NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

AUTHOR: R.S. RAVEENDHREN

ABSTRACT

From time immemorial, physical torture has been used on citizens and non-citizens to obtain confessions and as a trial-trick to determine their guilt. This research paper is an honest attempt to portray 'torture' in the global context.

The author understands that immediate eradication of torture is difficult. However, it is the duty of everyone to work towards abolishing all forms of inhuman treatment. Nations must strive to voice their opinion when they see torture being used as a tool outside their borders. Many nations have taken a bold step in the modern age by acknowledging their past role in torture, now categorically denouncing it as a 'crime against humanity'.

Still, it is disheartening to note that India is lagging behind with half-hearted attempts. The absence of a proper legal framework in India is the main reason for perpetuating torture into becoming a sanctioned norm.

It is unforgiving that the India is still dilly-dallying to bring out legislation on torture, even as a signatory to United Nations Convention Against Torture. An expedition of a thousand miles starts with the first stride; the big question is: Why is India afraid to take the first step?

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

Introduction:

Torture is a brutal violation of human dignity and human rights. No political, military, religious, or other cause can justify it. But here is a fact: we are still far away from stamping out torture1. After the sordid destruction witnessed in World War II, most believed that nations would have learnt a lesson. But the torture and the killing spree by the French army immediately afterward in Algeria belied all fond hopes. Nearly 1.5 million Algerians lost their lives in the carnage; most were tortured before they were killed.

Torture includes inhumane treatment and execution; and medical experiments carried out on humans without their consent. Similar to what was carried on by the Nazis and the Japanese army during the holocaust.

Between 1967 and 1974, when the Greek Military Junta surfaced as a brutal police state, political opponents and dissenters were systematically tortured by harassing them and sending them into domestic exile. Tales of horror had come to light when two escaped prisoners testified before the Human Rights Commission of the Council of Europe that very loud noise was used to terrorize detainees during routine interrogations.

Countries played the role of mere spectators to the chilling images of torture unleashed by the US and the UK army on various facilities such as Abu Ghraib, Guantanamo Bay, and Bagram Theater Internment Facility in Afghanistan. Definitely, the world can't just sit with folded hands and watch the war crimes committed by the Sri Lankan army in the 2009 Eelam War, the murder of George Floyd by the Minneapolis police in 2020, and the custodial torture that led to the death of Jeyaraj and Benniks at Sattankulam in Tamil Nadu.

Some of the regimes in countries such as Brazil, China, Congo, Cameroon, Egypt, Ethiopia, Eritrea, Iran, Iraq, India, Mexico, North Korea, Sudan and Syria, among other countries, have

gained notoriety at various times for using torture on citizens to suppress dissenters and control social, political, and cultural activities. Reports of torture of refugees have emanated against countries like the U.K. and Greece.

Even though these crimes have never failed to shock the world's collective conscience, why a comprehensive legislation to abolish torture in every form is still a distant dream?

Evolution Of Torture:

Various studies have concluded that the practice of using torture evolved gradually into an official policy in the hands of the States

- For the protection of its power and
- For the perpetuation of its authority.

(1) The widespread use of torture by States paved the way for the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 by the United Nations Organisation (UNO). It has also given an impetus to several private organizations to protect human rights.

(2) In 1972, Amnesty International launched a campaign under the leadership of former Secretary-General Martin Ennals to completely abolish torture. This could rouse the public conscience against the systemic use of torture by governments worldwide. The scathing report prepared by it in 1973 recorded the widespread prevalence of torture in various countries in the world[2]. The report galvanized the international community to focus and work concertedly towards eradicating barbaric practices.

(3) Although torture is no longer used as a spectacle of state power, it continues unhindered as a practice hidden from plain sight[3]. Torture impacts issues relating to governance, social control, and the principles of basic respect and human dignity. The UNO in 1984 came out with a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, also known as the United Nations Convention against Torture (UNCAT). The convention aims to prevent torture and other acts of cruel,

- [1] Kofi Annan, Secretary-General calls for ratification by all States of Convention against Torture, Optional Protocol, in message for International Day, Statement and Messages, Secretary General (June 8, 2021, 10am), https://www.un.org/press/en/2003/sgsm8752.doc.htm
- [2] Amnesty International, Annual Report 1973-74, campaign for abolition of torture, p.13
- [3]Evans, Rebecca, The Ethics of Torture: Definitions; History, and Institutions, International Studies, Oxford Research Encyclopedia (June 10, 2021, 11am), https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-326

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

inhuman, or degrading treatment and punishments everywhere in the world. This treaty came into force on the second day of June 1987 and was ratified by 20 Member-States.-

As a follow-up, several countries signed and ratified it. But there are glaring examples to show that this journey of eradicating torture is an uphill task.

Here is how India is placed on the torture map.

Much as we don't like to acknowledge the largest democracy in the world, India is not immune to the horrendous culture of torture. Torture, as well as extra-judicial killings, have continuously raised their ugly heads in:

A. Armed conflicts in Manipur and Nagaland in the 1950s;

B. Insurgencies in Bengal and Mizoram in the 1960s

C. In Punjab in the 1980s,

D. In Kashmir, since independence and

E. Maoist militancy in Central India, Andhra Pradesh, and Kerala.

Torture is often sought to be justified under the garb of 'Security of the State.' The state's machinery kills all the victims after inflicting brutal torture on them often drawing the adverse attention from Amnesty International and other global human rights organizations.

Decoding Torture:

Even though torture is proscribed in several countries' international law and municipal laws, there is no common definition of 'torture.' Let us examine how it is defined under international instruments:

Interestingly, neither the Universal Declaration of Human Rights, 1948, nor the International Covenant on Civil and Political Rights, 1966, have defined torture.

– Article 5 of the UDHR states that *"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

– Article 7 of the ICCPR states that *"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".*

The first international document that came close to defining the term 'torture' is the 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.' This declaration that the General Assembly adopted on the 9th of December 1975 defined it as follows:

Article 1: *"For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."*

Sub Article 2: *Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment*

Yet another instrument defines 'torture,' albeit not a global one. The Inter- American Convention to Prevent and Punish Torture, 1985 (IACPPT) comprises countries from South America, North America, and West Indies islands.

Article 2 of IACPPT defines torture as:

(sic) *"…for the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."*

Many social scientists feel that the definition of torture under the United Nations Convention against Torture (UNCAT) which was adopted on the 10th of December 1984, is the most pragmatic

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

of all definitions on the subject. Article 1 of the said Convention against Torture states:

"the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation inherent in or incidental to lawful sanctions."

Ingredients of Torture:

From the above definition, the basic elements of torture can be deduced as follows:

(a) Infliction of severe physical pain or mental suffering

(b) Intention to inflict such pain or suffering

(c) A purpose

(d) Perpetrator

(e) Victim

In any case, the above definition should not be construed as exhaustive in nature; the scope is expandable. Sub-article (2) of Article 1 of UNCAT specifically states that this definition is without prejudice to any international instrument or national legislation that may contain wider application provisions. This definition of the term 'torture' under UNCAT has laid the basis for all the interpretations that would evolve with time under various international and national documents and treaties. It has also vastly influenced the municipal laws of member-states.

International Instruments On Torture:

The major international instruments concerning torture are as follows:

(A) The Universal Declaration of Human Rights, 1948:

Adopted by the General Assembly on 10th December 1948 as Resolution #217, it is described as "humanity's Magna Carta" by Eleanor Roosevelt, who chaired its drafting committee. Article 1 famously declares that all human beings are born free and equal in dignity and rights. Article 5 states that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.

(B) The Geneva Convention Relating to the Treatment of Prisoners of War, 1949:

The Geneva Conventions is a set of international treaties agreed to between 1864 and 1949 to establish standards of international law for humanitarian treatment in the case of war. It was adopted on 12th August 1949 and came into force on 21st October 1950. The conventions ensure humane treatment of non-combatants (civil and medical personnel), prisoners, combatants not actively engaged in fighting, and sick or wounded soldiers. Article 17 and 87 of the Convention expressly prohibits torture in any form to prisoners of war. Article 130 stipulates that a breach of any provisions of the Convention would be considered a grave breach.

(C) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949: This Convention was adopted on 12th August 1949. It came into force on 21st October 1950. The Convention, also popularly known as the Fourth Geneva Convention, provides humanitarian protection to civilians stuck in war zones. Article 3 states that torture shall not be inflicted on persons - in the case of armed conflict not of an international character; persons taking no part in the hostilities, including members of armed forces who have laid down arms or wounded, detained or by any other cause are to be treated humanely. Article 32 specifically prohibits the infliction of physical suffering on such persons. Article 147 stipulates that a breach of any provisions of the Convention will be considered a 'grave breach.'

(D) International Covenant on Civil and Political Rights, 1966:

This covenant was adopted by the General Assembly Resolution 2200A (XXI) on 16th December 1966. It came into force on 23rd March 1976. It primarily exhorts parties to

respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights, and the rights to due process of law and a fair trial. Article 7 states that no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment.

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

(E) United Nations Code for Law Enforcement Officials, 1978:

The UN Code of Conduct for Law Enforcement Officials is a resolution of the UN General Assembly adopted on December 17, 1979. They are basic guidelines and not legally binding on member-states. It encourages member-states to follow guidelines and incorporate them into their municipal law. It outlines the standards, duties, and responsibilities to be observed by law enforcement officials. Article 5 provides that no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman, or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

(F) Principles of Medical Ethics Relative to the Role of Health Personnel, particularly Physicians in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1982:

The guideline for doctors is a code of medical ethics, which the UN General Assembly adopted on 18th December 1982. It contains six principles. Principle #2 explicitly states that it is unethical and an offence for health personnel, especially physicians, to engage in acts that constitute participation in complicity in incitement to or attempts to commit torture or other cruel, inhuman, or degrading treatment or punishment.

(G) Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988:

The Principles are meant to protect all persons under any form of detention or imprisonment. The UN General Assembly adopted it on the 9th of December, 1988. Principle 6 states that no person under detention or imprisonment shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman, or degrading treatment or punishment.

Principle 33 provides that a detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman, or degrading treatment, to the authorities responsible for the administration of the place of detention and higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

(H) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984:

The UN General Assembly adopted this Convention, popularly known as UN Convention against Torture (UNCAT), on 10th December 1984 (Resolution 39/46). The convention came into force on 26th June 1987. The convention is in line with the principles enunciated in the charter of the UN, recognizing equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world. The primary object of this convention is to strengthen provisions in the other UN Conventions on Torture so that the struggle for the eradication of torture is an effective one.

Tracing The History of Torture in India:

Torture has a very long history in India. It is a primordial practice. Much to people's disdain, it is neither a product of British rule nor a tool of recent times. Before looking into the Constitutional scheme and statutory framework touching torture in India, it is essential to study the jurisprudence that has evolved from the past.

Ancient India:

In ancient India, the laws of Manu and Kautilya extensively influenced the governance and administration of justice under the kings. Though they were loosely referred to as laws, they never had the legal or judicial intent to have a binding effect on the society, king, or the State.

They basically expounded the fundamental principles to follow the right path in life and laid down the rules of conduct for people and their rulers.

Manu's *'Dharmashastra'* was written between 200 BCE and 100 CE. Kautilya's *'Arthashastra'* was written around 150AD, containing discourses on good conduct, politics, economics, governance, military strategies, law, administration of justice, and crime and punishment.

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

Mention of torture in Ancient Indian texts:

The practice of torture finds significant importance in Manu's 'Dharmashastra' and Kautilya's 'Arthashastra.' Arthashastra goes one step ahead and even prescribes the types and methods of torture. Torture has been categorically recognized as a form of punishment.

Manu mentions four forms of punishment: admonition, censure, pecuniary punishment such as a fine or forfeiture of property, and all sorts of physical punishments, including the death penalty[4]. Kautilya refers to about eighteen methods of torture - four for ordinary offences and fourteen for serious ones. The four ordinary ones involve lashes/strokes and tying. The fourteen kinds of torture for serious offences involved different kinds of beating, tying, burning, and pricking[5].

Medieval India:

Medieval India was predominantly under the Muslim dynasties. Though the Muslim rulers professed to discharge their duties and responsibilities in consonance with the Islamic principles of equity and justice, their conduct hardly justified their claims. Often, penalties in the administration of justice-involved substantial elements of torture and infliction of pain. It greatly reflected the idiosyncrasies of the rulers of that time. Some of the cruel methods of torture employed by them were

- Snake bites
- Severing of limbs
- Breaking of bones especially the arm and the thigh bones
- Trampling by elephants.
- Execution of condemned persons in public so that it would serve as a deterrent to others

Medieval India saw the continuity of brutality and rulers remained autocratic. The absence of systematic legislature rendered the people absolutely helpless.

Colonial India:

The advent of British rule by way of colonization brought in several structural and systemic changes in the governance and administration of justice. The British denounced cruel practices, and we're keen to demonstrate their idea of 'The Process of Law,' 'Civilised Standards of Justice,' and 'Humane Treatment.' According to Thomas Metcalf, the idea of 'improvement' and 'rule of law' were part and parcel of the justification for the British rule in the colonies[6].

Setting up of Torture Commission:

By 1854, several accusations of torture cropped up against the officials of the East India Company in the Madras Presidency. Consequently, the Torture Commission was set up in 1855 to inquire into the allegations of torture perpetrated by revenue and police officials. The commission's report documented the widespread practice of torture during the colonial regime.

To date, the Madras Torture Commission Report of 1855 qualifies as the only government-backed study on the practice of cruelty, torture, and violence in Colonial and Modern India. The Report propelled the Second Law Commission in 1855 to recommend divesting evidentiary value to the confession made by an accused person in the custody of the police.

This quintessential distrust blossomed into legal provisions in the Indian Evidence Act, 1872 and the Criminal Procedure Code of 1898. A report of the Police Commission that Lord Curzon appointed in 1905 presented a very bleak picture. It recorded the continuance of torture and adoption of different torture methods by station house officers of police in most parts of India.

Even as the British decried the practice of torture, they continued to practice torture in different forms against Indian freedom fighters – whipping, cellular confinement and inhuman treatment of prisoners that were deported for life. Those were the times when people thought that losing a limb was tolerable than losing liberty.

- [4] Alam, Dr. Qadeer, Historical Overview of Torture and Inhuman Punishments in Indian Sub-continent, JPUHS, Vol.31, No.2, July - December, 2018, p.127
- [5] Rangarajan, L.N., Edited, Rearranged & Translated, The Arthashastra-Kautilya, Penguin Classics, 1992, p.476
- [6] Metcalf, Thomas, Ideologies of the Raj: The New Cambridge History of India, Cambridge University Press, 1994, p.17

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

Modern India

(i) Pre-Constitution Period:

Democracy intended to dissolve the inherited modes of authority. But the fact remained that India inherited a colonial state and kept much of its functioning architecture intact[7]. Despite massive expansions, all the State practice was heavily governed by legislations that were passed between 1860 and 1947[8].

Even today, there is no specific legislation as far as torture is concerned. The term 'torture' is also not been defined. All available safeguards against torture flow from unintended provisions of general statutes and imaginative interpretation of constitutional provisions by the courts of law.

(ii) In the Constituent Assembly:

On 15th September 1949, engrossing debates took place on the subject of torture. Pandit Thakur Das Bhargava had proposed the insertion of 'Article 15A' to define the 'procedure established by law' relating to criminal proceedings and the trials of the accused persons. Clause (e) of Article 15A proposed the *right to freedom from torture* and unnecessary restraints[9]. Another member, H. V. Kamath, had proposed the insertion of a new clause - 'clause (2a) in Article 15A' stipulating that *no detained person shall be subjected to physical or mental ill-treatment.* In support of his proposal, H. V. Kamath drew the attention of the Constituent Assembly to the Constitution of West Germany that had adopted a clause on the very lines that no one that is detained shall be subjected to physical or mental ill- treatment[10].

Sadly, the proposals were not accepted, and it was left to the Parliament to provide for and regulate the subject. In spite of such amazing foresight, the Constituent Assembly had overlooked invoking plenary power to address this menace.

The Constitutional Scheme and Legal Provisions:

Human Rights are enshrined in Part III of the Indian Constitution. The basic human rights under the Constitution can be traced to Articles 20, 21, and 22. However, there is absolutely no explicit prohibition on torture found in the Articles.

Article 20(1) of the Constitution provides that no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to any greater penalty than that which might have been inflicted under the law in force at the time of the commission of an offence. It prohibits making an ex-post-facto criminal law-making an act a crime for the first time and making that law retrospective and the infliction of a penalty greater than that which might have been inflicted under the law, which was in force when the act was committed.

The concept of ex-post facto law as provided under the Constitution is recognised under international instruments like Article 11(2) of the UDHR and Article 15 of the ICCPR. The basic principle of ex-post facto law is founded upon the maxim 'nallapoena sine lege' which means - no man shall be made to suffer except for a distinct breach of the criminal law.

Article 20(2) of the Indian Constitution provides that no person shall be prosecuted and punished for the same offence more than once. Not only the Constitution but also Section 26 of the General Clauses Act, 1897 provides that 'where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.' Similarly, Section 300 of the Criminal Procedure Code (Cr.P.C.) of 1973 also recognizes it as the right of an accused person. The said section of Cr.P.C. is wider in ambit than Article 20(2) of the Constitution. The distinguishing feature is that constitutional protection is available only to an accused person who has been prosecuted and punished. In contrast, under the Criminal Procedure Code, 1973, the protection offered also extends to an accused person who had been prosecuted and acquitted.

Article 20(2) is founded on the principle enunciated by the maxim *nemo debetbisvexari,*

- [7] Mehta, Pratap Banu, The Burden of Democracy, Penguin Group, 2003, p.11
- [8] Supra, p.108
- [9] Constituent Assembly Debates on 15 September1949, Part I, Constituent Assembly Debates (June 10, 2021, 22.40pm), https://indiankanoon.org/doc/1278245
- [10] Constituent Assembly Debates on 15 September1949, Part 2, Constituent Assembly Debates (June 10, 2021, 22.55pm), https://indiankanoon.org/doc/213750

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

siconstat curiae quod sidprouna et eadem causa, which means - no one must be vexed twice if it appears to the court that it is for one and the same cause.

Article 20(3) of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. This constitutional protection against testimonial compulsion is on the assumption that such compulsion may act as a subtle form of coercion or torture on the accused. It also echoes the theme of several statutory provisions – particularly Sections 24-26 of the Indian Evidence Act. This article assures the right not to be a witness against oneself.

Code of Criminal Procedure, 1973

Section 163 provides that no police officer or other person in authority shall offer, make, or cause to be offered or made, any such inducement, threat, or promise as mentioned in Section 24 of the Indian Evidence Act, 1872.

Further, Section 163 provides that no police officer or person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will, provided that nothing in this sub-section shall affect the provisions of subsection (4) of Section 164.

Section 164 (4) provides that any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession, and the Magistrate shall make a memorandum at the foot of such record.

The right against self-incrimination guaranteed under the Indian criminal justice system is in tune with international law. Article 14(3) (g) of the ICCPR obliges the State parties to provide minimum guarantee to persons charged with criminal offences so as not to be compelled to testify against himself or confess guilt.

Indian Penal Code, 1860

Section 348 provides that whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

The right against self-incrimination recognizes the fundamental principle of criminal law that the accused must be presumed innocent, and it is for the prosecution to establish his guilt.

Indian Evidence Act, 1872

Section 24 provides that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority. The accused cannot be compelled to make any statement against his will. These propositions emanate from an apprehension that if the statements of the accused were admitted as evidence, then force or torture may be used by the investigating authorities to trap the accused. This may be prejudicial or against the interest of the accused person.

This right seeks to enable him to preserve his privacy, dignity, and inviolability of his person from torture.

Section 25 provides that no confession made to a police-officer shall be proved as against to a person accused of any offence.

Section 26 provides that no confession made by any person whilst he is in the custody of a police officer unless it is made in the immediate presence of a Magistrate shall be proved as against such persons.

Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

A bare reading of these provisions would reveal that the present framework is not victim-centric in terms of the prohibition of torture. They

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

do not recognize torture as an independent crime. The present legal treatment of torture as it is one of the limbs of the right to life and personal liberty has prevented it from evolving into a separate fundamental right. Only the expansive interpretation of Article 21 of the Constitution by the Supreme Court while dealing with cases involving torture has protected the victims' rights.

Article 21 of the Constitution of India:

This ever-evolving Article provides that no person shall be deprived of life or personal liberty except according to procedure established by law. It does not contain any express provision against torture or custodial crimes. The expression 'life or personal liberty' occurring in the Article has been interpreted to include a constitutional guarantee against torture, assault, or injury against a person. It is no longer confined to fundamental rights but also includes un-enumerated human rights.

Judicial Activism:

Since no specific legal right has been conferred on the citizens against torture, the onerous task of protecting civil liberties fell on the shoulders of the Supreme Court. A series of judgments show how the judicial conscience crescendoed to guard the dignity of the citizens.

In the seminal Nandini Satpathi case[11], the Supreme Court held that physical threats or violence and psychological torture, environmental coercion, and untiring interrogation methods resorted to by the police tantamount to violations of law.

In Sita Ram's case[12], the Supreme Court held that an undertrial or convicted prisoner could not be subjected to physical or mental restraint, which is not warranted by the punishment awarded by the Court or which was in excess of the requirement of the prisoner's discipline or which amounted to human degradation.

In re Sunil Batra[13], the Supreme Court held that if a prisoner breaks down because of mental torture, psychic pressure, or physical infliction of pain, the prison administration shall be held liable for all the excesses. In a related case[14], the Court observed that if a human being is treated in a manner that offends human dignity and reduces him to the level of a beast, it would certainly be arbitrary and can be questioned under Article 14.

In a case[15] concerning torture by the police, the Supreme Court expressed agony. It upheld the life sentence awarded to a police officer responsible for the death of a suspect due to the torture inflicted upon him in the police lockup.

In Francis Coralie Mullin's case[16], the Supreme Court has observed as follows:

Any torture or cruel, inhuman, or degrading treatment would be offensive to human dignity and constitute an inroad into his right to live. It would be prohibited by Article 21.

The Supreme Court, in Sheela Barse's case[17] laid down that prison restrictions that amounted to torture, pressure, or infliction going beyond what the Court order had authorized was un-constitutional.

In the case of Mohan Lal Sharma[18], the Supreme Court has ruled that it is a well-recognized right under Article 21 that if a person is detained lawfully by the police, it does not mean that he can be tortured or beaten up. If it is found that the police have ill-treated the detained person, he will be entitled to monetary compensation under Article 21 of the Constitution of India.

The Supreme Court, in the Chandrima Das case,[19] observed that the applicability of the UDHR and the principles thereof might have to be read into domestic jurisprudence if there is a need.

In the celebrated judgment of D. K. Basu[20] which was a forerunner of cases relating to arrest, the Supreme Court has observed:

- [11]Nandini Satpathi v. P. L. Dani, AIR 1978 SC 1025
- [12]Sita Ram v. State of Uttar Pradesh, AIR 1978 SC 745
- [13]Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 14 Sunil Batra v. Delhi Administration, AIR 1980 SC 1579 15 Raghubir Singh v. State of Haryana, AIR 1980 SC 1087
- [16]Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746
- [17]Sheela Barse v. State of Maharashtra, AIR 1983 SC 378
- [18]Mohan Lal Sharma v. State of Uttar Pradesh, (1989) 2 SCC 314
- [19]Chairman, Railway Board v. Chandrima Das, (1993) 2 SCC 743
- [20]D.K. Basu v. State of West Bengal, AIR 1997 SC 610

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

"Custodial violence, including torture and death in lockups, strikes a blow at the Rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law."

In the PUCL case[21], the Supreme Court stated that the provisions of the International Covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by Courts as facets of those fundamental rights they shall be enforceable as such.

In another landmark case called Vishaka[22], which dealt with harassment of women in the workplace; the Supreme Court came down strongly. It held that it was an accepted rule of judicial construction that International Conventions and norms must be considered for construing domestic law, especially when there are no inconsistencies between them.

In Apparel Export Promotion Council case[23], the Supreme Court stated that in cases involving a violation of human rights, the Courts must remain alive to the international instruments and Conventions and apply the same to a given case where there are no inconsistencies between such international norms and domestic law.

Without much doubt, the Supreme Court has left its indelible stamp on the nation's psyche through its proactive judgments that negate torture. It has reiterated that human rights cannot come from any political compromise and are not the sole prerogative of the State.

Law Commissions' Endeavours:

The government has established the Law Commission of India as an advisory body to the Ministry of Law and Justice. It examines various laws and also recommends reforms.

Consequent to the Supreme Court's scathing remarks in Ram Sagar Yadav's case[24] that related to police torture of a suspect, the Law Commission suo motu examined the need for reforming the law on the subject. The 113th Law Commission Report recommended for the insertion of a new section called 'Section 114B' in the Indian Evidence Act, 1872, to presume 'custodial violence'. The recommendation has only gathered moss over the years.

Later, the 152nd Law Commission Report (1994) titled 'Custodial Crimes' recommended amendments to the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872 to disclose torture in custody by public servants and to protect the interest of the victims of torture and custodial crimes. Once again, these recommendations remain only on paper.

The Law Commission's 273rd Report on the implementation of UNCAT through legislation was submitted to the government in 2017. It suggested that the definition of 'torture' must include inflicting any injury, either intentionally or voluntarily, or even an attempt to cause such an injury – physical, mental, or psychological. It also prepared a draft bill titled 'The Prevention of Torture Bill, 2017' and proposed several amendments to the Criminal Procedure Code 1973 and the Indian Evidence Act, 1872. Like the other two times, the recommendations are consigned to cold storage.

Data Collated From National Human Rights Commission:

A detailed perusal of the annual reports of the National Human Rights Commission or the NHRC presents an alarming scenario. The increasing incidences of police excesses and a large number of custodial deaths are a cause of grave concern. Most celebrated judgments of the Supreme Court on the protection of life and civil liberty have been observed only in the breach. The following chart is a collation from several annual reports of NHRC on custodial deaths, custodial rapes, unlawful detention, and other police excesses.

- [21] Peoples' Union for Civil Liberties v. Union of India, (1997) 3 SCC 433
- [22] Vishaka v. State of Rajasthan, (1997) 6 SCC 241
- [23] Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 SCC 759
- [24] State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 41

DATA COMPILED FROM THE NHRC ANNUAL REPORTS					
Sl No	**Year**	**Custodial Death**	**Custodial Rape**	**Unlawful Detention**	**Other Police Excesses**
1	1993-94	26	No classification	No classification	No classification
2	1994-95	152	No classification	No classification	No classification
3	1995-96	136-Police custody 308-Judicial custody	No classification	112	1115
4	1996-97	188-Police custody 700 Judicial custody	3	282	1643
5	1997-98	193-Police custody 819-Judicial custody	1	330	1413
6	1998-99	183-Police custody 1114-Judicial custody	NA	436	2252
7	1999-00	177-Police custody 916-Judicial custody	NA	1157	5783
8	2000-01	127-Police custody 910-Judicial custody	1	1257	3947
9	2001-02	160-Police custody 1117-Judicial custody	NA	1975	4638
10	2002-03	183-Police custody 1157- Judicial custody	2	2983	9622
11	2003-04	162-Police custody 1300- Judicial custody	7	188	2344
12	2004-05	136-Police custody 1357-Judicial custody	4	876	6488
13	2005-06	139-Police custody 1591-Judicial custody	5	741	4248
14	2006-07	119-Police custody 1471- Judicial custody	10	605	3740
15	2007-08	188-Police custody 1789- Judicial custody	18	675	2623
16	2008-09	127-Police custody 1527- Judicial custody	11	1500	3823
17	2009-10	124-Police custody 1473- Judicial custody	2	696	1374
18	2010-11	146-Police custody 1426- Judicial custody	5	472	1131
19	2011-12	129-Police custody 1302- Judicial custody	2	No classification	No classification
20	2012-13	146-Police custody 1557- Judicial custody	No classification	No classification	No classification
21	2013-14	140-Police custody 1577- Judicial custody	No classification	No classification	No classification
22	2014-15	133-Police custody 1589-Judicial custody	No classification	No classification	No classification
23	2015-16	152-Police custody 1670-Judicial custody	No classification	No classification	No classification
24	2016-17	146-Police custody 1616-Judicial custody	No classification	No classification	No classification
25	2017-18	148-Police custody 1636- Judicial custody	No classification	No classification	No classification

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

Recommendations of National Commission to Review The Working of The Constitution:

The Government of India set up the above commission in the year 2000 under Justice M. N. Venkatachaliah. The Commission was required to examine and recommend how best the Constitution can respond to changing needs of our society without disturbing the basic structure. It submitted its detailed report in March 2002.

Chapter-3, Volume I, the NCRWC Recommendation- (5) states as follows[25]:

The existing Article 21 May be re-numbered as clause (1) thereof, and a new clause (2) should be inserted after that on the following lines: -

"(2) No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." [Para 3.9]

This recommendation remains only on paper, and no concrete steps have been taken by any ruling dispensations so far.

Recent Developments:

It's more than three decades since the UNO adopted the UNCAT. India signed it in October of 1997. India had assured the UN Human Rights Council three times that it would ratify the UNCAT, but still hasn't.

Sub-Article-1 of Article 2 of UNCAT stipulates that each State Party shall take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction.

As per the International Rehabilitation Council for Torture Victims, the most likely perpetrators to be involved in torture and other forms of ill-treatment are:

- The police
- The military
- Paramilitary forces
- State-controlled forces
- Government officials
- Health professionals and
- Co-detainees act with the approval or on the orders of public officials.

The attempt to bring out legislation preventing police excesses and custodial torture is a journey largely lacking proactivity. Things were looking up when the Prevention of Torture Bill, 2010 was introduced in the Lok Sabha on the 26th of April 2010 and was passed by the Lower House on the 6th of May, 2010, and later sent to the Upper House. The Rajya Sabha subsequently sent the Bill to a Select Committee for review. The Committee, on its part, made several constructive recommendations, but it all came to nought when the 15th Lok Sabha got dissolved.

The reports of the Law Commission and NHRC, judicial pronouncements, international treaties, and the recommendations of NCRWC have hardly made an impact. It will not be farfetched to presume that this indifference is a blatant affront to Article 21. The subsequent refusal of the Apex Court in issuing the required direction to enact anti-torture laws has only strengthened the anti-democratic stance of the State.

Every civilization must condone systemic violence, even if it is in the garb of momentary aberrations by agencies of the State. There are no two things about the fact that the coldness of the State in responding to the need of the hour is a violation of Article 39A of the Constitution that casts an obligation on the State to secure the operation of a legal system that promotes complete justice. The State's denial of the existence of torture at the outset; then its silent demeanour in the face of complaints and the covert encouragement is seen as a red flag in the biggest democracy of the world

.The existing provisions in the Indian Penal Code (IPC) can never be even remotely related to torture.

- Section 319 (hurt);
- Section 320 (grievous hurt);
- Section 331 (voluntarily causing hurt to extort confession)

IPC does not define 'cruel, inhuman and degrading treatment' or 'mental and psychological torture.' Nor does any other law! The clear prevalence of torture is enough to topple the government's stand that the present legal framework is adequate to deal with the menace.

The Union Home Ministry has also constituted a Committee for Criminal Law Reforms, but ironically,

[25] NCRWC Ministry of Law, Justice and Company Affairs, Department of Legal Affairs, (June 10, 2021, 16.28pm), https://legalaffairs.gov.in/ncrwc-report.

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

the issue of torture has been squarely ignored. By not ratifying UNCAT, India will invariably hurt its prospects in maintaining international relations. Take, for example, the extradition case of the Danish citizen Kim Davy; who is known as the mastermind behind the Purulia arms drop case. The courts in Denmark have point-blank refused to extradite him, citing India's poor track record of torture and failure to ratify the UNCAT.

The reluctance of the State to enact anti-torture laws or the lack of proactivity can be easily seen as high-handedness. This stream of thought raises several disconcerting questions. Its refusal to acknowledge the problem of torture and, therefore, not enacting an adequate legal framework leaves a lot of space for speculation regarding its welfare intentions.

A question relating to torture legislation posed by a Member of Parliament in the Lok Sabha elicited a categorical reply from the Minister of State in Home Ministry that they did not have any intention to bring out anti-torture legislation since 'Police' and 'Public Order' are responsibilities of the federal governments[26].

'Torture' cannot be an act that the State officially sanctions. Unless torture is a tacit tool in the hands of the agencies of the State to assert their control and authority over its citizens, it cannot be construed as part of discharge of sovereign functions. In this context, it cannot be labelled either as a State subject or as Union subject under the Seventh Schedule of

the Constitution. Such an irresponsible reply can only be tantamount to blatant de-validation of India's international obligation. It is also a clear infraction from Article 253 of the Constitution, which provides unbridled power to the Parliament to enact legislation implementing international treaties and conventions.

In stark contrast, France, in 2018, officially acknowledged for the first time that what was carried out during Algeria's War for Independence was tantamount to systematic torture. This confession is considered a milestone admission with regard to its role that was hitherto shrouded in secrecy and denial. French President Emmanuel Macron has formally recognized wartime torture that was inflicted by the French army and categorically denounced it as a 'crime against humanity.'

Conclusion:

If we turn the pages of history, it would show that the very first report (1956) of the Law Commission dealt with the fundamental question of the liability of the State and its agents for injuries caused to its citizens. The report titled 'Liability of the State in Tort' observed that the old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the State. It further exhorted that the law should, as far as possible, be made certain and definite instead of leaving it to the courts to develop the law according to the judges.

Pursuant to the 253rd report of the Law Commission, the union government had circulated a draft bill on torture to all the state governments seeking their opinion to make India's domestic laws compatible with the international standards so as to enable ratification of the UNCAT. But the state governments have been absolutely lax on this subject[27], perhaps because of the apprehension of the Union government overstepping on their quasi-federal rights.

This may sound like a legit argument, but they need to ask themselves if it's proper to sit with crossed hands when citizens are being brutalized and tortured in custody? The better approach is for the union and the states to come together so that common people do not suffer.

The Union Home Minister candidly stated on the occasion of 50th Foundation Day of the Bureau of Police Research and Development (BPRD) that the age of third-degree torture is over. The Hon'ble Minister further observed that in the British Era, the police were raised to protect their interests, but now the duty of the police is "protection of the people."

In consonance with Article 2 (1) of UNCAT and taking cue from the recommendation made by NCRWC, it is suggested that the Constitution be

- [26] Lok Sabha, Ministry of Home Affairs, Unstarred Question No.290, 15/09/2020
- [27] Azan Javaid, States, UTs yet to reply on ratifying convention on torture, India News, https://www.hindustantimes.com/india-news/states-uts-yet-to-reply-on-ratifying-un-convention-against- torture/story-hsJNbwM2znbfzZ4UECfd6J.htmlhsJNbwM2znbfzZ4UECfd6J.html, (June 10, .2021).

NEED FOR EFFICACIOUS LEGISLATION ON TORTURE IN INDIA- A GLARING LACUNAE IN HUMAN RIGHTS JURISPRUDENCE

amended by incorporating a clause under Article 21 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. A constitutional amendment to secure the right against torture would confer a fundamental right. Doing so will help to claim a superior right than that can be secured by a special statute. It would go a long way in strengthening the human dignity in the hands of the State.

Democracy cannot flourish till it recognizes that every time it crushes or effaces an individual, it is inflicting a wound on itself and depriving its own life of priceless stimulation and growth[28]." As world's largest democracy and a civilized society it is our earnest duty to eradicate the menace of undesirable and inhuman practices of police excess, custodial torture and custodial deaths.

■■■■■

• [28]Mehta, Pratap Bhanu, The Burden of Democracy, Penguin Books, 2003, p.103.