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Evolution of Torture through the Lens of Justice: Theories of Jurisprudence

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ABSTRACT

In the light of evolution of torture, the purpose of this paper explores the evolution of torture from the perspective of justice, focusing on the theories proposed by Immanuel Kant and John Rawls. The concept of torture has undergone significant transformation over time, with debates arising around its ethical implications and compatibility with the principles of justice. This article discusses how Kant's and Rawls' theories contribute to the understanding of torture in the context of justice. While Kant's emphasis on human dignity provides a strong moral foundation for rejecting torture, Rawls' theory explores the systemic implications of torture on societal fairness. Their theories offer distinct lenses through which to analyze the evolution of torture, highlighting the intrinsic immorality of torture and its inherent conflict with justice. By examining these philosophical perspectives, this article aims to deepen the discourse on the evolution of torture, encouraging critical reflection on its compatibility with principles of justice in contemporary society and to further conclude if it's just.

Keywords: Immanuel Kant, John Rawls, Justice, Torture.

I. INTRODUCTION

Torture has been a means of power and control throughout history, frequently defended by people in positions of authority as necessary for the pursuit of justice. Yet, legal scholars, human rights advocates, and international organisations have long contested the use of torture as a tool for gathering information, coercing confessions, or punishment. Many believe that torture is fundamentally unfair and breaches the fundamental concepts of human rights, despite the fact that some feel that it is often a legal form of punishment.

According to Association for Prevention of Torture: The legal definition of torture in human rights law differs quite significantly from the way the term is commonly used in the media or in general conversation.² Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the internationally agreed legal definition of torture:

¹ Author is a student at Jindal Global Law School, India.

² Definition of torture | Association for the Prevention of Torture, (2020).

*“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 on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation 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, inherent in or incidental to lawful sanctions.”*³

As stated in the Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly in 1948, *“no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”*.⁴

(A) John Rawls’ and Immanuel Kant’s idea of Torture

According to **Rawls’** Theory of Justice,⁵ *‘the liberty to life is, more extensive than the liberty from torture’*, based on the permanency of deprivation of liberty of life, Rawls believes that the temporary infliction of liberty of the torture victim can be justified in terms of extreme circumstances, where on or the other would be deprived of their liberty either way. However, Kant believes in the idea of punishment over torture, as in his article *“Two Theories of Punishment”*⁶, he justifies that the benefits of it outweighs its harms. Rawls also believed that the use of torture is counterproductive as it can undermine the moral authority of the state and create a culture of fear.

According to **Kant’s** ideas, there is a commitment towards moral absolutism about torture, *‘...there can be no disgraceful punishments that dishonor humanity itself (such as quartering a man, having him torn by dogs, cutting off his nose and ears).⁷ Not only are such punishments more painful than loss of possessions and life to one who loves honor... they also make a spectator blush with shame at belonging to the species that can be treated this way’*,⁸ Kant seems to only prohibit a few kind of torture but not all. Kant’s theory of justice allows one to treat people as they are, according to their own maxims and principles. In his work *“The*

³ Definition of torture | Association for the Prevention of Torture, WWW.APT.CH (2020), <https://www.apt.ch/en/what-we-do/torture-prevention/definition-torture> (last visited Mar 22, 2023).

⁴ Article 15 – Freedom from torture or cruel, inhuman or degrading treatment or punishment | United Nations Enable, UN.ORG (2022), <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-15-freedom-from-torture-or-cruel-inhuman-or-degrading-treatment-or-punishment.html>. (last visited Mar 22, 2023).

⁵ JOHN RAWLS, *A THEORY OF JUSTICE*, 3, revised edition, (1971).

⁶ *Id.*

⁷ Peter Brian Barry, *The Kantian Case Against Torture*, 90 PHILOSOPHY 593–621 (2015).

⁸ Barry PB, ‘The Kantian Case against Torture’ (2015) 90 Philosophy 593.

Metaphysics of Morals"⁹ Kant says, "Never treat humanity, either in your own person or in the person of others, merely as a means, but always also as an end",¹⁰ explaining how torture cannot be used as a means to justice, as torture itself is an end.

Torture and justice have a complicated relationship; while some say that it can be a legitimate way to get information or punish the guilty, others claim that it is fundamentally unfair and incompatible with the rule of law. Torture is still a sensitive and controversial topic, with practical and political factors competing with legal and ethical ones.

II. HISTORICAL DEVELOPMENT OF TORTURE AND LAWS AGAINST TORTURE

Laws prohibiting torture have been developed over a long, extensive process. One of the earliest laws against torture was the Code of Hammurabi from ancient Babylon, which forbade its use unless there was unequivocal proof of guilt.¹¹ The practise of torture was strongly condemned by the church during the Middle Ages, and it was ultimately outlawed by the Inquisition.¹² Early modern ages witnessed the peak of the use of torture as a form of punishment, when it was codified in the legal systems of several European nations.¹³ For instance, historical documents and literature both extensively detail the infamous use of torture during the Spanish Inquisition.¹⁴ With the rise of the humanitarian movement and the creation of contemporary legal systems, the use of torture as a form of punishment came under increasing attack during the Enlightenment. With the abolition of torture in France in 1789 and the following expansion of the abolitionist movement to other nations, the French Revolution, in particular, represented a turning point in the history of torture. Although it persisted in several nations, like Russia, China, and Latin America, torture as a form of punishment gradually declined over the 19th and 20th centuries in Europe and North America. Modern international laws and treaties, such as the Universal Declaration of Human Rights and the Geneva Conventions, condemn torture.¹⁵

Justice is the foundation of a just and equitable society, one in which every person is treated with respect and dignity and has their rights and liberties upheld. It is a set of laws and standards that guarantees that everyone is treated fairly and is held accountable for their deeds without favoritism or prejudice. Justice requires us to acknowledge the inherent value of every

⁹ Kant, Immanuel, and James W. Ellington, *Grounding for the Metaphysics of Morals: With, on a Supposed Right to Die Because of Philanthropic Concerns* (1981).

¹⁰ *Id.*

¹¹ Moyn, S, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY*, Cambridge, MA: Belknap Press, (2010).

¹² Alston, P, *THE FUTURE OF HUMAN RIGHTS*, Oxford, UK: Oxford University Press, (2005).

¹³ Kaufman, Z. D, *A JURISPRUDENTIAL DEFENSE OF TORTURE*, *Journal of Political Philosophy*, 18(2), 183-204, (2010).

¹⁴ Levinson, S, *Torture: A Collection*. Oxford, UK: Oxford University Press, (2013).

¹⁵ Alvarez, A, *THE FOUNDATIONS OF THE MODERN LAW OF TORTURE*, *Oxford Journal of Legal Studies*, 31(4), 699-721, (2011).

individual and work to build a world that is fair and compassionate for all.¹⁶

This definition is based on the concept of justice, which is a social and political principle that emphasizes fairness, equality, and the defense of individual rights. It underlines how critical it is to build a society in which everyone, regardless of background, status, or circumstances, can experience justice as a lived reality.¹⁷

(A) John Rawls' and Immanuel Kant's idea of Justice:

According to **Rawl's** Theory of Justice,¹⁸ Justice is a social arrangement based on two principles; the first principle of a just society must be the equality of all people's fundamental rights and freedoms, and the second is the equality of opportunity principle, which guarantees that people have an equal chance to hold social responsibilities and offices based on their skills and abilities. These principles create a just society where everyone is treated fairly with equal rights and opportunities. He claims that a just society must be set up so that the people who are poor and disadvantaged are nevertheless better off than they would be under any other realistic scenario.

In addition, **Rawls** proposes the idea of the "original position," a fictitious situation in which people are hidden behind a "veil of ignorance" and are unaware of their social standing, inherent talents, or any other qualities that would put them at a disadvantage.¹⁹ Without being affected by their own self-interest, people would choose the justice principles they wanted to rule society in this state. According to Rawls, the two justice principles he suggests are the same as the ones people would choose if they were in the original position.

According to **Kant**, Justice is a fundamental moral principle that governs people's behavior and interactions, Kant says, "*If justice perishes, then it is no longer worthwhile for men to live upon the earth.*"²⁰ In addition to writing substantially about political philosophy, Kant also wrote extensively about ethics. For instance, in his "Critique of Pure Reason"²¹ he establishes that the state has a responsibility to uphold justice and preserve the rights of its citizens. He thinks that the rule of law should serve as the bedrock of government and that laws should be fair to all people. According to him, justice demands that people are treated fairly and equitably, and to achieve this, institutions and laws must be established that guarantee the protection and equal

¹⁶ *Supra* note 4.

¹⁷ *Supra* note 4.

¹⁸ *Supra* note 4.

¹⁹ *Supra* note 4.

²⁰ David Held & Pietro Maffettone, *PROLEGOMENA TO A CRITICAL THEORY OF THE GLOBAL ORDER, ETHICS & GLOBAL POLITICS* (2019).

²¹ Immanuel Kant, *CRITIQUE OF PURE REASON*, revised edition, (1998).

treatment of all people.

III. MAGNA CARTA CLAUSE 39-49 IN RELATION WITH TORTURE AND JUSTICE

Magna Carta, also known as "The Great Charter," is one of the most well-known historical documents. Magna Carta, which was originally signed by King John of England (reigned 1199–1216), established for the first time the idea that everyone, even the king, was subject to the law.²² It was issued as a response to the political crisis faced by him in 1215. The majority of the 63 clauses King John gave related to particular complaints about his governance. But they also contained a number of fundamental principles which opposed the king's authoritarianism and proved to be extremely adaptable during later generations.²³ Magna Carta clauses 39 to 49 are very important in terms of torture and justice. These provisions guarantee that those accused of crimes are dealt properly and justly and offer significant protections for those accused.

Magna Carta's Clause 39 declares that, "No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against, except by the lawful judgment of his peers and the law of the land."²⁴ This provision created the notion of due process, which states that anyone charged with a crime must be granted a fair trial and cannot have their life, liberty, or property taken away from them without first receiving due process of law.

Magna Carta's Clause 40 declares, "We will not sell, or deny, or delay right or justice to anyone."²⁵ This provision guarantees that everyone has a right to equal protection under the law, regardless of their social or economic standing.

The Magna Carta's Clause 42 forbids the use of torture to coerce confessions or gather data. No one shall be subjected to harsh or unusual punishment, and the punishment shall be appropriate to the offense committed, according to this clause.²⁶

The Magna Carta's Clause 45 created the idea of habeas corpus, which states that anybody who has been arrested or taken into custody must appear before a judge or court and have the basis for their detention justified.²⁷

In accordance with Clause 48, "No bailiff for the future shall, upon his own unsupported complaint, put anyone to his 'law', without credible witnesses brought for this purposes.". This

²² Magna Carta Project - 1215 Magna Carta - Introduction: Magna Carta 1215, UEA.AC.UK (2015).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Supra* note 21

clause guarantees that no one may be jailed or punished in the absence of sufficient proof and a fair trial.²⁸

In conclusion, the Magna Carta's Articles 39 through 49 establish the fundamental values of justice, fairness, and the rule of law in medieval England. These provisions seek to protect people from being arbitrarily harmed or imprisoned, from justice being bought and sold, from competent officials upholding the law, and from being punished without conclusive proof and a fair trial.

(A) Why is torture not just

The premise that torture is wrong on its surface does not entail that such actions are always wrong or that the right to be spared torture is non-derogatory. We now need to focus on upcoming developments regarding the international human rights community's ban on torture. In addition, the 1975 declaration states that exceptional circumstances, such as a state of war or the threat of war, internal political instability, or any other public emergency, may not be cited as a justification for such practices.²⁹ No state may permit or tolerate such practises of torture, according to the 1975 declaration.

It appears that by enacting such provisions- the UDHR's initial outright ban on torture, the international human rights community has made significant progress in this regard.³⁰ There are roughly three sets of analytically distinguishable considerations, according to the record of comments made to the UN Human Rights Committee and the reports of special rapporteurs to the UN Commission on Human Rights.³¹ One set is concerned with the fundamental nature of torture and its damaging effects on the victim. A second set focuses on how torture affects people and communities besides the main sufferer. The final group of factors to be taken into account includes empirical assumptions and data regarding the metastatic potential or uncontrollability of the use of torture.³²

Contrary to those who defend the use of torture on consequentialist grounds, proponents of a categorical ban on such practises often adopt a deontological perspective. The deontologist believes that torture is evil inherently, regardless of the results. The prohibition against torture is based on respect for human dignity under international law. All people are created with the same amount of dignity and rights from birth, according to the Universal Declaration of Human

²⁸ *Supra* note 21.

²⁹ Andrews, W. G, *TORTURE IN THE AGE OF REASON*, Journal of the History of Ideas, 71(2), 183-206, (2010).

³⁰ Danner, M, *TORTURE AND THE TWILIGHT OF EMPIRE*, New York Review of Books, 56(3), 20-25, (2009).

³¹ Special Rapporteur on torture, OHCHR (2020).

³² Neuman, G. L, *THE TORTURE DEBATE IN AMERICA*, Cambridge University Press, (2011).

Rights (United Nations, 1948).³³ Referring to Rawls, we can observe there is a global overlapping consensus based on the value of dignity as defined in the UN Declaration even though no explanation of the foundations of human dignity is given.³⁴ Rawls explains that when someone is tortured, they experience unbearable physical and mental suffering at the hands of a person in a position of authority.³⁵ As a result, there is an 'artificial inequality' between the torturer and the victim because the victim's physical and mental health are entirely within the torturer's control. The victim's fundamental human dignity is violated when they are brought to a position of weakness and vulnerability. In addition, according to Rawls, torture breeds a cycle of revenge and violence that erodes the foundations of justice. The victim of torture develops feelings of resentment and anger, which they may use to seek revenge on the torturer or others they believe are to blame for their sufferings. This could result in additional acts of retaliation and violence, which would continue the cycle of injustice and inequality.

Additionally, a majority of Kantian scholars believe that torture serves as a model example of a violation of human dignity. In most cases of torture, the victim's standing as a moral and human entity is not taken into account; instead, the victim is seen as merely a tool to serve the torturer's objectives, such as retrieving information. So, from a Kantian viewpoint, engaging in such behaviour is morally wrong in itself since it breaches the Categorical Imperative.³⁶ Kant thought that because torture includes purposefully causing another person pain and suffering, it is intrinsically degrading. This leaves the torturer with a moral taint because they are accountable for the victim's harm and violation of their inherent value and dignity.

Kant concluded by saying that because it diminishes people's inherent dignity and worth, torture is always unethical. Torture is the deliberate infliction of pain and suffering on people with the purpose to harm them. It also weakens their autonomy and sense of reason. According to Kant, treating people with regard for their inherent value and dignity is necessary to uphold the notion of respect for humans, and torture contravenes this fundamental idea.

Finally, arguments based on Kant and Rawls that torture can be viewed as an act that significantly disregards the victim's autonomy are supported by psychological and neuroscientific studies.³⁷ As a result, political systems founded on human dignity are justified

³³ United Nations, *Universal Declaration of Human Rights* / United Nations, United Nations (2022), <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201,in%20a%20spirit%20of%20brotherhood..>

³⁴ Nayef Al-Rodhan, *The wrongs, harms, and ineffectiveness of torture: A moral evaluation from empirical neuroscience*, *Journal of Social Philosophy* (2022).

³⁵ *Id.*

³⁶ Peter Brian Barry, *The Kantian Case Against Torture*, 90 *PHILOSOPHY* 593 (2015).

³⁷ *Supra* note 30

in considering torture to be absolutely unacceptable. Therefore, even when coercive measures may not violate human dignity to the same extent as torture, they are nonetheless ethically unacceptable. Consequently, it is morally necessary to respect the dignity of a perceived opponent and treat them humanely, especially under exceptional cases.

IV. CONCLUSION

Considering the fact that torture is characterised by the infliction of suffering that is so intense that it practically destroys a person from the inside. That is to say, torture, even when it is carried out at the instigation of another, entails a form of coerced self-betrayal in which the victim is made to actively participate in the degrading of himself as a person by deconstructing himself and his environment through his body and natural responses. For these reasons, as well as the fact that it infringes upon the victim's fundamental rights and sets off a vicious cycle of violence and retribution, Rawls concluded that torture is inconsistent with the norms of justice. Hence, according to Rawls and Kant, torture should never be tolerated and is never justified.
