



Political-Legal Barriers to Iran's Joining to The United Nations Convention Against Torture

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ABSTRACT

The disgraceful act of torture is one of the most flagrant human rights violations that has hurt human dignity in the most severe way and has so far taken numerous international, regional and national measures to combat with it. The adoption and approval of human rights documents and treaties are regarded among these measures. Both the Convention against Torture and the Regulations observing the Torture of Iranian law consider torture as inhuman and contrary to human dignity and honor, and prohibit doing it; while at the same time, there are many differences both in the definition and in the instances of torture between Iranian law and the Convention against Torture. Although in the Iranian Constitution, the physical and psychological torture has absolutely been prohibited, in the Islamic Penal Code, punishment has been determined only for the physical torture. In addition, there are differences between the Iranian legal system and the Convention against Torture in determining the instances of torture and its limit with applicable penalties. But the existence of these differences does not mean that there is a lack of sharing between the provisions of the Convention and the laws of Iran. Comparing the requirements of the Convention and the internal legal system regulations makes it possible to, while identifying the legal barriers to Iran's accession to the mentioned convention, identify the solutions for removing these barriers too.

Keywords: Torture, Punishment, Political-Legal Barriers, Convention against Torture

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INTRODUCTION

In Iranian law, immunity from torture is among the (personal) individual rights and freedoms. Although this right has been among the hot debates of the assemblies and governments, and the nations of the world chant on the realization of this principle in their expressive demonstrations, and they have adopted many national and transnational laws in this regard, practically much care is not paid about why and how these rules are. Inhuman behaviors are becoming widespread every day for getting confession or forbidding the disclosure of the secrets of states' crimes, but Iranian criminal law inspired by Shiite jurisprudence, apart from moral guarantees, provides strict criminal guarantees for those who have violated this principle (the prohibition of torture). However, we have witnessed people throughout history who have forgotten the individual rights and freedoms by authenticating the community and the interest of people and the expediency of government. Hence, when there is a conflict between the benefits of state, including preserving it with human interests, such as respect for individual rights and freedoms, they do not have any hesitation to deny these rights and sacrifice them. The method of solving this conflict is alarming when the issue of torture arises (Ebrahimi, 2010).

Torture, one of the tools used by authoritarian and autocratic governments, has long existed and consequently has hurt the emotions of all human beings wherever they were. Today, the foundations of the criminalization of torture exist in international conventions, such as the Universal Declaration of Human Rights approved in 1948, the International Covenant on Civil and Political Rights approved in 1966, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments approved in 1984. In addition, torture has been severely forbidden by legislator and there are many narrations regarding the prohibition of torture and mistreatment (Mehrpour, 2015).

Considering many common aspects between the Convention against Torture and the Constitution of Iran, the purpose of this article is to examine the legal and political barriers to Iran's joining the UN Convention Against Torture, 1984, whereby the degree of compliance or non-compliance of Iran's legal system concerning torture with the international law system is specified, and the reasons of prohibiting this convention is investigated.

2. The Nature of Torture

1-2 Torture in terms of Word

The word torture has been meant as suffering, harassment, and annoyance. The English equivalent of the word is also "Torture", which means torture, doing torture and to make suffer. As it is observed, the torture, lexically, or its equivalent English word, includes absolutely any suffering and torment

that comes to the other, and there is no restriction to limit it to the physical or mental torture either (Amid, 1990). At first glance, the word torture seems to be Arabic, but it is essentially Persian and has been recorded in literary and historical texts as Shekanj, Eshkanj, and Eshkanjeh (torture, hackney, and blackmail). For that, meanings such as the twist of the string, the chin of hair, forehead and abdomen, the knot, the red snake, the torture, the torment and the torn, and the piece, and sticking to the wood are also given. In the Arabic word, the torment is precisely used as the spiritual equivalent of torture in the modern sense (Dehhoda, 1998).

2-2. Torture in the term

In the science of law, torture is considered as a kind of illegal bothering and teasing, that most of its purpose is to obtain confession. In the criminal law, torture has been defined as follows: harassment to the accused and non-accused to make him/her confess to a crime or an obligation (Jafari Langroudi, 2009).

Dr. Moin has also given this definition: Torture: Suffering, harassing the accused with torture equipments and devices of torture to get confession or testimony from him/her (Moin, 1985).

One of the jurists has defined torture as follows: What is definite and consensual is that torture involves the practice of any behavior, including the action and the discontinuity of the action, which involves the physical and mental suffering, performed by government officials towards the accused or another person to get confession or testimony (Shams Natari, 2005).

2.3 Definition of Torture in International Documents

In order to understand each subject in any scientific discipline better, it is necessary to define the subject from the viewpoint of the same field, so that understanding it accurately and investigating it would not be difficult. In the discussion of torture from the point of view of international criminal law, it is also necessary to examine its definition in international criminal law. What nowadays has engaged the minds of jurists and has been considered by them is how to define and provide criteria for understanding and inferring the term "Torture" and how the rule is consistent with its objective examples. Of course, some supervisory authorities, such as the United Nations Human Rights Committee, believe that it is not necessary to accurately define the term torture and other similar terms (cruel, inhuman or degrading treatment), because these terms are general and relative concepts that can be discovered and inferred with regard to the implementation according to the purpose, the intensity and nature of the behavior. The aforementioned approach is not considered to be the dominant approach today, and most of the international documents and international judicial and supervisory authorities have tried to define each of the above terms (Niknafs, 2005).

3. The Process of Compiling and Approving the Convention against Torture

Despite the passage of long time from the formation of modern human rights system based on the Charter and the recognition of right to prohibit torture and inhuman treatments in numerous human rights documents at various levels, and the determination of the United Nations to combat this anti-humanist act, the international community still witnessed torture and different kinds of inhuman punishments and behaviors carried out by governments for various excuses. Hence, the need for a more effective and serious struggle with

this inhuman act led the United Nations General Assembly in its resolution 32.62 dated December 8, 1977, to ask the Human Rights Commission to compile the draft of Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments in the light of the principles mentioned in the Declaration to Protect All Persons against Torture and Other Inhuman, Cruel, and Degrading Treatments or Punishments (1975). Also, in its resolution 38.119 dated December 16, 1983, the Human Rights Commission was asked to compile a convention in this regard, as a subject with highest priority at its 40th summit, with the aim of presenting it to the thirty-ninth General Assembly and considering rules to perform the Convention effectively. The Human Rights Commission, in resolution 21.1984 dated March 6, 1984, also decided to submit the draft text of the Convention to the General Assembly in the Annex to the Working Group Report, and this Convention was eventually approved on December 10, 1984 in an introduction and 33 articles (in three sections) and on June 26, 1987 it took executive power in accordance with article 27 of the Convention (Convention against Torture, 1984).

3.1 Overview of the Content of the Convention against Torture

In the introduction to the Convention, the General Assembly, recalling the Declaration on the Protection of All Persons against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments (1975), and resolutions 62.32 (1977) and 38.119 (1983), and referring to the principles of the Charter of the United Nations and the rights deriving from human dignity and the prohibition of torture in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, has declared that the present Convention is approved with the consent of states intending to make combating torture and other cruel, inhuman or degrading treatments or punishments more effective (Mehrpour, 2015).

But in the text of Convention, which consists of three main parts, the most important inserted points can be presented in the following format:

3.1.1 Definition of Torture (From the Perspective of the Convention against Torture)

Paragraph 1 of article 1 of the Convention has defined torture and states: according to the present Convention the word torture refers to any intentional act resulting in severe physical or mental pain or suffering against a person for the purpose of obtaining information or getting confession from him/her or from a third party. A personal punishment is also considered to be torture because of the act that he/she or a third party has performed or is likely to be committed, or threatening or compelling him/her or a third party, or punishing a person for any reason that is based on any form of discrimination. In accordance with this regulation, such terrible physical or psychological acts are regarded torture if they are committed by authorized government officials or by their incitement or consent or silence. In addition, suffering and pain which is inherently or consequently necessary for legal punishments, is not regarded as torture. Paragraph 1 of article 2, , does not consider this definition to be in contradiction with a document that has considered limited and broader concept for torture, and if another document expresses a broader concept that include a wider range and more instances as torture, the recent document will prevail (Anti-Torture Committee, 1984).

3.1.2. Obligations of Member States

From article 2 to article 16 of the Convention, the obligations of the member states to the present Convention are largely

addressed and the most important obligations of the government are referred to as: commitment to prevent the use of torture in the territory under their authorization through effective legislative, administrative and judicial, etc. measures under any circumstances (paragraph 1 of article 2), failure to expulsion, return or extradition of persons at the risk of torture (paragraph 1 of article 3), the criminalization of torture and participating or assisting in it, and imposing appropriate penalties for this crime (article 4), the necessary and essential measures to establish jurisdiction in the detection of crimes mentioned in article 4 and other judicial measures related to the issue about conducting preliminary investigations and arresting the defendants and the extradition of offenders as specified in articles 5, 6, 7, 8, 9, training the prohibition of torture to the national or military officers and law enforcement officers, medical staff, public officials and other persons involved in the protection, interrogation and contact with detained or imprisoned persons (article 10), regular monitoring on common regulations, guidelines, practices and procedures for interrogation, monitoring and treatment of persons arrested, detained or imprisoned for the purpose of prevention from torture (article 11), conducting impartial and prompt investigation in cases where there are reasonable reasons indicating the use of torture (article 12), recognizing the complaint right of the tortured and the impartial and rapid investigation and adoption of supportive measures for the plaintiff and witnesses (article 13), guaranteeing the right to claim compensation and obtaining fair and appropriate indemnity, and having the necessary mechanism for the rehabilitation of tortured in the legal system (article 14), invalidity of the resulting data (including confessions) through torture (article 15), the prevention of any form of cruel, inhuman or degrading treatment or punishment (article 16). One of the most important provisions of this part is paragraph 2 of article 2 in which the non-diversion of the prohibition of torture and other inhuman treatments have been identified (Mirmohammadsadeghi, 2013).

3.1.3 Executive and Supervisory Mechanism of the Convention against Torture

The second part of the provisions of the Convention against Torture (1984), which includes articles 17 to 24 consists of provisions on the establishment, composition, selection method of members, duties and functions, and the manner of activity and connection with the members with the executive and supervisory mechanism of the present Convention (Smith, 2005).

According to article 17 of the Convention, a committee called the Anti-Torture Committee is responsible for executive provisions related to implementing the regulations of Convention. The committee is composed of ten top-level experts with a high level of moral and competence in the field of human rights, performing duty with their personal competence and are elected by secret ballot of member states for a four-year period (paragraphs 2 and 7 of article 17) (Abazari Fomashi, 2008).

The most important tasks of the Committee are to review the periodic report of the member states (article 19), to review information received concerning the existence of torture (in accordance with article 20), to review the complaint of a member state against another government indicating that it has failed to comply with the provisions of the Convention (article 21), and to handle individuals' complaints against member state (article 22). The members of committee will benefit from the facilities, privileges and immunities decided for the experts serving in the United Nations (article 23), and the Committee will prepare its annual report about its

activities and present it to the member states and the General Assembly of the United Nations (article 24) (Drick, 1991).

3.1.4. Other Provisions of the Convention against Torture

In the third section, including articles 25 to 33 of the Convention, the general provisions supervising the present Convention concerning signature, accession, procedure, and the time of entry into force, the condition right, the manner of resolving a dispute in the interpretation and implementation of the Convention, and etc. have been investigated. Accordingly, it is stated in articles 25 and 26 that the present Convention is open for signature and accession by all states. Article 27 also stipulates that the Convention shall enter into force 30 days after delivering the twentieth document of approval or accession to the Secretary-General of the United Nations. Article 28 stipulates that any state, at the time of signature, approval or accession to the Convention, can declare that it does not officially recognize the competence of committee. The proposal to amend the present Convention by the member state is also investigated as provisions stipulated in article 29. Whenever a dispute between two or more member states of the Convention about the interpretation or execution of the present document is established and the matter is not resolved by means of a dialogue, it shall be referred to arbitration at the request of one of them, and if they do not reach an agreement within six months from the date of arbitration request about arbitration organization, any beneficiary country can refer the dispute to the International Court of Justice (article 30) (Cassese, 2008).

Article 31 recognizes the expiration from the Convention in written declaration to the Secretary-General of the United Nations, and article 33 also recognizes the texts of the Convention in Arabic, Chinese, English, French, Russian, and Spanish languages validated (Columbia University Human Rights Documents, 2001).

3.1.5 Points about the Convention against Torture

The Convention against Torture (1984) in terms of the nature of document in terms of having or not having mandatory is considered as binding document, and in terms of its included scope also has the widest inclusion circle and is classified among the international documents of human rights.

In terms of the issue, considering the fact that the present document concerns the prohibition of torture and other cruel, inhuman or degrading treatments or punishments and does not include all fundamental human rights and freedoms, to this credit it is considered among special documents, but in respect of those covered, it is not restricted to specific classes and groups, and supports all human beings, that to this credit it is classified as public documents.

As evidenced by the resolution 32.62 dated December 8, 1977 and the provisions of the present Convention, the Declaration to Protect All Persons against Torture, Punishments, or Other Cruel, Inhuman or Degrading Treatments (1975) has been the main pillar in compiling this document.

Since this Convention has provided a relatively comprehensive and acceptable definition of various international judicial institutions about torture and also has prepared the executive and supervisory mechanism for a more effective and serious struggle against torture and other inhuman treatments, it has special position among other human rights documents (Ebrahimi, 2010).

The convention has so far had 147 members, and over 51 states have recognized the competence of the Committee in the implementation of articles 21 and 22; a number of states have also accepted the present Convention conditionally, which the majority of states' conditions are related to article 20 about the competence of the Anti-Torture Committee for research and reviewing the existence of torture in the member state and

article 30 about referring the resolution of dispute to arbitration and the International Court of Justice (Mehrpour, 2015).

3.16. The Islamic Republic of Iran and the Convention against Torture (1984)

The text of the Convention against Torture (1984) was approved under a single article and without any conditions by the Islamic Consultative Assembly in the form of a legal proposal signed by a significant number of representatives of the Islamic Consultative Assembly on July 23, 2003, as follows: The government of the Islamic Republic of Iran is authorized to accede to the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments, including an Introduction and Thirty-Three Articles Adopted on December 1987, and submit the related documents.

Although the convention was not submitted by the government in the form of a bill to the assembly, according to the letter of the First Vice President to the Deputy of Justice and Assembly Affairs of the President, the consent of the Cabinet of Ministers with the proposal was announced on May 18, 2002, and the Deputy of Justice and Assembly Affairs of the President was also appointed as the representative of the government. However, the Guardian Council of the Constitution, in the comment No. 82.30.3971 dated August 18, 2003, has commented on the proposal as follows: The proposal for the accession of the Government of the Islamic Republic of Iran to this Convention, approved by the Islamic Consultative Assembly on July 23, 2003, was raised at the meeting of the Guardian Council dated on August 6, 2003; in addition to offering the accession to the convention in the proposal format, in terms of including the principles 77 and 125 of the Constitution, and also the adaptation of certain articles with Islamic standards can be investigated, the comment of Council is stated as follows:

1. The accession of the Government of the Islamic Republic of Iran to this Convention in the form of a proposal has been introduced that in several cases, including paragraph 1 of article 2, paragraph 1 of article 10, article 11, paragraph 7 of article 17, paragraph 5 of article 18, and article 30 cause the raising of public expenditure which the method of compensation for it has not been specified, thus it was recognized as violating article 75 of the Constitution.

In order to resolve the objection of the Guardian Council, the Islamic Consultative Assembly adopted a modest amendment to its approval and reaffirmed the single article annex to the Convention, but the Guardian Council did not know the amendment resolving the issue, however the issue was addressed to the Expediency Discernment Council. The Government of the Islamic Republic of Iran has not yet joined the Convention.

Although the Guardian Council recognizes the assembly's approval contrary to article 75 of the Constitution and did not confirm it, because it is a proposal and has a financial burden, and refused to review and mention cases which do not conform to the Islamic standards, it seems that the major conflicts and problems from the recent aspect is related to article 16 of the Convention about extending the Prohibition of Torture Order to Penalties, as well as the acceptance of the investigation qualification by the Human Rights Committee (Article 20) (Mehrpour, 2015).

4. Political and Legal Barriers Facing Iran

In general, there are barriers facing Iran in acceding to the Convention in the current conditions that will be resolved in the event of major changes in various fields. The existence of international institutions and conventions is very useful and constructive, because it becomes a factor that moves countries towards advancement and progress, and the elimination of

imperfections. Since laws (if they have a guarantee of implementation) play an important role in the fulfillment of human prosperity, setting them regarding various social phenomena, including torture, move human prosperity towards evolution. Therefore, the complete human prosperity depends on the rules that have a guarantee of implementation concerning all social phenomena; otherwise human prosperity is incomplete (Pourbafrani, 2013).

The political barriers facing Iran in acceding to the Convention is the lack of internal preparedness for dealing with torture and eliminating it, that this lack of internal readiness is in various areas, which include:

- Lack of decisive determination by the instrumental elites,
- Lack of civil society,
- Lack of supervisory institutions,
- Lack of full training and familiarity of people with their rights when tortured, and
- Lack of full training of security forces and police about the rights of the accused and the existence of the culture of torture among them.

But in the case of legal barriers, it should be said there are currently two barriers:

- ✓ Torture
- ✓ Penalties

By examining torture in the legal system of Iran, we found out that, according to the constitution (article 38), any form of torture for the purpose of getting confession or obtaining information was prohibited and doing it has been considered as a crime.

Although the examples inserted in article 38 of the Constitution of Iran are specific to the definition given in article 1 of the Convention on Torture 1984, since it prohibits the nature of torture, hence it cannot be considered as an obstacle. The main barrier to the adoption of the Convention is article 16, because with the interpretation that has been made of this article, punishments inserted in it mean physical punishments. Considering that relatively a high number of physical punishments are observed in Iranian criminal law, it has made the possibility of joining the 1984 Convention difficult.

But this barrier also goes away in two ways:

1) We join to the Convention conditionally, because the Convention has considered condition right for the countries upon accession, but this action does not seem logical for us because the source of our laws is the rich Islamic jurisprudence and it has also been set for all times and places by the Almighty, who is aware of all human's issues, because in this case the Iranian legal system will be subordinated.

(2) Islam considers human prosperity, and its purpose in doing punishments is also human prosperity, not harassment and bothering humans, therefore Islam will certainly allow the use of alternative punishments for physical punishments if they fulfill the same purpose of physical punishments and they are in accordance with the circumstances and situation. Therefore, it is possible to achieve these goals by reconsidering the old laws of jurisprudence and making comprehensive efforts and studying them accurately.

Comparing Iran's criminal law with regard to the prohibition of torture with international documents, it is natural that the criminal law of any country is specific to that country and its sources also come from the religions, traditions, customs and thoughts of the nation and people of the same country. Obviously, the source of Iran's criminal law in the first place has been derived from the Islam criminal law, and the Constitution of Iran has depicted the manifestation and orientation of Islam criminal law. Iran's Constitution has prohibited torture in general, and it can be said that it is

consistent with international documents, but Iran's ordinary laws about torture have shortcomings as expressed below:

A) International documents have defined torture and have explicitly stated some instances of it, but Iran's criminal law, in spite of mentioning torture in the Constitution, has not defined it, and apparently its examples are exclusively physical bothering and harassment in Iran's law.

B) The concept of torture in international documents is wider than its concept in Iran's criminal law.

C) Although Iran's law is derived from Islamic law, and the necessity of the prohibition of mental and psychological torture has been explicitly emphasized and referred in the Cairo Declaration, Iran's laws lacks performance guarantee in this area.

D) Regardless of the weakness of Iran's criminal law in defining torture, Iran's criminal law (Islamic Penal Code) has only mentioned the punishment of the agents of physical harassment, thus it has not foreseen punishment and penalty for other forms of torture, such as psychological and mental torture. Meanwhile Iranian law has not stated any examples of psychological or physical torture.

E) Therefore, regarding the prohibition of torture, Iran's ordinary laws have not been able to fulfill the purpose of the Iranian Constitution and international documents that have absolutely prohibited torture and even failed to provide a definition of torture in accordance with the Constitution of Iran (Shokri and Sirous, 2010).

The Iranian legislator must strive to eliminate the abovementioned gaps so that the health and accuracy of obtaining reason is not compromised in criminal matters and the fair trial is realized. It should be noted, however, that the prevention of torture and the prohibition of it in the countries that have little credibility in using advanced methods of detecting crime for the statements of the accused and witnesses have been very successful. It is sufficient that the positive evidences of a crime are so strong that defendants cannot deny it. However, in the countries where there are weaknesses in the collection of the evidence of crime and there are inadequate procedural systems, especially imposing the burden on the judicial authority (prosecutor or his successor) is apparent, the desire to maintain this method and using it is very strong, provided that it is only for the purpose of obtaining information and getting confession from the defendants and witnesses (Ardebili, 2009).

CONCLUSION

The prohibition of torture is among the fundamental and irrevocable rights of humankind. The United Nations Organization as the protector of international security and promoting and encouraging respect for human rights and fundamental freedoms since its establishment has tried to eliminate this inhuman treatment (torture) and has issued many resolutions on this issue. Iran's Constitution prohibits torture in general, and it can be said that it is consistent with the international documents, but Iran's ordinary laws on torture have shortcomings (they have not paid attention to mental and psychological torture). Therefore, Iran's ordinary laws on prohibiting torture have not been able to achieve the objective of Iran's Constitution and international documents that have absolutely prohibited torture and even failed to obtain a definition of torture according to the Iranian Constitution.

Considering that there are many shared points between the Convention against Torture and the laws of the Islamic Republic of Iran regarding torture, these shared points in the realm of comparing the Constitution with the Convention are quite tangible, so that it can be said that there is not that much

gap between them. The gaps are more observed in the realm of ordinary rules, which we believe they can also be reduced with more consideration. In the principle of the prohibition of torture, its criminal nature, the invalidity of the confessions obtained through torture, and the compensation to the tortured, Iran's laws are not different from the Convention against Torture. The most significant difference is related to some physical punishments that from the viewpoint of Anti-Torture Committee are contrary to the Convention against Torture, but another approach excludes it from the realm of the Convention by referring to article 1 (Ashouri, 2009).

From this angle, it is obvious that the issue of the Iranian government's accession to the Convention does not face with problem either formally or substantially, because not only article 38 of the Constitution is about prohibiting torture and other denial forms of getting confession or acquiring information, and in accordance with international practices, such as the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and even in accordance with the provisions of the Constitution of countries such as France and Belgium, but most of the articles of Chapter Three of the Constitution of the Islamic Republic of Iran entitled as "The Rights of Nation" in deploying phrases and using terms are also in full compliance with many of the provisions of international sources and documents, some of which have been approved by the Iranian government and formally joined to them (Goldozian, 2005).

The important issue in the international obligations of each state in a particular legal field or area is the justification and modification measures of internal legal system of that government through the legislative branch in order to adopt its domestic system or laws with the considered aspects of international obligations.

In fact, such actions that are called "the process of merge or conversion" from legal point of view seek to adopt or reconcile two domestic and international legal systems so that governments can remain loyal to their international obligations, while in terms of implementing the system of internal law do not suffer disturbance or tension.

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