

ISTIR 10.87.89

UDC 341.4

DOI: 10.54649/2077-9860-2026-1-54-64

W. Heyoung¹, L.F. Tatarinova², D.V. Tatarinov^{3*}**¹PhD, Harbin University of Technology, School of Law,****ORCID ID: 0000-0002-4092-2136****²PhD, Associate Professor, Higher School of Law "Adilet,****Caspian Public University,****ORCID ID: 0000-0001-6857-6821, e-mail: dove_2003@mail.ru****³PhD, Associate Professor, Higher School of Law "Adilet,****Caspian Public University,****ORCID ID: 0000-0003-3340-2180, e-mail: danila_tatarinov@mail.ru**

LEGAL DOGMATIC REFLECTION ON "PRIVATE TORTURE CRIME"

Abstract

In *R. v. Reeves Taylor*, the UK Supreme Court ruled that Reeves Taylor lacked the "official identity" required to qualify his actions as torture, sparking significant debate in the international community. This decision demonstrated the complexity of applying international criminal law to individual actors operating outside formal state structures and called into question the effectiveness of existing mechanisms for accountability for torture. The prevailing discourse in international criminal law tends to support the radical approach of a "private crime against torture", which allows an individual's actions to be considered a separate crime, regardless of their official position. This approach, while theoretically enabling Reeves Taylor to be held accountable and ensuring the implementation of criminal justice for the victims, in practice it creates serious challenges to legal certainty, violates formal standards of the rule of law, and calls into question the stability of the existing legal system. In this context, it seems appropriate to examine the concept of "official identity" within the crime of torture through the lens of legal dogma, establishing reasonable and justifiable boundaries for the scope of this crime. Only by respecting the existing legal framework, including the provisions of the UN Convention against Torture, can a balance be achieved between the formal and substantive dimensions of criminal justice, ensuring fair prosecution without violating the fundamental principles of law and the rule of law.

Keywords: Torture, official identity, legal dogmatic, criminal justice

Introduction

During the Libyan civil war, Charles Taylor led the "National Patriotic Forces of Liberia (NPFL)" to try to defeat the Libyan national government and overthrow the Samuel Kanyon Doe's regime. Charles Taylor's wife, who is known as the mother of the revolution- Reeves Taylor, allowed Charles Taylor's rebels to rape seven women at her headquarters. In June 2017, Reeves Taylor was charged with torture in the UK. On November 13, 2019, the British Supreme Court made a judgment in the *R. v. Reeves Taylor* case, holding that NPFL did not exercise "the functions normally exercised by the government over its civilians" when the alleged crime occurred, so Reeves Taylor's behavior did not comply with the provisions of Article 134 of the <Criminal Justice Act 1988> (CJA) [1]. Subsequently, the British criminal prosecution office appealed. On December 6, 2019, the British Central Criminal Court dismissed all charges against Reeves Taylor [2]. The decision and reasoning of the British Supreme Court is an important contribution to its case law, but its judgment has been widely opposed by the international community. The international community argues that the scope of the <United Nations Convention Against Torture> (UNCAT) should be extended to private persons who are not state public officials when committing the crime of torture- Reeves Taylor doesn't have official identity, but should be convicted of torture. The crime of torture is the most serious violation of physical integrity. Therefore, the conviction of

*Corresponding author, e-mail: danila_tatarinov@mail.ru

Reeves Taylor can undoubtedly meet the just demands of the people of the world, at least the victims of Libya. However, the mainstream scholars' interpretation of the "crime of torture" in Article 1 of the <UNCAT> goes beyond the legal framework of the crime of torture stipulated in the <UNCAT>¹. It fully demonstrates the value conflict between the arrogant and conceited "arbitrary rationality" (substantive rationality) and the technical and professional "evil law also law" (formal rationality) [3].

Since the enlightenment, the formal rationality established by "nulla poena sine lege" in the field of criminal law has laid a foundation for the protection of human rights - people are ends rather than instruments - and it also has independent formal value. As Li Yanqiu pointed out, "formal rationality not only refers to the way in which the law is expressed outside, but also refers to some highly abstract legal concepts and propositions that may be far away from specific things, so the certainty of law is guaranteed to the greatest extent...The certainty of law emphasizes that the law obtains the external functional characteristics expected by people because of the rationalization of form" [4]. Criminal justice includes two dimensions of Justice: form and substance. The international community has violated the principle of the rule of law in order to achieve substantive justice, and the initiative to extend the crime of torture to private individuals is undoubtedly inappropriate. The author believes that a more moderate approach - Legal dogmatic - should be adopted to explain the identity of "officials" within the scope of "literal range" in the existing legal framework. This way not only sets a reasonable boundary for the scope of application of the crime of torture to meet the requirements of substantive justice, but also maintains the stability of international legal norms to ensure formal justice.

Materials and Methods

Literature analysis. The authors have read a lot of literatures, and summarized and sorted out the literatures.

Historical analysis. This paper summarizes the comprehensive meaning of "official identity" through a historical review of "official identity".

From the standpoint of historical jurisprudence, this paper gives a dogmatical explanation of the "official identity" in the "crime of torture". This paper points out that the key to understanding "official identity" is to understand what is "exercising government functions", and the way of "exercising government functions" is "land acquisition", and then control and establish order on the land space. The paper also points out that the theories of "development theory", "purpose theory" and "practice theory" in the international mainstream discourse are all aimed at pursuing substantial justice while ignoring formal justice.

The main task of this paper is to explain why <the Conventions against Torture> stipulates "official identity" as the pillar element of "crime of torture", and explain the legal connotation of "official identity". This paper also points out the problems in the interpretation of "private torture crime" in mainstream discourse.

Results and discussion

Three theories of "private torture crime" in the mainstream discourse of the international community

With the deepening of the international human rights movement, the prohibition of torture has been enshrined in some international legal documents with different levels and different goals. It is true that the prohibition of torture reflects the rational consciousness of humanism, but the reality that "each competent international body under relevant legal instruments has elaborated its own definition" [5] also poses a challenge to the standardization of the international community in determining the reasons for the prohibition of torture. Although scholars have a broad consensus on the purpose dimension - "to prevent interference with human dignity with a particularly serious nature" [6] - beyond the general level, the definition of different elements of the crime of torture will inevitably open the door to differences. After combing the mainstream discourse, the author concludes that the reasons

¹ According to the definition of torture in <UNCAT>, the legal framework of the crime of torture includes three pillars: (1) the suffering caused by the act and the severity of the suffering; (2) A person who intentionally inflicts pain on others with a view to achieving a particular purpose; (3) There is a link between the abuser and the public or officials.

why scholars advocate “private torture crime” are mainly divided into “development theory”, “purpose theory” and “practice theory”.

(1) Development Theory: it is a historical necessity to extend the crime of torture to private acts

The jurists who hold this view prefer to deduce the norms through the way of historical progression. They believe that the subject of the crime of torture will inevitably expand to the private sphere with the development of the civilization of the rule of law. For example, Manfred Nowak reviewed the development history of <UNCAT> and pointed out, “Since the <Universal Declaration of human rights> (UDHR) and the <International Covenant on Civil and Political Rights> (ICCPR) comprehensively and absolutely prohibited torture in 1948, the world’s first ‘torture report’ was issued in 1973, <the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment> (UNCAT) was promulgated in 1975, followed by the <Costa Rica Agreement>, and then the <Convention on Enforced Disappearances> (CED) in 2000, let alone the <Geneva Convention> and other international treaties,” [7] the international community is increasingly committed to making countries include the “Prohibition of torture” in their national codes in order to combat impunity and safeguard human dignity. Professor Paola Gaeta deduced the historical practice from the judicial practice of the ICTY: “The definition of torture contained in Article 1 of the <UNCAT> reflects the content of customary international law and is therefore applicable to the purposes of the jurisdiction of the International Criminal Court over war crimes and crimes against humanity. However, it broadly interprets the requirements of the <UNCAT>, according to which prohibited acts should be committed with the participation, instigation or consent of a public official or other person acting in an official capacity...It can be said that the trial chamber adopted this position in order to allow a torture review of whether acts committed by members of non state armed groups in the country are in violation of common article 3 of the <Geneva Conventions>” [5]. Professor Gaeta deduces the judicial practices and believes that it is a historical necessity to expand the scope of application of the crime of torture. Starting from the theory that “the bad nature of the act itself is mobile”, Professor E’milie Pottle asserted that “torture can be extended to other bad acts (private acts)” [8].

Although many scholars have different perspectives, they hold almost the same views - history is advancing, and so is the law. Therefore, it is a historical necessity for torture to expand from “official act” to “unofficial act”.

(2) Purpose Theory: the extension of torture to private acts helps to protect human rights

Karl Larenz pointed out: “the ultimate goal function of legal interpretation is to explore the standard significance of law in today’s legal order, and this goal can be achieved only by considering the intention of legislators in history and their specific normative ideas” [9]. In order to prove their own claims, scholars who hold the view of “purpose theory” have discussed the definition of torture in <UNCAT> from the perspective of legal purpose, clarifying that “the original intention of the legislator” covers “private acts of torture”. For example, Ginevra Le Moli passionately pointed out: “considering that the protection of human dignity is the inherent purpose of the prohibition of torture, the status of offenders as public or private actors is irrelevant” [10]. Professor Manfred Nowak demonstrated from the purpose of the establishment of UNCAT: “In my opinion, there are three main contents and basic principles of <UNCAT> today: first, combating impunity... Second, prevention... And finally, on victims of torture and rehabilitation. Considering that article 4 of the <UNCAT> requires States to criminalize torture, this is the main reason why torture is defined in the Convention” [7]. In the interview, Professor Nowak raised the narrowness of the definition of torture in Article 1 of the <UNCAT> more than once, and angrily stressed that “the interpretation of torture should include as many acquiescence elements as possible” [7], and the concentrated expression of this acquiescence factor is that “even if (the crime of torture) is committed by private actors, if the state does not take any action, the state has violated its obligations by acquiescence”. In other words, private acts can constitute “collusion” in the crime of state torture. In addition, Professor Andrew Clapham also pointed out the defects of the jurisdictional limitations of the <UNCAT> from the perspective of the overall interests of mankind, and said categorically: “(I) do not believe that the drafters intended to draw a clear line between torture as a crime of state action and torture as a prohibited act for all” [11].

All of us, including the author, recognize that the purpose of <UNCAT> is to protect human dignity and safeguard human physical rights. However, this does not mean that this paper agrees with schol-

ars' interpretation beyond the range of legal framework based on legal purposes, or violating the principle of rule of law.

(3) Practice Theory: the legislative practice of various countries provides a realistic basis for extending the crime of torture to private acts

From the perspective of philosophy, the scientificity of a proposition lies not in its logical self-consistency, but in its practical effect. Scholars who hold the "Practice Theory" demonstrate that "expanding the scope of application of the crime of torture" is reasonable in practice from the perspective of international and domestic legislative practice.

In the international dimension, they pointed out that as the universal declaration of human rights against torture, the <UNCAT> has provided guidance for the legislative practice of countries against torture. After the <UNCAT>, the <European Convention on Human Rights> (UHR), the <American Convention on Human Rights (ACHR)> and the <ASEAN Convention on Human Rights> have all prohibited acts of torture, even the <Rome Statute> includes torture as an element of "crime against humanity" or "war crime" in international criminal law. The emergence of numerous international treaties indicates that "protecting human dignity and prohibiting torture" has become a consensus in the international community.

In the dimension of domestic legislation, scholars have provided detailed arguments to prove that there is a practical basis for expanding the scope of application of the crime of torture. For example, Professor Chean W.L. pointed out: "the laws of India, Malaysia, Singapore and other countries extend the prohibition of torture to any ordinary person" [12]. Professor Ginevra Le Moli pointed out: "Brazil, Honduras, Mexico, Argentina, Italy and other countries have all eliminated the requirement of public officials or other officials to participate in the process of torture by expanding the full privatization of torture crimes in their domestic legal systems"[10].

Criticism of three theories

It is undeniable that the direct purpose of the criminal law is to punish crimes and protect the rights of victims. As Ma Rongchun said: "The substantive rationality of Criminal Law refers to the criminal law practice seeking the purpose of criminal law in embodying the value of maintenance, confirmation or coordination... Any proposition of criminal law and even the position of criminal law named "doctrine" should seek support from the rule of law and human rights...The 'social responsiveness' of criminal law makes the two criminal law values of protecting human rights and protecting society present an unprecedented positive color" [13]. Scholars demonstrate the rationality of "crime of torture extends to private act" from the dimension of substantive rationality, aiming to promote the protection of human rights, which is commendable. But this romantic reasoning ignores the premise of realizing the legal purpose- Respect the law!

(1) Criticism of "Development Theory"

Scholars who hold the "development theory" believe that the law is constantly developing. For example, Novak, E'milie Pottle and other scholars cited numerous norms of international law to illustrate the rationality of "extending torture to private acts". However, it is undeniable that all current official international law documents on the crime of torture clearly stipulate that the official identity of the actor is a constituent element of the crime of torture. Even Novak and E'milie Pottle admitted that "the link between the abuser and the public or officials" is "one of the three pillars of the international prohibition of torture" [14]. The crime of torture is an international crime. The determination of this crime must be in strict accordance with the existing norms of international law, or it will violate the basic principle of "nulla poena sine lege".

(2) Criticism on the "Purpose Theory"

The rule of law is developed from outside to inside - society is controlled by law, and law has external formality. The systematization and scientization of legal rules based on rational control and the formalization of the process of law making and application can provide stable expectations for people's behavior. Therefore, in order to ensure stability, the law is often an abstract concept or rule far away from specific things, so as to avoid arbitrary control of the law and make the law fall into nihilism. In short, the rule of law is the formal rule of law. Any interpretation of law can't go beyond the original legal framework. As Beccaria pointed out in <Dei Delitti E Delle Pene>: "the spirit of law needs to be explored, and there is no more dangerous axiom than this" [15]. Whether it is domestic law or international law, crime can't be arbitrarily identified in theory, but must be measured according to the provi-

sions of international conventions, and must have the basis of international law. Therefore, the basic principle of “nulla poena sine lege” is equally applicable to the crime of torture, whether it is domestic law or international law.

(3) Criticism of “Practice Theory”

As pointed out above, any criminal justice practice must strictly follow the general principle of “nulla poena sine lege”, which is not only the internal requirement of the principle of rule of law, but also the fundamental guarantee of human rights protection.

In the international dimension, the judicial practice of the crime of torture can be traced back to the “crime against humanity” in the <Charter of the International Criminal Tribunal for the former Yugoslavia>. For example, in the Freddy case, the trial chamber stated that “the definition of torture contained in Article 1 of the <UNCAT> reflects the content of customary international law and is therefore applicable for the purposes of the jurisdiction of the International Criminal Court over war crimes and crimes against humanity” [16]. However, the court has broadly interpreted the requirements of the <UNCAT>. According to the treaty requirements, prohibited acts should be performed with the participation of public officials or other persons in an official capacity or with their instigation, consent or acquiescence. The court stressed that “at least one of the persons involved in the process of torture must be a public official, or at least must act in a non-private capacity, like, as a de-facto organ of a state or any other entity with authority to act.” [16]. Even in the later Kunarak case, the trial chamber held that “torture includes the intentional infliction of serious suffering for a specific purpose, so relying on two of the three pillars of the definition of the <UNCAT>, the third element is not required to define torture as a war crime or a crime against humanity, that is, torture is committed by a public official or a person in an official capacity or participation... This requirement has nothing to do with international criminal law and is therefore not an essential element in the definition of torture under international humanitarian law” [17]. However, the appeals chamber recognized the judgment of the trial chamber on Freddy, and still recognized that “at least one of the persons claiming to participate in the torture proceedings must be a public official or, in any case, at least a person acting in a non-private capacity”. It can be seen from this that the legislation and judicial practice in the field of international criminal law have not jumped out of the scope of <UNCAT>.

In the field of domestic law, Professor Ginevra Le Moli made statistics that “the perpetrator of the crime of torture must have an official identity” is still the mainstream discourse in the legislative practice of various countries [10]. In other words, the legislative practice of sovereign states is not enough to prove the legitimacy of the “practice theory” that “the crime of torture extends to private acts”. In addition, it should be noted that the crime of torture, as an international crime, its legal source is international treaties, customary international law or general legal principles. The specific norms in national legislation can't be used as its legal source, which means that domestic legislative practice only has reference value, not effectiveness value.

Conclusion

“The legal dogmatic does not advocate criticizing the law, but devotes itself to the interpretation of the law. Through the interpretation of the law, the law can be easily understood, and even the loopholes in the law can be filled within a certain limit. The study of legal dogmatic has not made researchers lose their initiative and become slaves of the law, but offers another way to make the law more perfect” [18]. The legal dogmatic includes interpretation in a narrow sense, but it is not limited to interpretation. On the premise of respecting the law, it makes the law meet the needs of social development and avoids the inherent lag defects of the law through interpretation within the range of words.

Why “official identity” is stipulated in the <UNCAT> in the crime of torture?

Whether it is the <UNCAT>, <ICCPR>, <EUPR> or the <Geneva Conventions>, any international treaty on the crime of torture clearly stipulates “the official identity of the actor”. Therefore, the qualification element of the official identity of the actor has also become one of the three pillars of the crime of torture. International scholars generally hold a negative attitude towards the judgment of the British Supreme Court, and believe that the court “in order to maintain the stability of the rules (official identity) so that acts of torture that seriously infringe on human rights are not punished by law” [19] is a misinterpretation of the rule of law. Scholars all acknowledge that the purpose of the <UNCAT> is

to prohibit torture and protect human rights. Since its purpose is to protect human rights, why should legislators add the restrictive element of “official status” when defining the crime of torture? Except that Professor E’milie Pottle talked about this issue in a negative position, few people mentioned it. Professor E’milie Pottle believes that the <UNCAT> is the result of long-term negotiations among countries and is a pragmatic compromise. Because the provision of “acting in an official capacity” is vague enough and associating with the official can make the crime of torture “mobility diversity” – transforming ordinary criminal crimes into international crimes, and the offenders can escape criticism under the protection of national sovereignty.

The author believes that this view is biased. In essence, international treaties are the transfer of national sovereignty. In fact, the international community is still an “anarchic state of fighting for its own interests” [20]. Therefore, the process of creating the statute must be a process of compromise. However, it is worth noting that since the <UNCAT> puts officials of sovereign states at risk of international punishment, why should the international community still create and sign the <UNCAT>? Bassiouni gave us the answer – “because the immortal human value is recognized by all human kinds” [20]! Since torture is against human reason, why does the international community add the restrictive element that “the perpetrator must have an official identity” when defining “torture”? The author believes that the theoretical basis of this provision is “collective evil is greater than individual evil”.

From Aristotle’s time to nowadays, philosophers, behaviorists, sociologists and other scholars all believe that human nature has a tendency to harm others (or to surpass others) [21]. When individual behavior turns into collective behavior, can human nature be improved? The answer is not only negative, but also pessimistic. “The consequences of collective deviant acts are often several times the sum of the consequences of individual acts in the collective, which has been confirmed by the barbarity and cruelty of genocide and crimes against humanity. Driven by instinct, people are sometimes mean. However, if social control measures are weakened or ineffective, these instincts will play a worse role in collective behavior. At this time, the worst primitive instincts will become explicit and lead to destructive consequences” [20]. However, it should be noted that the way of demonstrating sovereignty by social contract originated from Hobbes led to the neutrality of the state and the technicalization of politics until Hegel finally separated the state from the civil society, and both the state and sovereignty lost their ontological status in politics. How can the artificial virtual political community achieve collective evil? On the basis of “control theory”, Roxin put forward the theory of “criminal domination established by using organized power institutions” [22]. Professor Roxin pointed out: “the establishment of organizational domination needs to meet three conditions: first, order the perpetrators to use the authority to issue orders; second, the authority they use is in violation of the law; third, the members of the organization who directly commit crimes are replaceable” [22]. In Roxin’s theory, the state can operate on its own like a machine, and the controller is the person who pulls the “trigger”. The fundamental reason why the evil of the state or the collective is greater than the evil of the individual is that it “grasps an inherent lethal force” [23], and the members of this inherent lethal force are endless. In addition, the crimes regarded as international crimes are all “endangering the interests of the international community, threatening human peace and security, and shaking the conscience of mankind” [20]. However, private torture acts do not have this characteristic. Even torture itself “must be related to the background factors of violence before it can be regarded as an international crime” [5]. In other words, the crime of torture must be associated with official status to have “enough” social harmfulness. Therefore, the <UNCAT> stipulates that the perpetrators of the crime of torture must have an “official identity” not to limit their role in protecting human rights, but to provide protection for the victims of torture when they are unable to seek judicial justice in their own country by defining acts of torture as international crimes.

Understanding “official identity” from the perspective of historical jurisprudence

“Acting in an official capacity” in Article 1 of the <UNCAT> is the identity element of the perpetrators of the crime of torture. The British Supreme Court held that: “Acting in an official capacity means that the perpetrator exercises similar government functions against civilians in times of peace or war” [1]. A person acting in an official capacity includes “a person who acts for or on behalf of the organization or institution in an area controlled by the organization or institution in a capacity other than a private or personal capacity and who has committed relevant acts, a function normally exercised by the government against its civilians. In addition, it includes any such person acting in times of peace or in situa-

tions of armed conflict" [1]. As we know from the history, the political organizations and their leaders played an important role in preserving the nationhood of a state [24]. The judicial interpretation of the British Supreme Court covers almost all the thinking about "official identity". The court's interpretation distinguishes between "governmental functions" and "purely military activities". By examining whether a political entity has established a sufficient degree of control, authority and organization, it is determined whether the political entity has become an official or quasi-official authority, rather than a purely military group.

Through the analysis of the judgment, the key to judge whether the actor has "official identity" is whether he can "exercise government functions", and the key to understand the abstract concept of "exercise government functions" is to grasp the concept of "government functions". This paper holds that the fundamental way to exercise government functions is to "occupy the land, then control the land space, and determine the order on the land".

Since Hobbes and Locke, the theory of the combination of government, state and sovereignty has become an important ontological content of political science. "Land is connected with legal rights because it carries the rules and fields of human common life" [25], and in the original action of occupying as the basis of legal power, the government and the state have laid the foundation of legal power in both inward and outward aspects: "Inward, that is to say, within the occupying group, the possession relationship and property relationship connected with the initial division and determination of land can be created; outward, the occupying group is often opposed to other forces that seize and occupy land" [25]. The sovereign state in today's society is a "legal Empire" with ruling power built by laws. Officials are just the executors of the law, and the law is "to distinguish our laws on the ground" [25] – In other words, law is the standard to divide and locate the foundation and ground of the land in a specific way, and the basic structure of the resulting political, economic and religious order – "All property rights and legal rights are determined by the land, which originates from the initial acquisition of the land of the whole earth. Kant pointed out that the original acquisition is nothing but land" [25]. In short, government officials are the executors of the land and the legal order on the land. This means that the most fundamental premise for the exercise of government functions is to obtain the mother of legal power – land, that is, the rule is the rule over the land first, and then the rule over the residents on the land. In the case of Mrs. Reeves Taylor, whether the "NPFL" led by Mrs. Reeves Taylor and Charles Taylor has completed the land occupation. The answer is obviously yes. Charles Taylor was the president of Libya from 1997 to 2003. Even though Libya has been in civil war since 1991, it is undeniable that Charles Taylor still controls most of the territory of Libya, and Mrs. Reeves Taylor is a senior member of NPFL. In other words, Taylor and his wife have the power basis to exercise government functions.

It may be pointed out that having the premise of exercising government functions does not mean that government functions can be exercised, so whether NPFL can exercise government functions as a military organization is still in doubt. As pointed out above, the premise of exercising government functions is to occupy land, but NPFL has not been internationally recognized. Whether it has legal government qualification is also the focus of debate between the British Supreme Court [1] and the international legal community [6]. Through the analysis of the content of the debate, it can be seen that the debaters all understand "occupation, government and constitution" from the standpoint of positivist law, but few scholars interpret these concepts from the standpoint of historical law.

From the perspective of legal history, excluding those acts of violence that quickly self-destruct, occupation can be divided into two types: one is the occupation inherent in the overall order of existing international law; The other is to break away from the existing space order and establish a new law in the overall space field of the existing neighboring countries. "Every occupation is always accompanied by territorial change... It is a process of building a new law" [25], positivist jurists – jurists of constructive law and statutory law – tend to believe that only the existing order and process inherent in the established order, that's to say, only in the established and stable field, especially the system with national legitimacy (the first form of occupation), can they enter their research and investigation field of vision. They are willing to regard the process of constructing order as an illegal problem and reject it. They found that it made sense to attribute all questions of legitimacy to the constitution or to the will of the country considered to have personality. However, when it comes to what is the origin of the constitution or what is the origin of the state, positivist law can't answer the legal rights of the Constitution and the source of the government. However, when we examine the constitution, the government and

the country from the perspective of historical law and political law, we can clearly realize that “the constitution is a specific way of life that is automatically given together with each existing political entity” [25], is the basis for absolute constitution, formulating constitutional laws and exercising government functions. And the formulation of absolute constitution (constitutional power) is accompanied by land occupation at the same time. Therefore, both methods of occupation reflect the unity of legal power and occupation. In this sense, NPFL also has the legal power to exercise government functions, that is, Mrs. Reeves Taylor has official identity.

Derivative value: maintaining the formal value of <UNCAT> and solving practical problems

Why does this article adopt a more moderate and even conservative way to explain the “crime of torture” in the eyes of most scholars? This article holds that the purpose of <UNCAT> is not to suppress torture itself, but to respond to the widespread and systematic torture in Latin America and other parts of the world [26]. As a human rights treaty, <UNCAT> not only has the function of protecting human rights, but also has its own independent normative value – “in judicial activities, the only criterion to distinguish between crime and non-crime is whether the act conforms to the provisions of the criminal law, that is, whether the act has criminal illegality. Therefore, in judicial activities, when there is a conflict between substantive rationality and formal rationality, I think we should choose formal rationality and give up substantive rationality. Only in this way can we uphold the independent value of abiding by the law and realize social justice through the law” [27].

In order to understand the basic principles of UNCAT, we need to review the broader background of the 1970s. <UNCAT> is the product of Amnesty International’s long-standing campaign against the so-called “torture crisis” and torture of political prisoners [28]. This campaign has greatly affected the international community, so that the General Assembly adopted resolution 3452 on December 9, 1975. The resolution included the <Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman and Degrading Treatment>, which also laid the foundation for the <UNCAT>. Both the British Supreme Court and positivist jurists in the international community believe that “other entities exercising effective powers (contents of the declaration)” should be understood as entities similar to countries, and such entities should be recognized by all members of the United Nations. Therefore, according to the preamble of the UNCAT, “the purpose of the UNCAT is to make the fight against torture more effective around the world. The drafters can achieve this goal in two ways: The first is that the State Party criminalizes acts of torture committed in its domestic law by public officials or persons acting in an official capacity or with their consent; The second is to establish its jurisdiction (quasi universal jurisdiction) [19] over any suspected crime of torture within the national jurisdiction.” Undoubtedly, the strict interpretation of the UNCAT first upholds the principle of the rule of law. Secondly, the strict interpretation of the UNCAT also urges the State Party to actively carry out domestic legislation to protect human rights, which can objectively promote the development of domestic and international legal capacity.

It should be noted that there is no tension between the independent normative value of UNCAT and legal dogma, and the provisions of “as a guideline for all States and other entities exercising effective power” in the <Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman and Degrading Treatment> provides a reasonable basis for the legal dogma interpretation of this article. When explaining this provision of the declaration, Professor Rodly pointed out: “the concept of public officials used in the declaration in the definition of torture is designed to go beyond state officials, including officials of other political entities that can effectively control the civilian population” [29, p. 30]. Professor Rodly did not understand the definition of torture in the declaration from the standpoint of empirical law, but explained “official identity” from the perspective of historical law and political law. This paper holds that Professor Rodly’s explanation is not only reasonable in theory, but also of practical significance. For example, although China’s Taiwan, Hong Kong and Macao regions do not have national qualifications – they have not been recognized as countries by the United Nations - under China’s “one country, two systems” policy, no country or individual can deny that they all participate in international practice as “Hong Kong of China”, “Taiwan of China” and “Macao of China” and can also independently exercise government functions within their jurisdiction. In addition, the international community can’t deny that Palestine [30] and Cyprus can exercise government functions within their jurisdiction.

With the deepening of the concept of human rights, torture is prohibited in international human rights law, international humanitarian law, international criminal law and even domestic law, which reflects the rational consciousness in the world, but it does not mean that legal interpretation can go beyond the principle of legal certainty. Maintaining the stability of legal provisions not only makes it possible to follow the method of legal governance, but also makes the means of pursuing justice follow formal justice – a more effective way. Taking legal texts as the starting point, legal dogmatic creates legal concepts, enriches the form of law, and expands the scope of law. It includes interpretation in a narrow sense, but is not limited to interpretation. By summarizing the logical analysis of legal concepts into a system, it not only realizes the advancement of legal norms with the times, but also acts on the verification of judicial decisions, so as to promote people's inner obedience to the law. In addition, "what is law depends on what is the standard of legitimacy, which is multidimensional" [31]. Therefore, the study of law is rooted in the law, but it cannot be limited to the law. Instead, it must go deep into the political, social, historical, economic and other fields to explore the potential meaning of the legal text, and meet the requirements of social progress on the premise of maintaining normative stability through doctrinal interpretation.

References

1. R v Reeves Taylor v Crown Prosecution Service [2019] UKSC 51 // Supreme Court of the United Kingdom. URL: <https://supremecourt.uk/cases/uksc-2019-0028> (accessed: 05.03.2026).
2. Weber M. Economics and Society. Trans. by Lin Rongyuan. Beijing: Commercial Press, 1970. – P. 710-730.
3. Li Yanqiu. On the relationship between logical judgment and value judgment in legal reasoning // Study & Exploration, 2010. – No. 6. – P. 99-103.
4. Gaeta P. Another Step in What it Means to Be Human – Prohibition v. Criminalization of Torture as a Private Act // Journal of International Criminal Justice. 2021. – Vol. 19. – P. 425-438. URL: <https://academic.oup.com/jicj/article-abstract/19/2/425/6294216>
5. Терновая Н.С. Понятие и классификация принципов местного самоуправления // Вестник Карагандинского университета, 2014. – № 73. – С. 35–41.
6. Nowak M. Can Private Actors Torture? // Journal of International Criminal Justice, 2021. – Vol. 19. – P. 415-423. URL: <https://academic.oup.com/jicj/article-abstract/19/2/415/6295723>
7. Pottle E. What is Torture? Making the Case for Expanding the Definition to Include Private Individuals as Perpetrators // Journal of International Criminal Justice, 2021. – Vol. 19. – P. 407-413.
8. Larenz K. Legal Methodology. Trans. by Chen Ai'e. Beijing: Commercial Press, 2004. – P. 11.
9. Le Moli G. Torture by Non-state Actors: Four Inquiries // Journal of International Criminal Justice, 2021. – Vol. 19. – P. 363-391. URL: <https://academic.oup.com/jicj/article-abstract/19/2/363/6357821>
10. Clapham A. Thinking Beyond the Offence of Torture // Journal of International Criminal Justice, 2021. – Vol. 19. – P. 439-446.
11. Cheah W.L. Some Views on Torture from Asian // Journal of International Criminal Justice, 2021. – Vol. 19. – P. 447-453.
12. Ma Rongchun. Formal rationality or substantive rationality: an in-depth study of the debate on the interpretation of criminal law // Oriental Law, 2015. – No. 2. – P. 19–36.
13. Rodley N. The Definitions of Torture in International Law // Current Legal Problems, 2002. – Vol. 55. – P. 467-493.
14. Beccaria C. Dei Delitti e Delle Pene. Trans. by Huang Feng. Beijing: Peking University Press, 2008. – P. 12.
15. ICTY. Prosecutor v. Furundžija (IT-95-17/1-T), Judgment, 10 December 1998 // International Criminal Tribunal for the former Yugoslavia. URL: <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (accessed: 07.03.2026).
16. ICTY. Prosecutor v. Kunarac et al. (IT-96-23/1-T), Judgment, 22 February 2001 // International Criminal Tribunal for the former Yugoslavia. URL: <https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> (accessed: 08.03.2026).
17. Chen Xingliang. Doctrinalization of criminal law knowledge // Chinese Journal of Law, 2011. – No. 6. – P. 27-30.

18. Eatwell T., Powles S. "Quasi-governors" and Questions Relating to Impunity and Legal Certainty // *Journal of International Criminal Justice*, 2021. – Vol. 19. – P. 393-406.
19. Bassiouni M. *Introduction to International Criminal Law*. Beijing: Law Press, 2006. – P. 26, 30, 151, 595.
20. Li Meng. Why is the state of nature a state of war: Two proofs of Hobbes and the reconstruction of human nature // *Journal of Yunnan University*, 2014. – No. 5. – P. 3-23.
21. Roxin C. On criminal domination established by using organized power institutions // *Peking University Law Journal*, 2016. – No. 6. – P. 1646-1654.
22. A/CONF.183/C.1/L.2 // United Nations Official Documents System. URL: <https://undocs.org/A/CONF.183/C.1/L.2> (accessed: 07.03.2026).
23. Botagarin, R.B. Polish Political Parties and Social Organizations and Their Attitude toward National Statehood. *Vestnik of Karaganda University*, 2015, No. 329. – P. 103-108. (in Russian).
24. Schmitt K. *The Nomos of the Earth*. Shanghai: Shanghai People Press, 2017. – P. 1, 6, 8, 12.
25. Nowak M., Birk M., Monina G. (eds.). *The United Nations Convention against Torture: A Commentary*. Oxford: Oxford University Press, 2019. – P. 6.
26. Burgers H., Danelius H. *The United Nations Convention against Torture: A Handbook*. Boston: Martinus Nijhoff Publishers, 1988. – P. 119.
27. Deng Zibin. *Criticism on the Concept of Substantive Criminal Law in China*. Beijing: Law Press, 2009. – P. 8.
28. Amnesty International (UK). *Epidemic Torture*. 10 September 1973. URL: <https://www.amnesty.org/en/documents/act40/003/1973/en/> (accessed: 08.03.2026).
29. Rodley N., Pollard M. *Treatment of Prisoners under International Law*. Oxford: Oxford University Press, 2009 – 750 p.
30. ICC-01/18-59. *Court's Territorial Jurisdiction in Palestine. Part Introduction*. 13 February 2020. URL: <https://www.icc-cpi.int/court-record/icc-01/18-59> (accessed: 08.03.2026).

В. Хэюн¹, Л.Ф. Татарина², Д.В. Татарин^{3*}

¹доктор PhD, Харбинский технологический университет, Школа права,
ORCID ID: 0000-0002-4092-2136

²к.ю.н., ассоциированный профессор Высшей школы права «Эділет»
Каспийского общественного университета,
ORCID ID: 0000-0001-6857-6821, e-mail: dove_2003@mail.ru

³к.ю.н., ассоциированный профессор Высшей школы права «Эділет»
Каспийского общественного университета,
ORCID ID: 0000-0003-3340-2180, e-mail: danila_tatarinov@mail.ru

ПРАВОВЫЕ ДОГМАТИЧЕСКИЕ СУЖДЕНИЯ О «ПРЕСТУПЛЕНИИ С ПРИМЕНЕНИЕМ ПЫТОК»

Аннотация

В деле Р. против Ривза Тейлора Верховный суд Великобритании постановил, что Ривз Тейлор не обладал «официальной идентичностью», необходимой для квалификации его действий как преступления в форме пыток, что вызвало значительные дискуссии в международном сообществе. Данное решение продемонстрировало сложность применения международного уголовного права к индивидуальным деятелям, действующим вне формальных государственных структур, и поставило под сомнение эффективность существующих механизмов привлечения к ответственности за пытки. Господствующий дискурс в сфере международного уголовного права склоняется к поддержке радикального подхода «частного преступления против пыток», который позволяет рассматривать действия индивида как самостоятельное преступление, независимо от его официальной позиции. Такой подход теоретически обеспечивает возможность привлечения Ривза Тейлора к ответственности и реализации принципа уголовного правосудия для пострадавших, однако на практике он создает серьезные вызовы для правовой определенности, нарушает формальные стандарты верховенства закона и ставит под сомнение стабильность существующей правовой системы. В данном контексте представляется целесообразным рассматривать

концепцию «официальной идентичности» в рамках преступления пытки через призму правовой догматики, устанавливая разумные и обоснованные границы сферы применения данного преступления. Только при соблюдении действующих правовых рамок, включая положения Конвенции ООН против пыток, возможно достижение баланса между формальным и содержательным измерением уголовного правосудия, обеспечивающим справедливое привлечение к ответственности без нарушения фундаментальных принципов права и верховенства закона.

Ключевые слова: пытка, официальная идентичность, правовая догматика, уголовное правосудие

В. Хэюн¹, Л.Ф. Татарина², Д.В. Татарин^{3*}

¹PhD докторы, Харбин технологиялық университетінің Құқық мектебі,
ORCID ID: 0000-0002-4092-2136

²з.ғ.к., Каспий Қоғамдық Университеті «Әділет»

Жоғары Құқық мектебінің қауымдастырылған профессоры,
ORCID ID: 0000-0001-6857-6821, e-mail: dove_2003@mail.ru

³з.ғ.к., Каспий Қоғамдық Университеті «Әділет»

Жоғары Құқық мектебінің қауымдастырылған профессоры,
ORCID ID: 0000-0003-3340-2180, e-mail: danila_tatarinov@mail.ru

«АЗАПТАУЛАРДЫ ҚОЛДАНА ОТЫРЫП ЖАСАЛҒАН ҚЫЛМЫС» ТУРАЛЫ ҚҰҚЫҚТЫҚ ДОГМАТИКАЛЫҚ ПАЙЫМДАУЛАР

Аңдатпа

R. v. Reeves Taylor ісінде Ұлыбритания Жоғарғы Соты Reeves Taylor-дың әрекеттерін азаптау деп саралау үшін қажетті «ресми сәйкестік» жоқ деп шешті, бұл халықаралық қоғамдастықта елеулі пікірталас тудырды. Бұл шешім халықаралық қылмыстық құқықты ресми мемлекеттік құрылымдардан тыс жұмыс істейтін жеке тұлғаларға қолданудың күрделілігін көрсетті және азаптау үшін жауапкершіліктің қолданыстағы тетіктерінің тиімділігіне күмән келтірді. Халықаралық қылмыстық құқықтағы басым пікірталас жеке тұлғаның әрекеттерін олардың ресми лауазымына қарамастан бөлек қылмыс деп санауға мүмкіндік беретін «азаптауға қарсы жеке қылмыс» радикалды тәсілін қолдайды. Бұл тәсіл, теориялық тұрғыдан Reeves Taylor-ды жауапкершілікке тартуға және жәбірленушілер үшін қылмыстық әділеттілікті жүзеге асыруды қамтамасыз етуге мүмкіндік бергенімен, іс жүзінде құқықтық сенімділікке елеулі қиындықтар туғызады, құқық үстемдігінің ресми талаптарын бұзады және қолданыстағы құқықтық жүйенің тұрақтылығына күмән келтіреді. Осыған байланысты, азаптау қылмысындағы «ресми сәйкестік» ұғымын құқықтық догма тұрғысынан қарастырып, осы қылмыстың ауқымы үшін ақылға қонымды және негізделген шекараларды белгілеу орынды болып көрінеді. Тек қолданыстағы заңнамалық базаны, соның ішінде БҰҰ Азаптауға қарсы конвенциясының ережелерін құрметтеу арқылы ғана қылмыстық сот төрелігінің формальды және мазмұндық өлшемдері арасында тепе-теңдікке қол жеткізуге болады, бұл құқықтың негізгі қағидаттары мен заң үстемдігін бұзбай әділ қудалауды қамтамасыз етеді.

Түйін сөздер: азаптау, ресми сәйкестілік, құқықтық догма, қылмыстық сот төрелігі