

Pathology of criminal laws related to the prohibition of torture and mistreatment of defendants in the light of International Human Rights

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Summary

Pathological examination of criminal regulations gives researchers, lawyers, judges and students the possibility to provide effective sources for implementing the principles of the rule of law, the authorities of the law, and the governing principles. Pragmatically examine the implementation of criminal laws. Through this relatively modern method, the study of structured criminal regulations can be obtained from numerous legal principles governing the laws. However, the specific parts of the criminal regulations should also be reviewed.

When it comes to torture, on the one hand, the minimal laws in this field and the unwillingness of the government to Legislate and correct implementation of regulations, on the other hand, facilitate and hinder pathological studies. The study is facilitated because the harms and damages are clear. However, it is hindered by the lack of political will to reform.

Numerous incidents and countless reports of torture have emerged from prisons and detention centers, particularly following the murder of Mehsa/Zhina Amini while in the

custody of the so-called moral police in September 2022, the struggle for women's freedom has begun,

have reached this point where the government, the law enforcers and the judicial system have faced a fundamental challenge. The ineffectiveness of the existing regulations¹ on one hand and the lack of independence of the judiciary on the other caused the prevalence of torture. Hence, the possibility of paying attention to pathological research in the current situation decreases. However, the pathological examination of criminal laws regarding the prohibition of torture in this critical social-political stage is necessary to establish order and criminal justice based on the universal principles of human rights. It pays more attention to the prohibition of torture. The findings of this research are far from the provisions of the procedure; however, It assesses the importance of the practical aspects of torture in light of the international standards of human rights.

Keywords: pathology, criminal laws, torture, accused, human rights documents.

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¹ See the commentary on article 48 of the criminal procedural code 2014/Feb/23 and the limitation of the presence of lawyers in the initial investigation phase in security-related charges.

Introduction

If we accept that the criminal justice system's goal is to achieve justice¹. Damages threatening the criminal justice system cause this structure to distance itself from the path of justice. Law and regulations shaping the Criminal justice system provide adequate tools to arbitrate between the government and the people. The damages prevent the realization of this arbitration. However, the identification of damages in all sectors is essential. From the point of view of methodology, all damages can be identified and assessed in the same manner in the criminal law system. However, the investigation of torture and ill-treatment of the accused has its special importance. The reason for this importance and emphasis is on the power structure and stakeholders involved in torture. Significant damages are caused by unjustified interference of power in legislation and implementation of the principles governing the criminal justice system.

Although the legislators have the authority to legislate in various areas of criminal law, this does not mean they are

¹ Sometimes, the political motives supersede the principles of upholding criminal justice.

immune from the critical review of experts. The most important effect of this scrutiny is that it will cause the continuation of torture and mistreatment of the accused and the convicted to become an issue.

Today, the need to prohibit torture and ill-treatment of everyone by those in power is a full-fledged moral matter. The pathological study of the regulations of this field is placed in the strengthening of the moral issue. Indeed, the criminal sciences and criminologists always emphasize that no evidence is acceptable by resorting to torture in the criminal justice system¹. In other words, torture does not serve any purpose in upholding justice. Following procedural and substantive regulations can prevent the spread of corruption through torture and vulgarity. In other words, the criminal justice system protects its standards from everything that causes vulgarity in the justice system. No criminal justice system can use torture to gain benefit and allow it into evidence of confession. In the Constitution, the Islamic Penal Code and the rules of criminal procedure, some miscellaneous provisions along with the prohibition of torture

¹ European Journal of International Law, Volume 17, Issue 2, 1 April 2006, Pages 349–367, The Admissibility of Evidence Obtained by Torture under International Law, by Tobias Thien

have raised examples of torture and mistreatment of the accused. However, we still see in many cases that the defendants file complaints against officers and judicial officials due to torture after being released from difficult situations. Some convicts or the accused publish their memoirs of torture, and some remain silent. Nowadays, we even witness cases in which the accused, after release from prison and under the effects of the extensive torture they experienced, commit suicide¹. Examining criminal laws and their pathology makes it possible to evaluate and understand the necessity of guarantees provided by the law to protect the freedom of human beings from torture. It also helps in identifying causes of torture and wrongful conduct.

The legal system cannot stop the spread of torture and misbehaviour only by referring to the law. Laws related to this field must be reviewed and amended continuously to ensure they are relevant and applicable in the current situation.

Among the cases that must be assessed are the necessary to determine the issues related to torture in the criminal justice system and seek sources to address them in the legislation.

¹ According to reports, Yalda Agha Fazli, 19, Atefa Naaami, 37, Arshia Imamquli, 16, Mina Yaqubi, 33, Siawash Bahrami, 25, and Muhsen Jafari rad, 37, committed suicide after being released from prison.

The pathological examination of criminal regulations establishes the possibility of obtaining practical examples of torture and misbehaviour that are not justified in law. Discourse about judicial, political, and security-related issues, and even cultural discourses can put the criminal justice system under critical scrutiny.

1. Pathology of legal sources of torture

1.1- The Constitution

The constitution is the most important legal document in any country. Article 38, prohibits torture¹. This principle clearly implies the absolute prohibition of torture, but no definition of torture is provided. Therefore, there is no constitutional guarantee for the prohibition of torture. The problem's source is that there is no implementation mechanism to enforce constitutional principles in the current legal system. Therefore, the political power can choose where to implement those constitutional principles and where to ignore them. The most crucial harm in this regard is that the absolute prohibition of torture in the Constitution lacks enforcement guarantees. The legal system in Iran has no authority to effectively monitor the implementation of the constitution in a way that makes it possible to be accountable to the people. The state is also not taking responsibility where it does not follow the constitutional principles or the rule of law. Article

¹ Article 38 of the Constitution stipulates:” Any act of torture to obtain a confession or obtain information is prohibited, and forcing a person to testify, confess, or swear is not allowed, and such testimony, confession, and oath have no value and credibility. Violators of this principle will be punished according to the law.”

98¹ of the Constitution introduces a Guardian Council that oversees interpreting the Constitution. This council provides a self-benefit interpretation concerning its roles and responsibilities. According to those interpretations, there is no mechanism to confront or challenge the council's views regarding the interpretation of the Constitution. Therefore, it has caused severe damage to the implementation of the Constitution. The most crucial supervisory role in the Constitution, about its implementation, is stated in Article 113 of the Constitution. According to this article, the president is the guardian of the Constitution and has the duty to enforce it. Despite the clarity of this principle, so far no mechanism for its implementation has been provided². None of the presidents so far have made any substantial interference in the implementation of the Constitution and did not introduce any supervision. The lack of an implementation mechanism and or a monitoring mechanism for the implementation of the constitution and the absence of a mechanism to claim damages due to non-implementation of the Constitution,

¹ Article 98 of the Constitution: “The interpretation of the Constitution is the responsibility of the Guardian Council, which is decided by a majority of 3 quarters.

² See the article: President’s responsibility in the implementation of the Constitution and the role of the supervisory board” Rahburd magazine 1998 volume 15,16. And also the Guardian Council, the implementation of the Constitution in the Islamic Republic of Iran” copyright; legal and judicial studies, spring 1987, volume 8.

including damages stemming from the violation of article 38 of the Constitution, has resulted in an increase of torture in practice.

1.2- International binding regulations on the source of torture:

Talking about binding international regulations for governments governed by theocracy¹ is pointless. For this purpose, in today's world, on the one hand, there are legal systems that are based on legal positivism, where they believe in the rule of law, and democracies that allow the majority to prohibit any behaviour, including morality with excuses such as public security, the rights of the majority and the mandatory aspect of the international law. On the other hand, in the legal systems that consider themselves divine or religious legal systems, Like the government system in Iran, there is no commitment to implement the rule of law, especially when it is against their interests., forcing the implementation mechanisms in the country to obey what they call as the God's command. Therefore, in this system, we face punishments such as *Fesad fl Arz* and *Muhareba*. The agents observing those accused of committing these types of crimes can commit any violence for the satisfaction of the God they worship. However, the Iranian government has

¹*Theocracy is a form of government in which one or more deities are recognized as supreme ruling authorities, giving divine guidance to human intermediaries who manage the government's daily affairs.*

accepted some international obligations and cannot avoid accountability to the world for fulfilling those obligations.

1.3- Iran's international commitments in prohibiting any type of torture

Article 77 of the Constitution ensures that ratified treaties, agreements, and international conventions are implemented. This provision was also reflected in Iran's Constitution a hundred years ago. Following the same principles, Article 90 of the Civil Code states that implementing the conventions that the parliament approves is mandatory, and those conventions are recognized as national legislation. With Iran's accession to the Convention on Civil and Political Rights during the Pahlavi's ruling and according to the legal structure¹ in Iran, the Islamic Republic must report on the implementation of this convention to the United Nations. The necessity of implementing this document, on the one hand, and Iran's international responsibility for the prohibition of torture and the prohibition of cruel punishments in Article 6 of the International Covenant on Civil and Political Rights, on the other hand, has created a continuous discourse about the prohibition of torture².

¹ *The International Legal Personality of States*

² Article 6 of the Convention on civil rights December 16, 1966, is enforceable and ratified in Iran on 1976/March/23.

The International Covenant on Civil and Political Rights has two approaches to torture. The first relates to cruel and degraded punishment inflicted on the body, and the second is any abuse or medical testing without consent. The prohibition entered here should be entered in two places in the structure of the criminal justice system. Iran deals with torture in punishments, sentencing, and other disciplinary, security, judicial, and police behaviours. In the criminal justice system In the Islamic Republic of Iran, we face both forms of torture in their general and concrete examples. The pathology of this part goes back to the legislative and executive structure of the country in the legal and judicial sectors, which requires reform.

The Convention on the Rights of the Child is another international document the Iranian government has ratified. Article 37 of this convention prohibits torture, ill-treatment, and long-term punishments for people under 18. Despite the commitment of Iran to this convention, much evidence and reports show the convention is not fully implemented. The harm caused by the non-implementation of this convention can put the country's future generation, that is, all under 18, at high risk.

Considering that the definition of childhood in Iran's criminal law is still a jurisprudential definition derived from Jafari's jurisprudence¹ and it is possible to impose punishments of hudud and qisas on people under 18², it is evident that the principles of the Convention on the Rights of the Child with regards to access to justice and the prohibition of torture for this group of population is not implemented and domestic laws and judicial procedures do not comply with the Iranian's international commitments.

¹ Article 147 of the Islamic Penal Code, 2013 – the age of maturity for girls and boys are defined as 9 and 15, respectively.

² While article 91 of Islamic Penal Code 2013/April/21 has introduced some progress, it is a long way to get to the desirable point.

1.4- Conflict between the criminal law system and international human rights

What are the harms of the criminal law system and criminal regulations under international law? In reply to this question, we can pay attention to the structure of the criminal law system and its intense conflict with the international law mechanisms. The root of this conflict should be sought in the political system of the Islamic Republic rather than in the legal system and the significant conflicts of the state with the West and the Western liberal democratic systems. Iran's political system's conflicts with international human rights principles are based on Iran denying any recognition and respect for human rights. The preference of Political considerations over the rule of law and access to justice have caused the legal field and the criminal justice system to sustain severe damages. In other words, the criminal law system of the Islamic Republic of Iran has many conflicting points with the International Covenant on Civil and Political Rights, which has caused significant damage to the legal system. When the States accept the international conventions as a binding document, there is no possibility of introducing conflicting legislation. The Islamic Republic negates this principle even though it is an active member of the UN and has never denied its relationship with the United Nations. At the same time, it refuses to implement the UN's

conventions and its principles. This behaviour has caused fundamental damage to the legal values to prevent torture.

The adherence of the legislative system of the Islamic Republic to the Islamic legal system, Sharia and Jafari jurisprudence, is so that dynamics in the formulation of laws and progress in this field is not seen. Prohibition of torture, especially by the principles of criminal law, is the only mechanism that can prevent torture¹.

The structure of crime and punishment in criminal regulations in Iran is mainly based on commitment and strong dependence on Jafari jurisprudence². This dependence and a narrow understanding of jurisprudence have caused the crimes and punishments to be limited to Retribution, *diat* and *tazirat*³. The implementation of these regulations and traditional mechanisms to prove crimes include torture and many physical and degrading punishments including torture. Removing Hudod and Qisas from the sentencing mechanisms in a conservative legal system is impossible.

¹ Abolishing lashing and other physical punishments.

² The 4th principle of Iran's Constitution has made it mandatory for the laws to be by Shia jurisprudence.

³ Article 14 of the Islamic Criminal Law 2013 has categorized the punishments to Hudod, Qisas, Diat and Tazer

This reading and understanding of the system caused the rigid implementation of Hudud and Qisas. This method contains an apparent conflict with International human rights regulations. Amputation of hands and feet, flogging and retribution on the one hand, and execution for non-serious crimes such as political crimes, sexual crimes with consent, or financial and drug crimes are among those conducts that are considered torture, cruel and degrading and are in violation of the international standards of human rights. Its implementation has caused severe damage and conflict with the principles of human rights and internationally binding documents.

In addition to what was stated from a structural point of view, enforcement of torture and degrading punishments during arrest and investigation by the police, prison guards, and security forces on the public is not only a violation of international human rights, but it is also in conflict with Iran's legal system. Such conduct is causing severe damage to the relationship between the states and the public. The Convention against Torture 1984 was enacted to prohibit torture, and most states agreed to its principles. Unfortunately, the Islamic Republic has not accepted the

convention¹. However, the non-acceptance of this convention can not justify torture. However, the same political system that prevents Iran from accepting the implementation of the Convention also turns a blind eye to torture in prisons and legitimizes it. Tortures like forbidding visiting the prisoner or preventing the timely treatment of the prisoner, keeping them in solitary confinement and a dark place, and Blindfolding are some methods of torture that are not only ignored by the judicial system of the Islamic Republic but are also not included in the definitions of torture, nor it has been prevented. For those accused of political and/or security-related charges, torture, especially mental torture where no signs of torture can be observed, is not prohibited but encouraged.

¹ What does this duplicity in article 38 of the constitution and denying implementing the UN Convention against torture mean?

2. Pathology of criminal laws in terms of the prohibition of torture

In many cases, the damages of the criminal justice system are due to the current political system. The most critical damages are the harm caused by the enactment of laws, the non-implementation of regulations preventing torture and the lack of attention to the international human rights system. In terms of implementing the rules, several situations are envisaged. We will mention some of them.

- A) Legislators in Iran do not have intellectual stability in approving or disapproving the laws. This is why Iran has no protection legislation, and the laws are not implemented properly. As mentioned earlier, one of the significant challenges of the legal system in Iran, which allows torture, is the legislation that is shaped based on the preference of the political system and not based on the views of the society. The same goes for Iran's refusal to ratify the UN Convention against Torture and the Convention on the Elimination of All Forms of Violence Against Women and or introducing legislative measures to protect vulnerable groups such as children, persons with disabilities and others.

The Guardian Council's critical role in preventing the election of independent and knowledgeable people to the parliament through their supervisory role and preventing the state from ratifying several key international human rights instruments is very evident¹.

- B) The implementation of criminal laws can guarantee the prohibition of torture to a large extent. These laws include the Constitution, the Islamic Penal Code and the Criminal Procedure Code, as well as some other legislations, such as the law of preservation of civil rights and legitimate freedoms. Surprisingly, these laws, which all prohibit torture, are misused to allow torturers by those required to be the guardians of the laws and have a duty to implement them. There is no will to change the status quo. Domination of officers of the Ministry of Intelligence and Security forces over the Judiciary, especially regarding security and political charges, has caused the Judiciary to be placed in the hands of bailiffs to the extent that it has eliminated the possibility of judicial supervision over

¹ The single article regarding legitimate freedom and protection of the rights of citizens enacted in 2003/May/05 has introduced positive changes; however, the practical impact is yet to be ascertained.

bailiffs and torture that occurs through them. Complaining about torturers does not go anywhere, and society is fully aware of the reports of extensive torture committed at the hands of the state. CNN's¹ report about the torture and rape of Armita Abbasi is one sign of the brutality of the agents of torture and their aggression in the judiciary. In this case, the Karaj prosecutor's inaction to deal with mistreatment and torture in his jurisdiction is clear. Many such cases exist where those officers should be prosecuted for cruel behaviour and torture, but no action is taken.

If the provisions of the Law on Protection of Citizen Rights and Legitimate Freedoms were observed, it was obvious that we were not faced with the horror of receiving such reports. If the officers who tortured individuals were questioned, implementing the criminal procedure law would not have faced challenges. There are always questions that citizens have but cannot be answered due to officers' behaviour.

¹ Iran protests: Covert testimonies reveal sexual assaults on male and female activists as a women-led uprising spreads (cnn.com)

3. International conventions regarding the prohibition of torture and the legislator's treatment

In international human rights regulations, torture is prohibited. Different types of torture are identified, and governments have been obliged to act in this direction. Article 5 of the Universal Declaration of Human Rights states: "No one can be subjected to torture or punishment or a behaviour that is oppressive or against humanity." Also, article 7 of the International Convention on Civil and Political Rights has a similar content about using force to conduct medical examinations. It stipulates: " No one can be subjected to persecution or cruel or degrading treatment. Subjecting a person to medical or scientific experiments without his free consent is prohibited." The Islamic Republic is obliged to implement these two international conventions. According to Article 9 of the Civil Code, the international conventions accepted and approved by the Iranian parliament are considered domestic regulations, and the government must implement its provisions without delay. In addition, paragraph A of Article 37 of the Convention on the Rights of the Child states: "No child shall be subjected to torture or other cruel treatment that is inhumane or contrary to human rights. The death penalty or life imprisonment without the

possibility of a pardon cannot be imposed on a person under 18.” Since the government has ratified this convention, they must implement it and ensure domestic laws comply.

The primary damage to domestic laws is twofold: first, the non-compliance or unwillingness of the government to adapt domestic laws to international regulations. This challenge will always be there until political will is established. From what is evident of the government’s conduct, there is no prospect for such will. This unwillingness on the part of the government caused the enactment of laws and policies that were contrary to the internationally accepted standard.

Second, is the lack of implementation of the international principles that the government has already approved. For example, Article 91 of the Islamic Criminal Law allows the implementation of the death penalty for a person under 18 in the crimes of Hood and Retribution with some improvements. According to this law, the accused should have mental and intellectual growth and a fair understanding of the implications of their conduct¹ before a sentence can be issued. The mental growth/maturity should be verified by forensics in the cases of Hudod and Qisas. This law conflicts

¹ See article: “An Assessment of the Concept of Capacity, Article 91 of Islamic Criminal Law – a Comparison Study of Law and Neurology” Criminal Law, volume 180, 1400, PT F, Arian, Abasi, Mahmoud, Zali, Alireza

with Article 37 of the Convention on the Rights of the Child, prohibiting torture and severe punishments such as execution for children. Although Article 91 has reduced the instance of death sentences for people under 18, it still does not negate the execution of minors. Despite the commitment to implement this legal convention, the Islamic Republic has enacted legislation that allows enforcement of capital punishment, including execution, and punishments that impose bodily harm in the case of minors.

The conduct of the Islamic Revolutionary Court of Karaj, 1st branch, related to the prosecution of 16 people accused of attending the funeral of Hadith Najafi, a participant in protests that resulted in the murder of plain uniform police (Ajamyar), can disclose several misconducts. Those accused were charged with *Fesad fi Arz* and *Muhareba* in the fall of 2022. 11 out of the 16 were accused of killing the plain uniform police (Ajamyar). A critical legal analysis of this conduct shows that three defendants in this case are juveniles under 14. The conduct of the court concerning the three children flag a violation of the principles of the UN Convention on the Rights of the Child in terms of its jurisdiction over the matter. Children should be tried only in a juvenile court. Trial in a revolutionary court has caused psychological pressure on teenagers. In addition, the decision of the court is also

aggravated. The court sentenced five adults to death and all three juvenile defenders to 25 years in prison. Courts are prohibited from issuing such gross punishments for minors. While the court verdict contains a violation of law towards the defendants and juveniles, issuing such sentences to children is prohibited. The inconsistency of the judiciary in dealing with children matters and the approval of part of the sentencing by the Supreme Court shows that the state and the judiciary have no intention to implement the rule of law by acceptable standards of human rights and prohibition of violence and torture. The primary damage caused by improperly implementing the rule of law is unavoidable because the criminal justice system insists on implementing the rules the way it desires, and there is no power to stop this from happening.

These behaviours and the judiciary's conduct show that adherence to international and protective regulations is considered least important and often ignored. In addition to this, another critical issue is that the court does not give the narrative of the torture experienced by the detainees any weight, and judges are not taking an impartial position in this regard. This conduct is harmful to enforcing any protective rules and regulations to address the rights of detainees.

Conclusion

The prohibition of torture is an absolute issue accepted in Iran's criminal system and the country's supreme law, the Constitution. However, several reasons, including denial of the state to ratify the UN Convention against torture, lack of strong political will in implementing national protective laws and the power and influence of the political and intelligence groups on the judiciary result in the lack of implementation of the constitutional principles with regards to torture. The Pathological examination of criminal laws indicates that there is no protection for individuals facing the criminal justice system in Iran. Damage caused by the situation is severe. This article's findings suggest a clear gap between the acceptable standards of Article 38 of the Constitution and the incorrect implementation of the rule of law. The situation requires close monitoring of the justice system to address the torture and the machinery imposing torture, including the police. More than ever, it is essential to ensure that the laws conform to the principles of Article 38 of the Constitution.

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