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Torture in India: Morality of Torture and Rights of Prisoners in India

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ABSTRACT

Torture as an act is not just limited to the dictatorships but also personnel in the world's largest democracies also use torture as a weapon and use multiple methods of torture against the arrested, the suspected and the prisoners as well.

Though torture is an International crime yet countries around the world yet use it in the war against terrorism. This paper discusses the morality of torture in light of the ticking bomb problem. Whether torture is justified in some circumstances where there is a question of the greater good.

This paper further delves into how India as the largest democracy in the world with multiple laws and judgments with regards to protecting the rights of the arrested the prisoners has failed to protect their basic human rights and how custodial torture has become a disease in India. It also discusses the problems with the Anti-torture bill that is still pending in the Parliament since 2010. It also discusses the various recommendations of various police commissions as well as the National Human Rights Commission. To sum up it to:-

1. *Discuss the morality of torture.*
2. *Discuss the International Jurisprudence with regard to torture specifically under the UNCAT, the ECHR and ICCPR*
3. *Discuss the Laws in India protecting the rights of the arrested,*
4. *Discuss the jurisprudence leading up to the Anti torture bill that was introduced in the Parliament in 2010*
5. *Analyse the various judgments of the Hon'ble Supreme Court of India*
6. *Discuss the rights of women prisoners in India.*

I. INTRODUCTION

Torture has been a practice which has often been used as a tool of interrogation from time immemorial. Kings and Emperors of the old used it on spies and criminals to extract information or to obtain confessions. The methods might have changed with times but the

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intention still remains the same.

Torture has been flagrantly been used as a tool by political authorities even today in many countries around the world without any legal sanctions on the authorities. It is not only a violation of Human Rights but also a violation of the right to dignity which is accorded to every person on earth by nature. Torture as a weapon has been used against detainees, prisoners and enemies of the state. In many instances it has been used against political detainees as a tool of suppression.

Torture as a principle of customary international law can be traced back to Article 5 of the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights under Article 7 deals with torture prohibiting all forms of torture, cruel, inhuman and degrading treatment. Act of torture during war is considered as a crime against humanity and a war crime and hence an international criminal wrong. Torture Convention further prohibits torture in all its forms.

Torture is defined as an act which causes mental or physical harm and is inflicted for the purposes of obtaining third party information or a confession, punishing him for the act of another pro s suspected of committing. These Acts are inflicted or instigated with the consent or acquiescence of a public official or a person acting in public capacity.[2] It is read in tandem with Article 16 which provides that any act of cruel or inhuman or degrading treatment which hasn't been covered under Article 1 shall be considered as torture.[3]

This paper focuses on the custodial abuse faced by arrested and prisoners in India. It also discusses the reasons why India, as the largest democracy in India still hasn't ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Prisoners, 1984 and the morality of undertaking acts of Torture.

Custodial violence including death, torture and other excesses is a practice since ages. Law enforcement agencies across the world undertake acts of torture on prisoners and wrongdoers. Trial by ordeal and torture as a method of punishment has been in practice for a very long time in India and finds mention in Kautaliya's Arthashastra.

The establishment of the Delhi Sultanate in India brought in Sharia Law which allowed for torture for crimes. The British Raj was notorious for belting out the cruellest forms of punishments known to man. These practices were not restricted to criminals but also to political

[2] Article 1, UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 hereinafter CAT.
[3] Article 16, CAT.

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prisoners as well.

The acts that were perpetrated against prisoners during the British rule of India were actions done by the English but the practice did not stop in India. Up until the 1980s torture was used to force confessions from the arrested. The concern for the rights of prisoners arose during the time of the Emergency, however, the Supreme Court of India failed to recognise the rights of the prisoners. It was not until later that the prisoners were stopped being regarded as an object. 1980s ushered in an era of Judicial Activism where the Supreme Court in various judgments recognised the rights of the prisoners.

Torture thrives not because of the lack of condemnation but because of the irrelevancy of it. Though UNCAT is an important convention which sets forth obligations on nations to adopt national laws and to penalize custodial torture and further provides for reparation, however, with majority of nations having not ratified the Convention against torture and not having accepted the jurisdiction of the Committee of Torture it is a concern for the entire world.

II. MORALITY OF TORTURE

States have a negative obligation to abstain from torture and a positive obligation. They also have the obligation to provide for legislative and administrative reforms to provide for protection of arrested and prisoners against torture. Torture as a crime against humanity is one of the worst possible treatments that is meted out to any human being.

The prohibition of torture is absolute and is non derogable and as a practice has attained the status of customary international law. The torture convention provides that torture cannot be justified under any circumstance be it internal revolution or a state of war with an enemy state. The ICCPR under Article 4(2) makes torture a non derogable right which cannot be taken away during times of emergencies.

The 9/11 attacks on the United States of America saw the invocation of Article 5 of the NATO Charter and led to the military invasion of Afghanistan and this invasion since has come to be known as the war on terror. The war on terror has brought in new questions and a demand to permit exceptions to torture. The war on terror is largely a reason for the demand for exception, this demand is known as the torture debate.

This has revolved around the ‘Ticking time bomb’ scenario. This scenario questions the morality of torturing one terrorist to know and find the location of bombs which will lead to the death of hundreds of innocent citizens.

The duty of the state to protect and preserve the life of all persons. On one hand are people,

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innocent men, women and children who will and might get killed due to the bombs and on the other hand the morality of putting one person through a world of pain so as to he reveals the location of the bombs he has set.

If you see this from the perspective of rule of law then torture is non compatible with the right of presumption of innocence. When you put someone through the process you already have taken away the presumption of innocence and already holding him guilty. The rule of law is inherent in every democratic state and it requires a proper judicial process so as to determine the culpability of a person in a case. Letting the police or any other organisation to act as God, Judge and Executioner is not just violative of morality, ethics and rule of law but also the basic principles of natural justice. In the Public Committee against Torture Vs State of IS real[4] the Israeli Supreme Court held that the ticking bomb argument is a slippery slope argument. It went on to hold that vesting judges with powers to issue torture warrants are judicially sanctioned state violence which is both unrealistic and highly inappropriate.

This version of the debate was unearthed by Alan Dershowitz[5] which envisages torture as an authorized practice. First the interrogee is offered immunity from prosecution which if fails then torture can be used in extreme situations. With regard to this the Benthamite principle of utilitarianism which talks about the realizing the rights of the greater good weighs over the rights of the few. Immanuel Kant with regard to morality in his thesis said that disposition as regard to moral law is never indifferent. Hence it is impossible to be good in some parts and bad in others. He operates under the presumption that someone's will is neither good nor bad but somewhere in the middle.

The German case of Gafgen[6] illustrated a difficult moral question where a child kidnapper was threatened with torture to reveal the details of about the boy's whereabouts by the chief of police. On his information the police found the body of the dead boy. Magnus Gagmen was found guilty and sentenced to life imprisonment. This brought forth a major debate as to the actions Germany prohibits torture in all its forms. The German courts though affirmed the prohibition of torture but didn't rule the conviction as unlawful. The ECtHR held that the threat of torture fell within the definition of Article 3 of the ECHR. IT further held that the punishment didn't satisfy the procedural requirement to punish torture with proportion to the crime. However, the majority of the Grand Chamber held that the evidence had not been material as Gafgen had already confessed to the crime hence, felt no reason to order a retrial.

[4] Public Committee against Torture Vs State of Israel, HCJ 5100/94 (1999) (Israel)
[5] A. Dershowitz, "Is There a Torturous Road to Justice?' Los Angeles Times (8 Nov. 2001)
[6] Gafgen v. Germany 2011 52 EHRR 2, ¶ 75-132

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Ultimately this judgment shows that the absolute prohibition of torture is often only the first step the question however, always remains that what legal question entails.

There is certain question which are not to be taken into consideration. These considerations are the reliability of information, whether the legal system allows torture, the extent of power given to the authority to torture and among other questions that arise include whether there is a difference between torture as a punishment and torture as a method of interrogation.

Torture as a method of interrogation time and again has gained results. For example, the above-mentioned example of Gafgen where the threat of torture led to the conviction for murder, similarly in the ticking time bomb question if the lives of hundreds can be saved, does it not make worth the effect it has on the detainee who gave up details which saved the lives.

Clandestine organizations like the CIA, the Mossad have had amazing results from torturing those suspected to be terrorists. Yes, there can be an argument that those who are innocent and have no links with terrorist groups suffer, but then when we talk about the greater good, the possibility of preventing another 9/11, another 26/11 then does it not make torture worth it. Torture of these suspects did yield results with the death of Osama Bin Laden when a top operative of the terrorist organization Al-Qaeda.

The morality of torture and morality of capital punishment is similar to the aspect that they are used in the rarest of the rare cases. The torture debate is restricted to the use of torture as a method of interrogation and not as a punishment. Torture is a uniquely awful thing and it is virtually unthinkable. Terrorist tortures and retributive torture all of it lacks justification but a moral case can be made for interrogational torture, but again the question is to what extent.

There is and always will be a conflict between the principles of liberty and justice for all and the responsibility of protecting the lives of others. Torture as a last resort delivers best of both worlds. As a last resort, the coercive practices are engaged when all other methods have been exhausted thus allowing the principles of liberty and justice to take effect and the duty and responsibility to protect its citizens is met.

Justice Posner has explained that when the stakes are high enough torture is permissible.[7]Senator John McCain, a former Presidential candidate for the presidency of the United States had been one of the most vocal advocates of the torture ban, but he had even acknowledged that when the stakes are high then he advocates for an exception to the ban

[7] Richard A Posner, 'Torture, Terrorism and Interrogation' in Sanford Levinson (ed), Torture: A Collection (Oxford University Press, 2004) 295.

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against torture.[8]

Torture is an evil which needs to be prohibited in all its forms. But when it deals with an issue for the greater good, where the life of hundreds and thousands are in line, then as a last resort torture can and should be used as an exception to the prohibition and it is time the international community recognize it.

III. INTERNATIONAL HUMAN RIGHTS LAW RELATED TO TORTURE

The Universal Declaration of Human Rights under Article 5[9] provides for the protection against torture, cruel and inhuman treatment. The ICCPR[10] provides for protection against torture or cruel inhuman treatment or degrading treatment. The ECHR also provides protection against torture under Article 3[11].

The first prohibition of cruel and inhuman treatment happened with the English bill of rights in 1688. A century later the French declaration provided that the laws shall impose only those punishment which is absolutely necessary. There have been multiple attempts to define torture UNGA in the Declaration on the protection of all persons from being subjected to torture and other cruel inhuman or degrading treatment or punishment[12] defined torture as " 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 which such purposes as obtaining from him or a third person information or confession, punishing him for an act he has 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 of treatments for prisoners*."*

It further added that torture is an aggravated, deliberate and cruel form of treatment or punishment. The Convention on the elimination of torture defined torture as an act which causes severe pain or suffering, whether physical or mental and is intentionally inflicted to force information or confession or punishment for an act already done.

The European Court of Human Rights hereinafter referred to as the ECHR in Denmark,

[8] H.R.1735 - 2015 McCain-Feinstein Amendment to National Defense Authorization Act for Fiscal Year 2016.
[9] Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71. [hereinafter UDHR]
[10] International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976. [ICCPR].
[11] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
[12] UN General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, A/RES/3452(XXX)

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Norway, Sweden and the Netherlands v. Greece[13] held that torture is inhuman and degrading. It further in Ireland v. UK[14] held that the actions of the British Security forces amounted to torture but disagreed on the question on if it constituted torture. There have been difference in judicial opinion whether motive is relevant in torture or not. However, the ECtHR is uniform in its decision that the intention is a necessary ingredient in torture. However, Justice Fitzmaurice in his dissenting opinion in Ireland Vs UK held that the motivation is rendered irrelevant, but the wordings of Article 3 and that torture is torture whatever its purpose.

Among the various methods of torture, the ECHR recognises certain practices such as Falanga, Bastiando, electric shocking, and dropping water on the head as practices which amount to cruel and inhuman treatment. It can also be infliction of mental suffering through the creation of anguish.

In Denmark et al v. Greece, the ECtHR further held that solitary confinement also amounts to torture and that sensory deprivation techniques and other methods such as deprivation of food, wall standing all amounted to torture.

The torture convention puts a blanket ban on the deportation of refugees or accused to states where there is a possibility of them being tortured. The ECtHR in X v. Belgium held that the deportation of a person may constitute inhuman treatment if he is to face cruel, inhuman or degrading treatment in which he is being sent to.

Torture has a wider interpretation as per the definition under the Convention. It covers all kinds of cruel, degrading and inhuman actions. The International jurisprudence so as to cruel treatment lacks teeth and hasn't developed properly. An understanding of cruel punishment would involve torture or a lingering death. Hence a punishment is to be proportional to the offence. A punishment which is violative of a man's dignity is cruel

Again, in Denmark et al. v. Greece the ECtHR held that the notion of inhuman treatment is what causes suffering, mentally and physically. In Ireland v. UK the commission said that under no circumstance inhuman treatment cannot be justified. However, the treatment must be of a minimum level of severity like all methods of interrogation which go beyond the normal methods amounts to inhuman treatment. The deportation of a person might also be inhuman treatment if he will face torture.

The Denmark case also defined degrading treatment as any treatment which humiliates an

[13] European Commission of Human Rights. The Greek Case: Report of the Commission: Application No. 3321/67-Denmark v. Greece, Application No. 3322/67-Norway v. Greece, Application No. 3323/67-Sweden v. Greece, Application No. 3344/67-Netherlands v. Greece. Strasbourg: The Commission, 1970.
[14] Ireland Vs United Kingdom, 2 EHRR 25.

individual the ECHR in Patel et al v. United Kingdom[15] held that the general purpose of prohibition is to prevent interference with the dignity of a man.

Torture as a crime has universal jurisdiction that is any country in the world can try an accused irrespective of nationality of the victims as well as the nationality of the accused. The torture convention further provides for protection of victims and provides for compensation to victims for torture. The Convention requires the state parties to provide for training to police and other public officials to refrain from acts of custodial violence.

India has signed the Convention against Torture but is yet to ratify to it. The next chapter shall deal with the laws prohibiting torture in Indian prison.

IV. LAWS IN INDIA

A. DEVELOPMENT OF THE ANTI TORTURE JURISPRUDENCE IN INDIA

Atrocities by the police, jail authorities' armed forces on the arrested and other prisoners is one of the most egregious violations of human rights in the world. Torture is looked at as a crime against humanity yet the number of cases of torture keep increasing in India.

As a systematic and state-controlled phenomenon, custodial torture is still is encouraged by democratically elected governments where the rule of law is supreme is a reprehensible and lamentable act.

Countries across the world authorize the police to use force in certain cases and this authority is basic and is of utmost necessary hence unquestionable. But under this authority the police have no right to brutalize any arrested or detained person. Hence it becomes important to hold the police accountable for custodial violence and other forms of torture.

In a democracy such as India where Rule of law is supreme the police is not above the law and hence its transgressions must be made punishable so as to keep a check on the policing system and ensuring the rights of the arrested persons.

Part III of the Constitution of India provides for rights which are non derogable and hence limits the actions of the states. Though there are no specific laws or rights against custodial torture but there are certain rights provided under the Articles 20, 21, 22, 32 and 226 and certain legal rights under the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence act provide legal rights and protection against custodial torture. The Supreme Court of India also plays a very important role in ensuring the rights of the arrested of the under-trials

[15] The East African Asians case 3EHRR 76

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and the prisoners.

Right to life is one of the most fundamental of all rights and is the basis of all other rights this is recognized across multiple conventions and human rights treaties which is non derogable in nature. Right to life in India was a derogable right before the 44th Amendment to the Constitution of India. The Supreme Court of India in ADM Jabalpur[16] had held that the right to life could be suspended during the emergency. However, the 44th Amendment to the constitution of India made Article 20 and 21 non-derogable rights which cannot be violated even during emergencies.

In A.K Gopalan[17] the Supreme Court again examined the question of procedure established by law where it was to determine whether the procedure established by law where it was to determine whether procedure established by law was meant to be reasonable and fair procedure by state for deprivation of life. The Supreme Court held that the procedure should be met with reasonableness. This judgment was a setback on the right to life.

In Maneka Gandhi Vs Union of India[18], it raised the same contentions, where the Supreme Court overruled the previous judgment and held that the procedure under Article 21 of the Constitution must be right, just fair and not arbitrary fanciful or oppressive "

A wider interpretation was provided in Kharak Singh[18] where the Supreme Court held that the term life didn't mean the continuance of one's animal existence but also the possession of each organ of his body. Thus, inhibiting against the deprivation of any part of him and faculties of life. This Judgement further prohibits the mutilation of any part of the body.

The right against self-incrimination protects against torture. One of the intentions of torture is to confess or incriminate. The presumption of innocence is a basic right which is guaranteed not just under international law but also form the basis of Indian criminal jurisprudence and has been provided under the Indian Evidence Act, 1872, The Constitution also recognises the right against self-incrimination in 20(3)[19] of the Constitution which reads as follows "No person accused of any offence shall be compelled to be a witness against himself"

Sections 24, 26 and 27 of the Indian Evidence Act[1920] and Sections 162, 163(1), 315 and 342(a) of Cr PC also prohibits forced confessions or testimony protecting the right against self-

[16] ADM JABALPUR V. SHIVKANT SHUKLA AIR 1976 SC 1207, 1976
[17] A.K Gopalan v. State of Madras 1950 AIR 27
[18] Maneka Gandhi Vs Union of India 1978 AIR 597 [18] Kharak Singh v. State of Uttar Pradesh 1963 AIR 1295 [19] INDIA CONST. art 20 cl 3.
[19] Indian Evidence Act, 1872,
[20] SCC 416

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incrimination. This right has been elaborated by the Supreme Court in various cases most notably in Nandini Sathpathy Vs P.L Dani where Justice Krishna Iyer laid down guidelines to provide protection to the accused in custody. It upheld the right against self-incrimination and the right to silence of the accused against any pressure applied by the police which becomes violative of the right against self-incrimination.

Further in DK Basu vs State of West Bengal[21], the Supreme Court laid down guidelines for the police to be followed during arrest and the rights of the arrested. The highlight of this decision was that a medical examination is to be performed every 48 hours. DK Basu was a landmark judgement which provided safeguards as against self-incrimination as well. Its reinforced rights of the arrested, such as the right to be informed about the reasons of arrest which is guaranteed under 14(3) (c) of the ICCPR[21] and 22(1) of the constitution of India[22]. The Court also has the authority to release an arrested person if he hasn't been informed about the grounds of his arrest.

Article 22(1) provides for success to counsel of choice. This is also provided by the ICCPR and this begins at the time or arrest. The Supreme Court of India in Janardhan Reddy[23] held that the right to legal aid cannot be at the state cost. However, this was later overturned in Hussainara Khatoon Vs State of Bihar[25] where the Supreme Court held that if the accused cannot afford counsel the counsel shall be provided at the state cost

Among other rights that are provided to the arrested is the right to be produced before the magistrate within 24 hours of detention. Any detention beyond 24 hours is illegal and if he isn't produced, he is to be released.

The Constitution under Article 32(2)[26] confers powers upon the Supreme Court of India to issue writs. And the citizens as well can move to the Supreme Court for enforcing fundamental rights. The Supreme Court has been very conscious of the responsibility towards prisoners who face custodial torture.

The Supreme Court in India in Gopalan[24] case has held that prisoner were non-citizens hence they didn't have any fundamental rights and that they lose it by being detained under a valid law. This judgement was overturned in the Prabhakaran case in 1966 where the court held that the conditions of deprivation cannot extend to other fundamental rights. This was again

[21] ICCPR, Article 14(3)(c)
[22] CONST INDIA. art 22 cl. 1
[23] Janardhan Reddy v. State of Hyderabad, A.I.R. 1951 S.C. 2 [25]
Hussainara Khatoon Vs State of Bihar 1979 SCR (3) 532 [26]
CONST INDIA. Art 32 cl 2
[24] Gopalan, supra note 12

reiterated in DBM Patnaik[25] where it was asserted that mere detentions don't deprive the convicts of all their fundamental rights they possess.

The Supreme Court of India in the pre emergence era gave a restricted interpretation of the

Right to life which was derogable at the time of emergency, The Supreme Court in ADM Jabalpur[26] was of the opinion that a presidential order regarding suspension of Article 21 remains in force and no person has the locus standi to move any writ to challenge any order of detention on the found of malaise or illegality of the act, This was again reiterated in Bhanya Das[27] where it was held that it wasn't open for anyone to challenge the validly of any law on the grounds of its violation of fundamental rights during emergency,

The post emergency period ushered in an era of judicial activism where it treated Article 21 as a shield of protecting the life and liberty and gave a wider interpretation of the right to life.

The Supreme Court of India in a number of cases acknowledged the rights of the prisoner's suspects accused and directed the prison authorities and police to refrain from custodial torture. It was of the opinion that they being suspects don't stop being person just because of their detention.

In DBM Patnaik[28] it observed that Convicts just by their conviction are denuded of their fundamental rights which they possess otherwise. The court further observed that no person, including prisoners can be deprived of their right to life except by the procedure established by law.

The Supreme Court dealt with the question of custodial torture in Sunil Batra II[29] where the SC again reiterated that the prisoners are persons in the eyes of the law. It stuck down handcuffing of under trials as well as suggested prison reforms.

The Supreme Court in Raghu Bir Singh[30] case came down heavily on police atrocities in custody and it observed that

"Their lives and liberty [of the common citizens| are under a new peril when the guardians of the law gore human rights to death. The vulnerability of human rights assumes a traumatic torture some poignancy (when) the violent violation is perpetrated by the police arm of the State whose function is to protect the citizens and not to commit gruesome offences against

[25] D.B Patnaik v, State of Andhra Pradesh 1975 SCC (3) 185
[26] Jabalpur, supra note 11
[27] Union of India v. Bhanudas A.I.R 1977 S.C. 1027
[28] Patnaik, supra note 32
[29] Sunil Batra v. Delhi Administration II, A.I.R. 1980 S.C. 1593.
[30] Raghubir Singh v. State of Haryana, A.I.R. 1980 S.C. 1087

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them"

Similarly, in Kishore Singh[31] the court passed seven strictures for acts of torture by the police. In this case it held and stated that "Nothing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a State official running berserk regardless of human rights"

In Sheela Braise[32] the Supreme Court gave directions to the police to improve the conditions of police lockups and to minimise police excess on suspects. Though this case dealt specifically with women, the judgement was equally applicable to men and women in custody.

The Supreme Court in the State of UP v. Ram Sagar Yadav[36] recommended a change in the law of evidence so as to ensure that the policemen accused of custodial torture couldn't escape from conviction. With this regard the law commission recommended an amendment to the Indian Evidence Act, 1872 with regard to section 114 which still hasn't been amended with the bill having been introduced in Rajya Sabha in 2017, it is still pending.

V. COMMISSIONS AND OTHER RECOMMENDATIONS

The first of the many commissions that were established to deal with torture was the Police commission of 1860 which recommended that the military police be abolished and that a single civil constabulary was formed under the Police Act, 1861. Subsequent enactments of the IPC in 1860, the Indian Evidence Act of 1872 and the Indian Code of Criminal Procedure 1898 prohibited torture under any form

The scrutiny of this was done by the Indian Police Commission in 1902 which found that the police weren't efficient due to deficiencies in training and supervision. It was generally regarded as corrupt and oppressive and had failed to secure the confidence of the people. Ti concluded that the police force was in an unsatisfactory condition and that the police excesses against the government and that radical reforms were urgently required. It further recommended that educated Indians be recruited at higher positions to keep in check a police excesses against the civilian populations

Post-Independence many committees and commissions were appointed to look into the workings of the state police and almost all of these committees came up with stories of third-degree torture in custody, the lack of infrastructure, the lack of training amongst all other findings.

[31] Kishore Singh v State of Rajas than, A.I.R. 1981 S.C. 625
[32] Sheela Barse v. State of Maharashtra, A.I.R. 1983 S.C. 378-80 [36]
A.I.R. 1985 S.C. 421

The Shah Commission of 1978 was establish to observe the police brutality during the Emergency and that the behaviour of the police during emergency was not acceptable as they were not accountable to any authority. It recommended the Government to take measures to make the police independent from political and executive interferences, It submitted 8 reports and in the first report it criticized for their third degree methods and that the police brutality in handling suspects. It recommended that handling of witnesses and suspects was a delicate exercises and in order to achieve quick results police resort to forms of custodial violence.

The National Police Commission recommended judicial enquiry to be conducted for cases of death and rapes in police custody by an additional session's judge. It also recommended that the government make it mandatory to establish a District Inquiry Authority and that its reports shall published within two months of the receiving the report.

The Rebeiro Committee of 1998 examined the relevance of the recommendations of the NPC and recommended establishing a police Performance and Accountability Commission at the State level to examine complaints of police excesses including arbitrary arrests, detentions, false implications and custodial violence. It further recommended that the investigative functions be separated from the law and order work and updating the Police Act of 1861 with a new act.

The Padmanabhaiah Committee of 2000 studied the recruitment processes including training and other procedures related to investigations. It stressed on the need for better scientific aid and reduction of custodial violence. The Committee of Reforms to the Criminal Justice System highlighted the various issues of the justice system and the police excesses within it. The Committee observed that the manner of police investigation is of critical importance and that it will be a miscarriage of justices if the evidence collection process is vitiated by error and malpractice. It is important to protect the arrested and hence if a under trial brings this up to the notice of the magistrate then the magistrate must remand him to judicial custody. It further recommended that the interrogations of witnesses, dying declarations and confessions should be done under tape.

However, most of these recommendations, barring a few have still not been implemented by the governments, neither at the Central nor at the State levels.

VI. THE MOST VULNERABLE: WOMEN.

Women happen to be the most vulnerable section even in custody with the methods of torture being meted out to them are the worst forms of torture and cruel treatments. Methods such as pressing lighted cigarettes on parts, torture of their children. Inserting rods and chili powder in

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their private parts are not only degrading but also violative of their privacy and are crimes against women.

The Constitution under Article 15(3)[33] provides for provisions to safeguard the interests of women and makes it a fundamental duty to renounce the derogatory practices against women under Article 51A (e)[34]

Section 51 and Section 100 of the Code of Criminal procedure state that a woman can only be searched by a female police officer with regard to strict decency. It further lays down that a woman cannot be called to a police station for interrogation and has to be interrogated in her residence.

Section 376[35] provides for laws against rape, which are strict and are made with the intention of deterring rape against women in custody. It provides for a punishment of up to 10 years to life imprisonment.

Even after the all this the condition of women in custody is untenable and unabated at best with many of them facing molestation, rape and other crimes against women which amount to custodial torture and custodial violence.

The Indian government under Justice Krishna Ayer set up the National Expert committee on women prison with the mandate to study the handlings of their custodial conditions. The committee report made numerous recommendations to the government, the most significant of which was to make a national policy on custodial justice for women.[36] This policy still hasn't been implemented.

The notoriety of the government is to establish commissions and the recommendations of these commissions have been under study. The Government established the National Commission of Women, yet very few of its recommendations have been implemented by the government.

The guidelines on custodial justice and the guidelines laid down by the Supreme Court of India in DK Basu case are the guiding light with regard to the protection of women in custody across the country.

VII. ANALYSING THE ANTI-TORTURE BILL

The Prevention of Torture bill was passed by the Lok Sabha in 2010 and it drew heavy

[33] CONST INDIA. art 15 cl 3.
[34] CONST INDIA art 51A cl e
[35] Indian Penal Code 1860, No 45 of 1860,
[36] Government of India, Ministry of Human Resource Development, Report of the National Expert Committee on Women Prisoners 1986-87. pp. 312-20

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criticisms from all quarters due to its lack of teeth and for not meeting the international standards and norms. Following which this bill was sent to a parliamentary committee to review it. However, a change in the government in 2014 led to the bill lapsing due to in actions of the subsequent government in power.

Following the judgement in Ashwini Kumar Case by the Supreme Court of India, the Law Commission in its 237th report recommended the accession to the UNCAT and it released a draft legislation on the prohibition against torture.

The bill again drew criticism from various quarters the bill as vague as it set very high threshold for physical violence and left grievous hurt to be open for interpretation under Section 320 of the IPC which deals with physical injuries and doesn't include non-physical injuries. It was further criticized to be subjective and exclusionary and that it was inconsistent with nonphysical injuries. It further fails to account for class discrimination amongst victims and is a regression from the 2010 bill and doesn't criminalize an act of a public servant.

It is further criticised for being under powering as it requires permission from a higher official to prosecute an accused which can be extremely problematic. It also remained non-committal to issues of victim welfare as it falls short in providing rehabilitation to victims.

This bill was more concerned with internal and external enemies of the State and that it had made no reference to gender based torture or any other form of inhuman treatment amongst its many other short comings.

VIII. INDIA'S PUBLIC SECRET

Mukul Rohatgi in his address to the United Nations during the Universal Periodic Review of India stated that India is the land of the Mahatma and that torture is completely alien into India and has no place in Indian Culture.

There has been a general trend among leaders of the country to deny the existence of torture in India. However, the annual report of the National Human Rights Commission talks about the rampant torture that prevails at the hands of the police.

The Supreme Court in Munshi Singh Gautam Vs State of MP[41] summarised the above violence over the years. It lamented over the fact that the concern shown in Raghu Bir Singh almost 2 decades ago and the follow up cases of G.S Sharma Vs State of UP, Nilabati Behera Vs State of Orissa[42] and the much-celebrated case of DK Basu Vs State of West Bengal[43] have fallen into deaf years.

This shows that the Supreme Court, the NHRC recognizes torture within the country even after

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multiple arrangements of the Supreme Court the state and their forces continue to inflict torture on persons in custody.

There is no documentation of cases of custodial torture and custodial death. There have been instances where torture isn't just limited to custody but also in prison, juvenile homes and deaddiction centres.

Multiple incidents of torture have been reported from the State of Kashmir where prisoners have been kept in solitary confinement and have been tortured. Muslim prisoners in Bhopal Central Prison were forced to chant Jai Shri Ram and were not allowed to sleep. The number of instances of torture is far greater than what comes out.

India is a signatory to the Convention against torture but is yet to ratify it. In 2008 the Prevention of torture bill was introduced in the Parliament and almost 12 years later it is still pending in the Parliament. In the Case of Ashwini Kumar[44], the Supreme Court said it cannot make the legislature make laws or adopt them.

The Discourse on torture in India has been strange with on one hand there has been denial on the other there has been a silent acceptance of it making it India's Public Secret.

IX. CONCLUSION

"Who shall guard the guardians?"

Police brutality and custodial violence is not a new phenomenon and has been prevalent in practice since the dark ages. Multiple initiatives, internationally and at the national level by the Supreme Court of India have fallen to deaf ears. Custodial torture is so common in our society that its practice isn't frowned upon any more and is taken for granted.

Torture, no matter when and where and by who it is done, for what reason is it done is a heinous crime and should be frowned upon by society. In modern democracies where rule of law is supreme, torture by police is violation of the basic rights of dignity and life of the accused and even the convicts in prison.

It is such an egregious violation of human that it is prohibited in all its forms. It is an absolute right provided to all citizens across the world and it is the responsibility of the states to protect their citizens from torture. This paper discusses the morality of torture. Though torture is considered to be highly immoral, states have continually violated the rights of the arrested and the detainees. The war against terror has seen so many gross violations of human rights by both sides.

This paper has further discussed and analysed the jurisprudence which as dealt with the rights

of the prisoners and the protection they have against torture in all its forms from jail authorities and the police.

The UNCAT as an instrument which is all round in its protection and prohibition. It multi faced nature provides for investigations, victim rehabilitation in the form of compensation along with mechanisms for complaint redressal and has contributed to the development of anti-torture jurisprudence in legal systems across the world. It has played a very important role in improving the status of prisoners in correctional homes.

The 237th Report of the Law Commission of India recommended the ratification of the UNCAT. The ratification of the UNCAT would be a slight improvement of India's human rights condition and meeting a set of International human rights standards.

Secondly the Draft Torture bill of 2017 with all its setbacks need a proper review. A proper torture legislation should include responsibility for higher officials. It must establish a command responsibility. Further it should protect individuals from deportation if they have the threat that they will face torture in their native country. The legislation should also acknowledge that torture is also a gender based violence.

The Supreme Court of India has been very proactive in dealing with cases of custodial violence and custodial deaths. Even then the Central government fails to recognise torture in police custody. The numerous guidelines including those laid down in D.K Basu are nothing but just letters of the law.

It is high time that the Government of India, ratify the UNCAT along with implement the guidelines laid down by the Supreme Court of India and the recommendation of the National Human Rights Commission so as to preserve the rights of the prisoners and the accused in custody.

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