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IS TORTURE JUSTIFIED IN THE INDIAN JURISDICTION?

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ABSTRACT

Should Torture ever be justified in the territory of India? Should torture at least be justified in emergency situations in order to save hundreds and thousands of lives? Should the torturer be given the same level of mental agony and physiological pain as they have inflicted upon the sufferer? This Article challenges these questions and give a detailed analysis with relevant instances and case laws in order to understand the stance of inflicting torture. The article not only express the general view as a sociological aspect but also delves into the legal realm by introducing the concept of Natural Law and Utilitarianism in the realm of Philosophy of Law and also deals with the relevant Conventions and Constitutional provisions with case laws. Finally, the article concludes by giving after considering all the above mentioned arguments to a conclusion driven by the needs of society and the societal well-being.

Flight No. B861, carrying 853 passengers to be exact, is about to take off from Indira Gandhi International Airport Delhi NCR, the busiest airport in India. A Terrorist organisation has placed 100 ticking bombs in the Airport and 50 on the plane. The master mind of the whole heinous action is under the Chief of BCAS (Bureau of Civil Aviation Security) in the Airport. Intensive torture methods are used by the Unit in order to make him speak with regard to the location of the ticking bombs. But to the utter shock and surprise of the Unit, the mastermind has zipped up. Is Torture Justified on one person in order to save thousands of innocent lives?

The majority section of the Indian population finds it somewhat very amusing to manslaughter the downtrodden people or the minority people who are much lower in standard as compared to the majority. They are considered as a blackbird and face nasty conditions in life. Is Torture justified on them in order to entertain the majority?

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INTRODUCTION

Torture is a word used by the general public very often. In every day-to-day activity or in any fight, or if a parent is scolding their child and the child claims and alleges them as a torturer. Hence, we use the word torture very often than ever. But, do we know the seriousness of this word? What actually the word signify? Is there any other connotation that can be taken of this word? If we ask the same question to a philosopher or an Advocate then she/he might give some interesting answers which will be very shocking to the people who use the same in a hither and thither way. Torture is a term which has very wide and scary understanding which makes us think more deeply as to its wide branches. Torture is a very serious crime and was never, is never and will never be justified in any way whatsoever. It has many aspects, the main would-be tragedy, mental agony, physiological pain and harm, loss of life and limb, etc. In this article I have argued on the stance that torture is something that can never be justified in any case, neither to save a single person nor to save millions.

In this article, I have expressly attached the same arguments with Natural Law and Utilitarianism with various cases and provisions in order to showcase the harm and consequences of the same and that it is dangerous for any society.

In order to understand the standing of torture in the Indian context, I'll divide the essay into four parts which will answer different but related questions as to whether torture is justified or not. The First entry will define – **What is Torture?** The second entry of the essay concerns the defining feature of torture from a moral vantage point, which will acknowledge the idea of the Natural Law – **What makes torture inherently morally wrong?** The third entry scrutinize the phrase “an evil necessary to prevent a greater evil” and will largely focus on the Utilitarian Philosophy propounded by Jeremy Bentham by addressing the question – **Is Torture justified in extreme emergencies?** And lastly, the fourth entry would be the legal scenario, as opposed to morality, of Torture in India and will address the question – **Should Torture ever be legalised or scrutinized in the legal realm?**

WHAT IS TORTURE?

In order to understand what is torture and how can one define the same, we'll need to distinguish it and understand it with various instances. The first could be the infliction of torture on two persons at the same time. *For instance, A has been locked in a small room tied to an electric chair defenceless and with no-consent, and A's friend B reside in another city. B is made to listen and watch his friend's unprecedented*

sufferings live. In the above scenario, Torture is inflicted upon two persons at the same time, just the mode and psychology are different, one is in bodily pain and the other is in mental pain. Can this be allowed in the definition of Torture? Yes, however the mental suffering at once is less palpable and can be resisted through rational control. *Now suppose the relation between A and B is of father and son*, in this instance both the torturer and the sufferer will undergo both mental and physical pain. Then what is the status of a person doing self-torment? Will it amount to Torture? The answer to this is in negative. If a person inflicts torture on oneself then that doesn't amount to torture, but just to test one's will.

Torture can be broken down into: (a) the intentional infliction of extreme physical suffering on some non-consenting, defenceless person, and; (b) the intentional, substantial curtailment of the exercise of the person's autonomy (achieved by means of (a)).²

Another central argument with relation to torture is to break the will of the person, as defined by **David Sussman**, *"The victim of torture finds within herself a surrogate of the torturer, a surrogate who does not merely advance a particular demand for information, denunciation or confession. Rather, the victim's whole perspective is given over to that surrogate, to the extent that the only thing that matters to her is pleasing this other person who appears infinitely distant, important, inscrutable, powerful and free. The will of the torturer is thus cast as something like the source of all value in his victim's world"*.³ Otherwise, to break a person's will in such a manner that their autonomy subsumes in Torture with their life hence, the maximum infliction of torture.

Consider **Gordon Liddy** who reportedly held his hand over a burning candle till his flesh burnt in order to test his will.⁴ But such is very different from breaking one's will and that of testing one's own will.

Hence, torture can be defined as - **"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

² Torture: Stanford Encyclopaedia on Philosophy.

³ David Sussman. Torture: A Sociology of Violence and Modernity. Pg. 6.

⁴ G. Gordon Liddy. Will: The Autobiography, Pg. 3.

person has committed or is suspected of having committed, or intimidating or coercing him or a third person.⁵

WHAT MAKES TORTURE INHERENTLY MORALLY WRONG?

Let us again understand the same with the help of an instance in which the minds and the intellect of the public is questioned. *Suppose there's one terrorist suspected of placing various ticking bombs in an airport (as mentioned in the start) and the location is only known to him. The authorities are torturing the suspect to get him speak to prevent the blast.* Is Torture justified? The majority will say Yes. Now suppose the other way round of the same example, *an official who have some confidential information which will impact the Terrorist organisation, and that official is being tortured by the terrorist in order for him to speak.* Is Torture justified now? The answer will be No.

With this we can say that the human mind which is controlled by the Naturalist Theory of Law will find it difficult to answer as both the scenarios are complex. In the first scenario, torture is inflicted in order to protect the innocents and in the other it is used to harm the innocent.

Let's take into account some famous Indian Cases in order to understand the morality perspective:

- i) **Sheela Barse v State of Maharashtra (1986)** - the term 'life' in Article 21 of the Constitution of India, covers the living conditions of the prisoners, prevailing in the jails. The prisoners are also entitled to the benefit of the guarantees provided in the Article subject to reason- able restrictions.⁶
- ii) **Shri D.K Basu v State of West Bengal (1997)** – invoked Article 22 of the Constitution of India, where the Supreme Court pass additional guidelines to prevent abuse of arrest powers and custodial torture.⁷
- iii) **Gujrat Riots (2003)** - over 1,000 Muslims were beaten to death and tortured and police was also engaged in the widespread torture on Muslims, from sexual assault to electric shocks.
- iv) **Prakash Singh v Union of India (2006)** - it behoves the court to insist that, in the eyes of law, prisoners are persons not animals, and to punish the deviant 'guardians' of

⁵ Preamble of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁶ Sheela Barse v UoI, 861 S.W.2d 507 [Mo. 1993].

⁷ D.K. Basu v State of West Bengal [1997 (1) SCC 416].

the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority' when Part III is invoked by a convict. When a prisoner is traumatized, the Constitution suffers a shock.⁸

- v) **The Rohingya Muslims (2016)** - Aid workers warned of a burgeoning humanitarian crisis for Rohingya Muslims fleeing the violence. Hundreds of Rohingya Muslims were also arbitrarily jailed in 2012 after a wave of clashes with Buddhist Arakanese, with the majority of those killed and arrested being Muslim. The UN Special Rapporteur for human rights in Burma, Tomas Quintana, who toured the country in October 2012, cited evidence of 'systematic torture' against Rohingya inmates. Other reports indicated that many Rohingya prisoners had died in detention.⁹

A person guided by the naturalist theory will argue that inflicting torture on anyone, be it innocent or not, is not justified ever. As Natural Law hold one of its principles as Morality, and the question here is that, is torture inherently wrong? Then the answer is in the affirmative. The Human Rights Activist will never argue that torture is justified even though large innocent lives are at stake. Hence, the **UN drafted Convention Against Torture and other cruel, Inhuman or Degrading Treatment or Punishment**. As happened also in **2008 Mumbai Terror Attack** when one of the convicts, Ajmal Kasab, upon being given the capital punishment, **NHRC (National Human Rights Council)** protested against his threat to Right to Life and Dignity. Therefore, torture is inherently wrong be whatever the situation.

IS TORTURE MORALLY JUSTIFIED IN EXTREME EMERGENCIES?

From the above-mentioned instance, we can directly come to the conclusion that torturing someone is never justified be whatever the situation. But inflicting torture in order to save millions of lives without any life threat to the sufferer can be considered. Let's understand the same with the help of the very first example of the Article. *In the Terrorist situation or any akin situation where millions of live are on stake*, then a pure utilitarian calculus will amount to torture in order to save the happiness of greater number. As this doctrine derived by **Jeremy Bentham**, as the “greatest

⁸ Prakash Singh v Union of India, [2006] 8 SCC 1.

⁹ World Directory of Minorities and Indigenous Peoples, Muslims and Rohingyas at <https://minorityrights.org/minorities/muslims-and-rohingya/>

happiness of the greatest number” was accepted as the true goal of the society. As discussed in the second entry, Jeremy Bentham would deny the Natural Law theory and has a popular saying that Natural Law is – “nonsense upon stilts”.

Many other philosophers and professors have also a utilitarian or consequential approach towards torture, like,

Professor John Yoo who now teaches law at the school of University of California, Berkeley, argued that the captured members of Al Qaeda and the Taliban were not protected by any prohibition on torture or cruel interrogation arising out of the Geneva Conventions because the particular category of armed conflict in which they were involved was not explicitly mentioned in the Conventions. This pertained particularly to the issue of interrogation and torture. He also argued that interference from the Geneva Conventions so far as torture was concerned, nor was it constrained in this regard by Jus Cogens norms of Customary International Law.¹⁰

If it is to protect the happiness of a greater number, then it is justified. But what about if it is for a single individual?

Let's consider an *instance of a kidnapping case where a small infant is being kidnapped from the car. If police didn't do anything to save the infant, then she might die of dire consequences.* Now is torture justified?

In both the instances we can come to a conclusion that torture is justified in certain extreme situations, to save the life of the innocents, if looked upon from the Utilitarian or Consequentialist Approach. But still, the Utilitarian approach is not justified in its absolute sense as it may lead to false statement which will adversely affect the innocent lives. In both the cases the victims are innocent and person inflicting threat to the lives of those are not. Hence, one-off acts of torture in extreme emergencies, that are, all things considerable, justified, but not truly.

SHOULD TORTURE EVER BE LEGALISED OR SCRUTINIZED IN THE LEGAL REALM?

¹⁰ Jeremy Waldron Torture and Positive Law: Jurisprudence of White House, Pg.4.

To understand the debate of Torture, we have to look at the broad spectrum of it, both at the international level and at the Municipal level.

GENERAL PRINCIPLE OF INTERNATIONAL LAW

The prohibition of torture is found in a number of international human rights and humanitarian treaties and is also regarded as a General Principle of International Law. The prohibition of torture is also considered to carry a special status in general international law, that of Jus Cogens, which is 'peremptory norm' of general international law.¹¹

GENEVA CONVENTION

The four Geneva Conventions of 1949 for the protection of wounded, sick and shipwrecked members of land and sea forces, prisoners of war and civilians in time of armed conflict also prohibit torture-whether physical or mental. These provisions apply both to international and internal armed conflict.¹²

JUDICIAL SUPREMACY

India has a long stand on Judicial Activism, which gives access to individuals to claim their fundamental rights engraved in the Constitution of India through the development of PIL (Public Interest Litigation) by directly approaching the Supreme Court and the High Court under Article 32 and 226 respectively. A glimpse of such cases has been mentioned above, and more such reference can be given by mentioning the case of *Nilabati Behra v State of Orissa* where Torture under police custody were given grave importance in order to curb such menace.

¹¹ Mohd. Yusuf Bhat Menace of Torture: Prohibition in International Law, Pg. 10.

¹² (Supra), Pg. 11.

The Indian Constitution, considered as the Grund Norm for every other Acts and provisions preventing torture and protecting against torture, is the Pure Theory of Law. The fundamental principle of law from which all law originates. It is on the height of Jus Cogens, from which no derogation whatsoever is possible. To prove the point, let's take some examples;

1. **SC and ST (Prevention of Atrocities) Act, 1989**, derived from **Article 17** of the Constitution of India. Highly protects the rights of the marginalised community of India which earlier were tortured by means of unethical works like removing carcasses, litter, etc.
2. **The Juvenile Justice (Care and Protection of Children) Act, 2015** derived from **Article 253** of Constitution of India. Which protects the rights of the Juveniles in India in conflict with law to protect them from inhuman treatment in jails.
3. **Transgender Persons (Protection of Rights) Act, 2019** derived from **Article 15** of the Constitution of India. To protect the gender diversity in India by protecting LGBT people from violence.
4. **The Protection of Human Rights Act, 1953**, derived from **Article 21** of Constitution of India. To protect the inherent Human Rights of even the convicts
5. **Immoral Traffick Prevention Act, 1956**, derived from **Article 23** of Constitution of India. To protect small children and women from sex trade
6. **Sexual Harassment at the workplace (Prevention, Prohibition and Redressal) Act, 2013**, derived from **Article 15** of Constitution of India. To protect the women from sexual harassment at work place.

TORTURE CAN NEVER BE JUSTIFIED

To conclude, we can sum up from the above-mentioned definitions, Conventions, Acts and instances that Torture is never justified universally. We looked at various School of Thoughts in Philosophy of Law and from their as well we can conclude that with respect to Natural Law, Torture was never justified and will never be and with respect to Utilitarian School of Thought, Torture might be justified to sum up the larger interest or happiness of the society but can lead to false statements and mental agony. And hence, torture can never be justified, and if someone is inflicting torture onto anyone, then the torturer is subsuming their autonomy to make them more violent and to multiply crime.