰³ The aim of torture is to strip away from its victims all the qualities of human dignity that liberalism prizes. It isolates, terrorizes and humiliates its victims. It gives them the ultimate fear that they are not only powerless to resist but also must scream and beg for mercy. The victims are impelled in the fastest and most urgent way possible to get away from the pain they are suffering by satisfying torturers' demands even if they have no idea what it is all about. This kind of act reflects cruelty and tyranny in the microcosm that liberals rank first among vices.⁵⁰⁴

⁵⁰⁰ Memoranda of The U.S. Office of Legal Counsel, Aug 2002.

⁵⁰¹ Jeremy Wisnewski, *supra* n 12, p. 45.

⁵⁰² *Ibid.*, p. 46.

⁵⁰³ David Luban, *Liberalism, Torture, And The Ticking Bomb* (2005) 91 *Virginia Law Review* pp. 1425-1461.

⁵⁰⁴ *Ibid.*, p. 1438.

There must be something morally special about torture that distinguishes it from all other kinds of violence and cruelty. The wrongness of torture cannot be fully grasped by understanding it as just an extreme instance of these more general moral categories.⁵⁰⁵ Torture is seen as more morally offensive than other ways of inflicting physical or psychological pain. As distinguished above, torture is distinct from other forms of ill-treatment. Hereinafter, I follow Wisniewski's chain of thought on the wrongness of torture by exploring how torture constitutes violations of trust, autonomy and agency.

1. Violation of Trust

Torture results in the rise of social mistrust in States using it. In a civilized society, it is state responsibility to protect dignity of persons, not to violate it. The trust of the torture victim is 'utterly annihilated'. In return, the state uses torture loses moral standing in the international community. Then the mistrust is like an epidemic disease spread widely to those who do not undergo torture. They see a state of powerlessness does nothing but torture his citizens, violates his own rule of law principles and allows impunity to abhorrent actors that must be punished.

This account tries to explain the wrongness of torture by referring to its negative consequences for those other than the person tortured. However, I do not think it can adequately capture the unique wrongness of torture since states are expected to do the right, not the wrong thing, and prohibition torture is only a part of it. The mistrust of a whole civilized society is inevitable if states do what they are not allowed to do, such as genocide. In my opinion, this account should be seen as a consequence of torture, not the root cause that makes torture unique.

2. Violation of Autonomy

Torture possesses a coercive nature, thus violates the autonomy of its victims, which is regarded 'intrinsically valuable'. On this point, there is a need to continue distinguishing torture's wrongness from other acts like coercion and brainwashing.

David Sussman conveys a point that torture 'aims to manipulate its victims through their own responses, as agents, to felt experience of their affects and emotions in a context of dependence, vulnerability, and disorientation.'⁵⁰⁶ Meanwhile, coercion exploits the agent's rational responses to the cognitive content of these feelings. The victims' acts will be influenced through their own appreciation of their reasons for action. Coercion involves 'too direct an appeal to its victim's rationality to count

⁵⁰⁵ David Sussman, *supra* n 4, p. 3.

⁵⁰⁶ David Sussman, *supra* n 4, p. 8.

as torture', requires the autonomy of the agent being coerced. Brainwashing, just like the way it is put, attempts to exploit the victim's effects and bodily responses to directly subvert or restructure his rational capacities and commitments. All of the beliefs, desires and perceptions of the victim are reshaped at the brainwasher's want.

Torture is believed to exist somewhere between coercion and brainwashing even though they often overlap.⁵⁰⁷ Torture often involves coercion. In order to direct its victim, torture puts them in a panic and insecure state of mind and completely lost in understanding of what is being done to them. In torture, the victim's feeling becomes his own problem and he struggles to find himself accountable for responding to it. Moreover, torture dismantles the very capacity for rational deliberation.

Violation of autonomy, even though is often intrinsically wrong, can be sometimes considered necessary and morally justified in certain circumstances, for example, legitimate defence. Therefore, this account contributes largely to the wrongness of torture, somehow still does not catch the uniqueness that only this phenomenon possesses. After all, only the humanity and agency of the person matter.

3. Destruction of Agency

The elasticity of torture is overwhelming in that it can be nothing but also everything. Torture is not easily detectable since bodily effects are not always the same. Employing pain inflictions is not always necessary to create the fear and terrifying obsession, but the use of sleep deprivation, solitary confinement, phobias, sexual humiliation, forced nudity, and environmental manipulations may lead to a similar outcome. The agency of the person is destroyed and ground under torture's feet intentionally. It is the aim of all forms of torture: breaking the agent. This is the core wrongness of torture.

The singular goal of torture is "to destroy the integrity of human being in front of them, to isolate him from society, by using different methods of torture that deprive him of his fundamental trust in humanity and make him look crazy in the eyes of society."⁵⁰⁸ It wipes out the victim's ego, effectively dehumanizes and deconstructs her agency. The victim's trust in everyone around her is destroyed during the process that makes a human inhuman. It makes the victim incapable of directing her own actions, determining the significance of the things that populate the world around her. On this point, it is worth referring to the point made by David Sussman:

⁵⁰⁷ Ibid, p. 9.

⁵⁰⁸ Britta Jenkins, "There, Where Words Fail, Tears are the Bridge: Thoughts on Speechlessness in Working with Survivors of Torture", in Christian Pross, Collectif, Sepp Graessner, Norbert Gurriss (eds) *At the Side of Torture Survivors: Treating a Terrible Assault on Human Dignity* (JHUP 2001), p. 143.

“Unlike other kinds of unwanted imposition, pain characteristically compromises or undermines the very capacities constitutive of autonomous agency itself. It is almost impossible to reflect, deliberate, or even think straight when one is in agony. When sufficiently intense, pain becomes a person’s universe and his entire self, crowding out every other aspect of his mental life. Unlike other harms, pain takes its victim’s agency apart ‘from the inside,’ such that the agent may never be able to reconstitute himself fully.”⁵⁰⁹

It is scientifically proved that torture leaves its mark on its victim’s brain.⁵¹⁰ After breaking down, the torture victim loses control over her own autonomy and self-determination sense. Moreover, the persistent suffering does not end there but continues enduring with numerous symptoms on the victim for the rest of her life. Since then, torture would lead to a permanent condition of very intense emotion and hypertension, which viciously reproduce pain in the victim’s mind in an endless circle. The internalization of trauma multiplies the pain the body experiences keeps torturing the effect on the victim day by day.

One might argue that killing also destroys the victim’s agency since it eliminates her capacity to carry out her will. However, torture does it in a very different way: it causes great harm to its victim, and it is just a beginning of a slow descent into death. Oriental has a proverb that roughly translated: making one suffer is worse than killing him since killing is too fast and easy, but suffering is woeful and eroding him every day until it fully swallows him.

In the victim’s eye, the whole social world collapses. She struggles to re-integrate into society, and often is incapable of rejoining family life. The victim becomes suspicious about everything and everyone around her. The moment of torture, as well as its aftermath, always put her in an insecure and fearful state of mind. No matter where she goes, she seemingly carries the pain and suffering along because it is now a part of her past. At any moment, a flashback comes and relives the suffering in the course of everyday life, hampers any attempt to seek a successful treatment. As a result, pursuing any kind of therapy to release herself gradually goes beyond her reach. Hopelessness and powerlessness continue undermining the agency. It isolates and alienated the victim. The notion of civilization and humanity has disappeared since the intense pain has become “a person’s entire universe and his entire self, crowding out every aspect of his mental life.”⁵¹¹

⁵⁰⁹ David Sussman, *supra* n 4, p. 14

⁵¹⁰ Jeremy Wisnewski, *supra* n 12, p. 75.

⁵¹¹ *Ibid.*

III. TORTURE IN THE TICKING BOMB SCENARIO

As clarified above, violations of trust and autonomy contribute largely to the wrongness of torture, however cannot capture entirely the core evilness of such practice. Only the destruction of agency can distinguish torture from other forms of ill-treatment and heinous crimes. This moral wrongness comes into sharp relief and seems blurry when it comes to the ticking bomb scenario (TBS). The TBS has it that the police and authorities are urged to run against time with the knowledge of a bomb being supposedly planted somewhere in the crowded neighbourhood. The suspect allegedly responsible for the bomb implanting is captured, however, he has refused to cooperate and unveil the location of the bomb. The thorny question facing the authorities is whether they should torture the suspect to obtain the needed information so as to defuse the bomb.

The rising influence of human rights discourse has induced and compelled states to give up the use of torture in the “almost” all circumstances. But the TBS has continued to lie at the core of the torture debate. Particularly since the 11 September tragedy, the debate on torture in exceptional cases as an anticipatory means of preventing the use of unlawful violence and, thus, protecting lives was revitalized on the legal, moral and philosophical fronts. Kahn argues that the events of 11 September opened the space of sovereignty beyond the law in which torture is practiced.⁵¹² Torture, according to Kahn, as a failure of the law, is an act of degradation that negates the terrorist’s self-sacrifice for their sovereign.⁵¹³

A. The Ticking Bomb in Real Life

At first, the TBS seems like an artificial construct to challenge the absolutists both in terms of the torture debate and moral philosophy in general. But understanding its actual emergence lends in-depth knowledge into how this case has been objectified and become a viable defence for the exceptionists to justify the practice of torture in the pressing situation.

For practical terms, it is probably impossible to trace the roots of the TBS debate, but one thing for sure is that it predates the 11 September events, which opened the floodgate for the abuse of the emergency card and the ticking bomb logic in justifying the widespread torture practice. According to Michelle Farrell, the Algerian war in 1957 offers a good departure point because of the spiralling controversies of the extensive and routine use of torture by the French military and police against

⁵¹² Paul W. Kahn, *Sacred Violence Torture, Terror, and Sovereignty* (UMP 2008) p. 14

⁵¹³ *Ibid.*, p. 76.

opponents in Algeria.⁵¹⁴ French officers did not even care to hide their intentions of torture so as to terrorize and avert imminent attacks by the liberation forces. The use of torture was so extensive that it was considered a vital factor in the victory of the French in subverting the insurgency campaign. Opposed to torture, Alistair Horne suggests that torture “may have won a transient victory in the intelligence it produced but, in the longer run, coupled with protests abroad, it lost the war for France.”⁵¹⁵ In somewhat contradictory terms, Horne pains to accept that some short-term benefits could be gained by the use of torture as a means of intelligence-gathering in the Algerian war. This narrative has been challenged by Darius Rejali that torture was not either effective or indispensable in gathering intelligence and attaining the final victory of the French. Researching numerous testimonies and biographies of many ex-military French, Rejali remarks that, although the ticking bomb reasoning was often employed to justify torture, “no rank and file soldier has related an incident in which he personally, through timely interrogation, produced decisive information that stopped a ticking bomb from exploding”.⁵¹⁶ According to Rejali, the Battle of Algiers is regarded as “the startling moment when modern democracies began official torture apology.”⁵¹⁷

No less intense is Israel’s use of torture in its war on terror during the late 1980s. In 1987, Israel established the Commission of Inquiry into the Methods of Investigation of the General Security Service (GSS) Regarding Hostile Terrorist Activity, also known as the Landau Commission. This establishment was a result of the revelation that an Israeli army officer had been charged and convicted of security offences for coercively extracting confession of a Palestinian detainee during an interrogation.⁵¹⁸ The Commission of Inquiry found that, since the early 1970s, “the GSS had used force in interrogation and had systematically lied when challenged in court”.⁵¹⁹ According to the Commission, while the GSS’s false testimony in court was highly condemnable, the interrogation methods were “largely to be defended, both morally and legally”.⁵²⁰ This was based on the GSS’s goal “to collect information about terrorists and their modes of organization and to thwart and prevent the

⁵¹⁴ Michelle Farrell, *supra* n 9, p. 83.

⁵¹⁵ Alistair Horne, *Shades of Abu Ghraib* (2009) Nov/Dec *The National Interest* 23, 27.

⁵¹⁶ Darius Rejali, *Torture and Democracy* (PUP 2007) p. 481.

⁵¹⁷ *Ibid.*

⁵¹⁸ David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNYP 2002), p. 136

⁵¹⁹ *Ibid.*

⁵²⁰ ‘Excerpts of the Report’ 148 cited in Michelle Farrell, *supra* n 9, p. 108.

perpetration of terrorist acts whilst they are still in a state of incubation".⁵²¹ Notably, as reasoned by the Commission, "[t]he effective interrogation of terrorist suspects is impossible without the use of means of pressure' and that this pressure 'should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided".⁵²² Motivated by the ticking bomb analogy, the Commission took the view that the resort to "moderate physical pressure" was justifiable, morally and legally, as a 'lesser evil', under the defence of necessity.⁵²³ Simply put, in extreme cases, torture might be justified. Parts of the Commission's report was published, while the guideline and constraints for GSS interrogation methods were not. As observed by David Kretzmer, "[t]he Commission apparently assumed that if the use of force were strictly regulated it could be contained and "excesses" would be prevented".⁵²⁴ In the years after the finding of the Commission, torture-like practices had become pervasive in the interrogation of Palestinian detainees.⁵²⁵ Unsurprisingly, the view of the Landau Commission was subject to criticism of international and non-governmental organizations.

The extraordinary interrogation methods of the GSS finally came before the Supreme Court of Israel in 1999. In which, the Court held certain methods authorized by the Commission *ultra vires* and in violation of Israeli laws.⁵²⁶ Most strikingly, referring to the ticking bomb case as "appropriate circumstances", the Court left room for the necessity defence in justifying torture committed by a GSS interrogator.⁵²⁷ This is oxymoronic and ironic, given that the Court had cited the absolute nature of the freedom from torture in the earlier part of its ruling. As observed by Ginbar, "when discussing the [ticking bomb case], international law simply vanishes".⁵²⁸

B. The Urgency Fiction

In the contemporary torture debate, the TBS is construed as an ethical dilemma, with both the competing sides couching their arguments in ethical terms. The dilemma

⁵²¹ Ibid.

⁵²² Ibid, pp. 108-09.

⁵²³ Ibid, p. 109.

⁵²⁴ David Kretzmer, *supra* n 32, p. 137

⁵²⁵ Ibid.

⁵²⁶ *Public Committee v. Israel* (2006).

⁵²⁷ Ibid., para. 34.

⁵²⁸ Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (OUP 2008), p. 206.

necessarily feeds on questions of torture's inherent immorality; torture's immorality vis-à-vis lawful killing; the immorality of not torturing; and the consequences of both torturing and not torturing. The ethical debate is cyclical, with no definitive answer. Underlying the debate is the structure of a moral conflict between the prohibition of torture and the right to life. The debate on torture in the TBS, therefore, moves between two propositions: absolute prohibition and exception to the prohibition.

Kantian moral theory seems well placed to grapple with the moral distinctiveness in the relation between torturer and victim. The Kantians argue that the essential wrongness with torture "is the profound disrespect it shows the humanity or autonomy of its victim."⁵²⁹ Everyone deserves to be treated as an end rather than a means to achieve other's purposes. Here, torture is wrong even in the TBS because someone is used as a mere means to purposes she does not or could not reasonably share. The Kantian theory "effectively challenges the causal link between the torture and its successful outcome, forcing us to focus on the act of torture itself and its justification irrespective of any imagined consequences which are completely unpredictable."⁵³⁰ Although this account captures part of the moral distinction of torture, it is not entirely complete. The Kantians can begin to make sense of the characteristic interpersonal structure of torture, but in turn, face difficulty explaining why torture seems morally special, particularly in the TBS. According to Sussman, as compelling as it sounds, the theory is "unable to do justice to what we would normally take to be a clearly nonaccidental truth: the fact that torture hurts."⁵³¹

Utilitarianism suggests the idea that the greatest good is for the greatest number. Generally, the lives of many people outweigh the pain of the suspect; thus torture is a should-do in the TBS. Basing on consequentialist grounds, Bagaric and Clarke argue that torture is only morally permissible in life-saving circumstances; the right to life trumps the right to physical integrity.⁵³² What if mistakenly torture the innocent? There is always a risk of an incorrect target subject to torture, as they acknowledge, however, it is a sacrifice as a utilitarian act to be borne by individuals and the society as a whole for the greater good.⁵³³ An informal poll conducted by Michael Levin with four mothers with a question as to whether they would approve of torturing a terrorist who had kidnapped their children, perhaps no wonder that all popped up

⁵²⁹ David Sussman, *supra* n 4, p. 13.

⁵³⁰ Christopher Tindale, *Tragic Choices* (2005) 19 *International Journal of Applied Philosophy* 2, p. 209, 216.

⁵³¹ David Sussman, *supra* n 4, p. 15.

⁵³² Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable is Morally Permissible* (SUNYP 2007), p. 2.

⁵³³ *Ibid*, p. 31.

with yes.⁵³⁴ This prompts Levin to the stance that torture is morally mandatory in the TBS as follows:

“The most powerful argument against using torture as a punishment or to secure confessions is that such practices disregard the rights of the individual. Well, if the individual is all that important – and he is – it is correspondingly important to protect the rights of individuals threatened by terrorists. If life is so valuable that it must never be taken, the lives of the innocents must be saved even at the price of hurting the one who endangers them.”⁵³⁵

The problem with the contention made by Bagaric, Clarke and Levin is the lack of attention to the difference between the sacrifice of oneself and the sacrifice of others. This difference comes into sharp relief as those to be sacrificed remain as outsiders in relation to the common good enjoyed by the rest. Those alleged for the crime now find themselves in a twilight zone that does not have their rights and dignity recognized as a human, but still have to make a sacrifice for the others' greater good.

Besides that, if the lives of many people outweigh the pain of an individual, why not torture the loved ones of the suspect like his children in front of him to make him talk? Chances to practise torture, even on innocent persons, will be in direct proportion to the number of people might be involved. If so, the principle of presumption of innocence saying that no one is deemed guilty when there is no legitimate court judgment, is violated. The agony of torture created an incentive to speak, but not necessarily to speak the truth.⁵³⁶ Generally, the TBS motivates people to act urgently even when they do not know where the bomb is and who is responsible for it. Moreover, this is categorically abhorrent when other people must be subject to torture for being innocent. As put by Strauss,

“A nation that intentionally and brutally harms an innocent child has clearly lost its moral bearings ... The temptation to forfeit our most precious values is always most pressing in times of emergency and war. Yet, it is at precisely those times when it is most important to maintain our moral compass. Only an absolute ban on torture without exception will enable this nation to resist the impulse to ignore critical core values in favour of an elusive security.”⁵³⁷

⁵³⁴ Michael Levin, 'The Case for Torture' *Newsweek* (7 June 1982).

⁵³⁵ *Ibid.*

⁵³⁶ John H. Langbein, "The Legal History of Torture", in Sanford Levinson (ed.), *Torture: A Collection* (OUP 2004), p. 97.

⁵³⁷ Marcy Strauss, *Torture* (2004) 48 *New York Law School Law Review* p. 201, 274.

The TBS shows us a different face of torture and prompts us to view the torturer through a different lens. For liberals, cruelty and tyranny is abhorrent and disgusting, so is torture. Now in the TBS light, the torturer is not a cruel or insensitive brutish man but instead “a conscientious public servant, heroic the way that New York firefighters were heroic, willing to do desperate things only because plight is so desperate and so many innocent lives are weighing on the public servant’s conscience.”⁵³⁸ All of a sudden, he becomes a hero with the willingness to do bad things for the good cause. This nuance mitigates partially the evilness of this practice in people’s eyes, even though it does not negate immoral uniqueness thereof, namely the breaking of the agent, the destruction of the agency.

Regardless of moral philosophies in use, one cannot find a satisfactory answer to the question: Is torture morally justified in the TBS? This type of question is actually misleading. At root, however, another question is lurking: Does torture actually work? Arguably, though, this question is practicably unanswerable because so far, no one has been able to come up with methodologically or ethically sophisticated means of conclusive investigation.⁵³⁹ For this, the exceptionists have failed to prove it is effective to make detainees speak of the truth, if any. And yet, the prohibitionists also have a hard time in responding to that if torture is not effective, why is it so ubiquitous in practice? As Levinson asserts, “[i]f we could be confident that torture never worked, then there would, in fact, be nothing to debate.”⁵⁴⁰

After all, the TBS logic has and will continue to haunt many philosophers. But it does not make it less as an artificial construct, which is unlikely to come into life. Henry Shue argues that the ticking bomb hypothetical is misleading insofar as it both idealizes and abstracts.⁵⁴¹ As he puts it, “[i]dealisation adds sparkle, abstraction removes dirt.”⁵⁴² The TBS abstracts in that torture requires institutional competence and trained torturers, which are hard to imagine these days. The hypothetical idealizes by claiming that “the right man” being held in custody and he will break under torture. Moreover, this individual is seen as a “ticking bomb” or a suspected “terrorist”, not as a human, and as a consequence, does not hold the right to have

⁵³⁸ David Luban, *supra* n 17, p. 1441.

⁵³⁹ Sanford Levinson, “Precommitment” and “Postcommitment”: The Ban on Torture in the Wake of September 11 (2003) 81 *Texas Law Review* p. 2013, 2029.

⁵⁴⁰ Sanford Levinson, Slavery and the Phenomenology of Torture (2007) 74 *Social Research* p. 149, 155.

⁵⁴¹ Henry Shue, Torture in Dreamland: Disposing of the Ticking Bomb (2006) 37 *Case Western Reserve Journal of International Law* p. 231

⁵⁴² *Ibid.*

rights. Such individuals reside within a zone in which they may not be treated as a human. "Clearly this is not a zone governed by ethics."⁵⁴³ Hence, no ethical dilemma follows. To conclude, Shue takes "the most moderate position on torture ... feasible in the real world ... Never, ever, exactly as international law indisputably requires".⁵⁴⁴ In a similar vein, David Luban sees the TBS as seductive, misrepresentative, bewitching.⁵⁴⁵ He argues that the TBS "cheats its way around ... [the] difficulties by stipulating that the bomb is there, ticking away, and that officials know it and know they have the man who planted it".⁵⁴⁶ This type of circumstance is "built on a set of assumptions that amount to intellectual fraud" because there is no causal relation between such a scenario and the practice of torture.⁵⁴⁷ This point is well captured by Farrell,

"The notion that torture might be considered morally permissible in ticking bomb situations on the basis of intuition or a judgement call is ... unsound. It is unsound, on the one hand, because such a basis for thinking about torture is necessarily subjective and, on the other hand, because an intuitive response or a considered judgement is only legitimate once all of the relevant factors have been taken into consideration. Because it equivocates on what is relevant for consideration, the ticking bomb scenario does not provide a legitimate basis for intuitionism or judgement."⁵⁴⁸

IV. CONCLUDING REMARKS

Torture can be nothing, and it can be everything. Pain and suffering matter, however, to understand torture, one must always embrace the purposive element of torture, which is also the evil nature of this phenomenon: the destruction of agency. The TBS presents the justification for an urgent use of torture for a greater good, however, it is based on the consequentialist fallacy that under strained pressure, the tortured would speak of the truth, if any. This stance is hard to sustain in the legal perspective that the prohibition of torture is absolute. In so doing, the potential victim of torture remains as a human, right-holder, entitled to human dignity as he should and must be. Under no circumstance, torture is morally sound even in the TBS. Torture violates every fundamental human value that we appreciate in the civilized world. It is like an epidemic disease spreading so fast and widely if an exception permitted. Surely, we do not want to live in a society constructed by torture.

⁵⁴³ Michelle Farrell, *supra* n 9, p. 242.

⁵⁴⁴ Henry Shue, *supra* n 50, p. 238.

⁵⁴⁵ David Luban, *supra* n 17, p. 1441.

⁵⁴⁶ *Ibid.*, p. 1440.

⁵⁴⁷ Michelle Farrell, *supra* n 9, p. 241.

⁵⁴⁸ *Ibid.*, pp. 241-42.

BIBLIOGRAPHY

1. Alan M. Dershowitz, Is it Necessary to Apply Physical Pressure to Terrorists and to Lie about it? (1989) 23 *Israel Law Review*.
2. Alan M. Dershowitz, The Torture Warrant: A Response to Professor Strauss (2003) 48 *New York Law School Law Review*.
3. Alistair Horne, Shades of Abu Ghraib (2009) Nov/Dec *The National Interest* 23, 27.
4. Britta Jenkins, There, Where Words Fail, Tears are the Bridge: Thoughts on Speechlessness in Working with Survivors of Torture, in Christian Pross, Collectif, Sepp Graessner, Norbert Gurriss (eds) *At the Side of Torture Survivors: Treating a Terrible Assault on Human Dignity* (JHUP 2001).
5. Darius Rejali, *Torture and Democracy* (PUP 2007).
6. David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNYP 2002).
7. David Luban, Liberalism, Torture, And The Ticking Bomb (2005) 91 *Virginia Law Review*.
8. David Sussman, Defining Torture (2006) 37 *Case Western Reserve Journal of International Law*.
9. David Sussman, What's Wrong With Torture? (2005) 33 *Philosophy and Public Affairs* 1, 2005.
10. Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2006) 37 *Case Western Reserve Journal of International Law*.
11. Jeremy Wisnewski, *Understanding Torture: Contemporary Ethical Debates* (EUP 2010).
12. John H. Langbein, 'The Legal History of Torture' in Sanford Levinson (ed.), *Torture: A Collection* (OUP 2004).
13. Lauren Glenmere, *Torture, Asian and Global Perspectives*, Volume 03, No. 06 (2014) p. 28, at https://issuu.com/humanrightsasiasia/docs/torture_v3_n6_web (last visited 5 Jul 2021).
14. Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (OUP 2008).
15. Marcy Strauss, 'Torture' (2004) 48 *New York Law School Law Review*.
16. Michael Levin, 'The Case for Torture' *Newsweek* (7 June 1982).
17. Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (OUP 2014) p. 4.
18. Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable is Morally Permissible* (SUNYP 2007).
19. Paul W. Kahn, *Sacred Violence Torture, Terror, and Sovereignty* (UMP 2008).
20. Sanford Levinson, "Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11 (2003) 81 *Texas Law Review*.
21. Sanford Levinson, Slavery and the Phenomenology of Torture (2007) 74 *Social Research*.
22. Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (OUP 2008).

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