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THE TORTURE CONUNDRUM IN LIBERAL DEMOCRACIES

Abstract

People who seek to legitimize and regulate the use of torture may have purposeful intentions, but they choose to overlook its ramifications on a democratic state. In order to end a state of hypocrisy and to ensure accountability stemming from the prevalence of covert use of torture, they are willing to go in for 'lesser evils' or make 'tragic choices', or in other words, legalize a system that undermines every democratic norm. The indifference to UN's mission and the international conventions on torture seems affordable to some extent. However, the universal and inviolable nature of the sanctity of human rights is so deeply imprinted, that it has left the proponents of torture to circumvent the problem by redefining torture. It has only confirmed the view that a state cannot afford to alienate the world without undermining its very existence. The interplay between torture and democratic fundamentals in the 'age of terror' is bound to have broad ramifications on the global community including the fragile democracies of South Asia. The obnoxious practices of the cabal of democracies led by the United States in the global war on terrorism have earned universal opprobrium, which attests to the incapability of torture with liberal democracies.

1. INTRODUCTION

This paper traces the evolution and tribulations of the human rights regime against the use of torture and related coercive interrogation practices and how the reaction of the United States to the cataclysmic attacks on its soil on September 11, 2001, ended the juggernaut that was mowing down practitioners of torture in every corner of the globe. It is natural that democracies provide an ideal framework for any analytical study of the success of the anti-torture norm simply because democratic states possess a transparency that is otherwise absent in non-

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democratic states. It cannot be denied that while police torture has diminished in liberal democracies, this decline is not so much perceptible in non-democratic states. Globalisation has at least impacted favourably on the human rights arena leading to intense scrutiny of human rights records of countries under normal circumstances. This was the situation at the close of the Cold War which also marked the triumph of western or liberal democracy.

While the adverse impact of the British torture of suspects in Northern Ireland, the French experience in Algeria, and the American tryst with torture in Vietnam have led to public awareness and further fortification of the anti-torture norm in these liberal democracies, the fall-out of 9/11 caused an immediate setback to the anti-torture culture at least in the United States and the United Kingdom. It has led the Americans to explore the extreme contours in the defence, redefinition, or reinvention of torture in order to deceive or bypass existing rules and regulations that censures or punishes the practitioners of torture. The Americans have also outsourced the “business” of torturing terror suspects to states that systematically use torture. The complicity of other democracies is disconcerting. The ramifications of this adverse development on the human rights movement is yet to be gauged. Liberal democracies are facing a conundrum in their attempts to justify or accommodate torture within the existing framework in order to afford better security to their citizens. While Pakistan lies on the frontline of the ‘war on terror,’ and has a carte-blanche in dealing with the radical Islamist insurgency, other South Asian nations are negotiating terms with a much weakened human rights regime. The intrinsic differences and complexities that set the South Asian democracies apart from Western liberal democracies, and impacts the anti-torture norms is examined in this project. The impact of the dilution of the human rights norm following the ‘war on terror’ on South Asia is also analysed. Barring introduction (I) and conclusion (6), the paper is divided into few sections and their accompanying sub-sections. The section 2 titled ‘Definition and Conceptualizing Torture in a Democracy’ has the following sub-sections (i) Efficaciousness of Torture (ii) Prevalence and Types of Torture. The section 3 under the caption ‘Torture in Liberal Democracies: The US Paradigm’ is followed by a sub-section titled ‘Torture in States other than Democracies’. The section 4 is titled ‘Conundrums and Hypocrisy’ and does not follow any sub-section. The section 5 titled ‘The Torture Debate’ has four successive sub-sections describing the debate on the issue in the US, Israel and few other countries including few of South Asia respectively.

2. DEFINITION AND CONCEPTUALIZING TORTURE IN A DEMOCRACY

The contentious issue of torture as a current problem in our societies has led some governments to try to redefine it instead of striving to uphold its prohibition. Therefore, it becomes imperative remembering what we understand

by torture. According to the United Nations Convention against Torture, 1987, it consists of:

“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.*”¹

Torture goes against the grain of democracy because it undermines the panoply of democratic ideals like rule of law, free press, and guarantee of civil liberties. Like cancer, it inexorably leads to the degeneration of the liberal democratic state, its institutions, its core values and fundamental respect for human rights and dignity.² Western liberal democracies took the lead in bolstering the human rights regime to eradicate torture, genocide, and other abuses. They occupied a lofty moral ground, something inaccessible to the non-democracies. The disintegration of the USSR and revolutionary changes in the map of Eastern Europe marked the triumph and heyday of western democracy. It was a vindication of the same ideals they cherished and championed during the Cold War era. But the shocking images of Abu Ghraib dented the image of democracies as never before. Offensive images of abused prisoners inflamed global opinion and discredited the so-called champions of democracy. Michael Ignatieff makes a valid point when he writes:

Torture shall remain anathema to a liberal democracy and should never be regulated, countenanced, or covertly accepted in a war of terror. For torture, when committed by a state, expresses the state’s ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose *raison d’etre* is the control of violence and coercion in the name of human dignity and freedom.³

Political and religious leaders of the global community are almost unanimous in decrying the use of torture in any type of government. Torture is anathema to democracies – liberal or otherwise. It is widely accepted that torture of criminal suspects and political opponents have become rare in liberal democracies. At the same time, there was optimism regarding the immutability of the absolute ban on torture. The post-Cold War period was marked by a noticeable decline in

¹ Pilar Calveiro, “Torture in the heart of Democracies”, available at http://www.boell.org/events/documents/Calveiro_torture_democracy.pdf accessed on 15 September 2009.

² Neil Macmaster, “Torture: From Algiers to Abu Ghraib”, *Race & Class: A Journal on Racism, Empire and Globalisation*, Vol. 46, No. 2, 2004, pp. 8-9.

³ Steven Lukes, “Liberal Democratic Torture”, *British Journal of Political Science*, Vol. 36, No. 1, 2005, p. 4.

espionage and allied clandestine pursuits, a hallmark of the preceding era. One direct impact was that it reduced the hazards connected with espionage, and at the other, spared western democracies the unpleasant task of ‘torturing’ communist spies to educe information, notwithstanding its efficaciousness. Michael Sheehan observes that where groups of democracies inhabit a region, war will become extinct in that region, and as democracy spreads throughout the world, war will decline.⁴ I invoke Sheehan’s ‘democratic peace’ argument to juxtapose the assumption that decline of conflicts leads to a corresponding decline of torture. Liberal democracies facing inconsequential threats in the form of wars or domestic strife have strengthened the human rights regime by eradicating torture within their territories. This anti-torture norm has become so firmly imprinted that it outlawed torture completely from their jurisdictions. And by that logic torture is of very little utilitarian use in the western world.

However, the horrendous events of 9/11, and the equally problematic United States’ reaction have opened up the debate on torture once again. The public clamour for exemplary action against terrorists and their sanctuaries gave unprecedented freedom to the U.S. government in the ‘war on terror’ with detrimental consequences. One was the revival and justification of torture on an extensive scale.

Efficaciousness of Torture

It is also disconcerting that the torture debate has raged across the democracies without questioning the efficaciousness of torture. Most governments are silent on the issue. Therefore, it might be assumed that the application of torture on suspects is justified on the contentious premise of its effectiveness in extracting “actionable information.” Methodical problems to the study of the efficaciousness of torture also preclude its analyses. Quantitative data for the study of human rights violations “simply do not exist in any systematic form” before the twentieth century; and in the twentieth century, torture has been conducted outside of formal legal practice, by government security agents, without regulation, and in secret”.⁵

An influential votary of torture, Jerome Slater, states: “the historical evidence leaves no serious doubt that torture has often produced information that, otherwise, would not have been revealed, especially about the organisation and location of members of resistance or insurgency groups.”⁶ He cites examples from the French experience in Algeria, the British against the IRA, Israel against

⁴ John Baylis *et al*, *The Globalization of World Politics*, Fourth Ed. Oxford, OUP, 2008, p.212.

⁵ Christopher J. Einolf, “The Fall and Rise of Torture: A Comparative and Historical Analysis”, Department of Sociology, University of Virginia, available at http://works.bepress.com/christopher_einolf/9/ accessed on 14 September 2009.

⁶ Jerome Slater, “Tragic Choices in the War on Terrorism: Should we try to Regulate and Control Torture?”, *Political Science Quarterly*, Vol. 121, No. 2, 2006.

the Palestinians, and Sri Lankan forces against Tamil militants – where torture led to success against terrorist activities. He also envisages that coercive interrogations would be essential in case of a “ticking bomb” scenario or when threatened by terrorists armed with Weapons of Mass Destruction (WMD).⁷ But ground evidence proves otherwise. John Kleinig in *‘Torture and Political morality’* asserts that most of the support for torture as an interrogatory technique lies in the domain of the “ticking bomb”. He also states that a “ticking bomb” has been unearthed and defused in at most a tiny fraction of cases and that officials who defend the use of such techniques refer generally to their value but is noticeably reticent about filling in details. According to him records show that in overwhelming number of cases suspects were innocents and/or in which extracted ‘information’ was false or misleading, designed more to alleviate suffering.⁸ Many others have commented on the plausibility of “ticking bomb” argument for torture as it was radically flawed; such a scenario was rarely, if ever, to be encountered in reality.⁹

Alfred W. McCoy reveals that in the thirty months after 9/11, authorities relied on intelligence to arrest 5,000 terror suspects, found evidence to charge just three, and won only one conviction. In the same vein, he makes a poignant statement: “If the government nabbed only one certain terrorist in 5,000 arbitrary arrests, should we not expect the same security apparatus to perform similarly with warrants for legalized torture – that is, 4,999 innocent victims tortured for every true terrorist interrogated?”¹⁰ One might assume that in the charged atmosphere prevailing soon after 9/11, at least 50 percent of these terror suspects were subjected to some sort of coercive interrogation or the other; in that case one might also draw a conclusion that the torture apparatus failed owing to incompetence or else its efficacy is not dependable as some make it out to be.

Prevalence and Types of Torture

While liberal democratic states employ torture against their citizens much less often than other states, they have used torture extensively in the context of foreign wars and in maintaining control of colonial possessions.¹¹ This legacy has spilled over into the twenty-first century. Though not an uncommon phenomenon in the present times, the practice of torture has varied by region. In Europe, torture increased greatly in the twentieth century with the rise of communism and fascism. Communist regimes in the Soviet Union and Eastern Europe used

⁷ *Ibid.*

⁸ Igor Primoratz (ed.), *Politics and Morality* (London: Palgrave, 2007), pp. 217-220.

⁹ Neil Macmaster, 2004, *op.cit.*, p.12.

¹⁰ Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*, (New York: Henry Holt and Company, 2006) p.194.

¹¹ Christopher J. Einolf, *The Fall and Rise of Torture: A Comparative and Historical Analysis* (Department of Sociology, University of Virginia), at http://works.bepress.com/christopher_einolf/9/ accessed on 14 September 2009.

torture widely against political opponents. In Latin America, torture occurred widely during the Cold War, as conservative governments cracked down on communist insurgencies in a number of countries, including Argentina, Brazil, Chile and El Salvador. In Asia, the communist governments of China, Cambodia, Laos, Vietnam, and North Korea employed torture extensively. Incidence of torture against political opponents was noticed in both communist and non-communist states in Africa, the Middle East, and Asia.¹² Torture is also prevalent in South Asia.

A noteworthy feature is that there are striking similarities in the methods of torture in both democratic and non-democratic countries, where techniques were finely tuned to inflict pain on the body without causing life-threatening damage. Common forms of torture include beatings, the application of electric shock, rape and sexual assault, the infliction of burns, painful stretching of limbs, crushing of the body or parts of the body, near-drowning, and being forced to maintain an uncomfortable position for a painfully long time.¹³

3. TORTURE IN LIBERAL DEMOCRACIES: THE U.S. PARADIGM

The general assumption that classical political right, such as the right to a fair trial or the right not to be tortured, inviolable in liberal democracies, came under severe strain after 9/11, and during the global war on terror. Subsequent reaction of the USA and other democracies has put the human rights regime to the rack. Washington devised ways to torture detainees by creating an internment camp at Guantanamo Bay intended to be beyond the reach of the Supreme Court and the public eye. The U.S. has also redefined torture to exclude interrogation techniques such as “waterboarding” (simulated drowning). The reaction of Western European governments was equally controversial, as with attempts by the British government to introduce extended periods of detention without charge. The U.S. policy of moving prisoners (‘extraordinary rendition’) to regimes with poor human rights records, such as Uzbekistan, Syria, and Egypt, was clearly designed to allow for unhindered torture of terror suspects.¹⁴ Recent developments confirm the fact that liberal democracies have resorted to torture mainly to extract “actionable intelligence” from terror suspects. It also attests to the proposition that the West has been more innovative in devising methods of torture.

¹² *Ibid.*

¹³ Amnesty International Report, 2000. available at <http://www.amnesty.org/en/library/asset/pol10/001/2000/en/20799676-dfea-11dd-8e17-69926d493233/pol100012000en.pdf> accessed on 20 September 2009.

¹⁴ John Baylis *et al*, *op. cit.*

Torture in States Other Than Democracies

On the other hand, the motive to torture in non-democratic states are varied: these include gathering information, forcing confessions, asserting political and social control through the spread of terror, and punishing people who are considered enemies of the state.¹⁵ Unlike liberal democracies, the scope of torture increases manifold in authoritarian regimes spread across Asia, Africa and Latin America. Firstly, colonial era problems have persisted in the form of border disputes thereby enhancing the threat of war. Secondly, insurgencies in many parts of the globe have aggravated the occurrence of torture. Thirdly, authoritarian regimes have also expanded the definition of treason because it is more convenient to prosecute activities seen as treasonous.¹⁶ Fourthly, globalisation has impacted on the socio-economic structure of many countries more profoundly, leading to unrest, which the rulers subdue by terrorizing the populace through arbitrary detention and torture. Finally, the ‘war on terror’ has afforded problematic regimes exceptional latitude, which under normal circumstances would have been improbable.

The Counterinsurgency Arena

While it is axiomatic that risk of inter-state wars has declined in the globalisation era, parts of the non-European world are plagued by counterinsurgency wars. Torture of prisoners of war occurs most often in counterinsurgency wars. In conventional wars, common soldiers possess little information that might be of use to the opposing side, so prisoners of war are generally not extensively interrogated, and for this reason are rarely tortured. In counterinsurgency conflicts, however, common soldiers do possess valuable information – the identity and location of other insurgents – and are often tortured for this information.¹⁷

Kashmir

The conduct of the Indian state in the counterinsurgency wars in Kashmir and the North-East should be instructive in the present context. The genesis of the intractable Kashmir problem lies in the obduracy of India to deny a plebiscite there in spite of its pledge to the United Nations.¹⁸ The subsequent insurgency in Kashmir, partly aided by Pakistan, has raised innumerable allegations of human rights violations by the Indian troops. A recent report by the U.S.-based Human Rights Watch (HRW) documents human rights abuses carried out by the Indian security forces in the state of Jammu and Kashmir with the protection of the

¹⁵ Christopher J. Einolf, *op.cit.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Partha Chatterjee (ed.) *State and Politics in India*, (New Delhi: OUP, 1997), p. 4.

Indian government and legal system. The report provides detailed accounts and interviews implicating the Indian agencies in torture and other crimes. Since 1989, at least 20,000 Kashmiri civilians have been killed as a result of the armed conflict; over 8000 Kashmiris have simply “disappeared” during the same period.¹⁹ It is also claimed that many more were tortured and then executed. This reprehensible abuse of human rights in Kashmir is facilitated by the extensive powers that Indian security forces enjoy. For example, the Jammu and Kashmir Disturbed Areas Act and the Armed Forces (Jammu and Kashmir) Special Powers Act permits them to use lethal force against anyone “who is acting in contravention of any law or order for the time being in the disturbed area.”²⁰ There has been similar allegations of widespread torture by security forces in the insurgency-wracked North-East India.

4. CONUNDRUM AND HYPOCRISY

The very existence of torture in liberal democracies is a conundrum because upholding the Rule of Law and respect for human rights is the *raison d’etre* of a liberal ideology as anchored in democracies. It is also a conundrum as the liberal democracies being the architects of various conventions empowering the human rights regime, have undermined the very principles they had themselves brought in to existence. Moreover, they have also infringed laws and regulations enshrined in their own constitutions that uphold humane treatment of detainees. And when not infringing, they have sought to bypass the existing laws, besides, venturing to redefine torture. It is also a conundrum due to the fact that western democracies have allied themselves with authoritarian regimes they had castigated in the past for human rights abuses in order to achieve their objectives in the ‘war on terror.’

A cogent example is the new-found bonhomie between Washington and Uzbekistan. Seven months before September 11, 2001, the U.S. State Department issued a human rights report on Uzbekistan. It was a manifest of horrors: the report cited the frequent torture of prisoners, noting that the most common techniques were “beating, often with blunt weapons, and asphyxiation with a gas mask.”²¹ Immediately after the September 11 attacks, however, the Bush administration turned to Uzbekistan as a partner in the global fight against terrorism. Thereafter, evidence pointed to the fact that the United States did send terror suspects to Uzbekistan for detention and interrogation, even as Uzbekistan’s treatment of its own prisoners continued to earn it admonishments

¹⁹ Parwini Zora & Daniel Woreck, *HRW Documents Repression in Kashmir*, (World Socialist Web), <http://www.countercurrents.org/kashmir-hrw011206.htm> accessed on 19 September 2009.

²⁰ *Ibid.*

²¹ Don Van Natta Jr., *U.S. Recruits a Tough Ally as Jailer*, (New York Times, May 2, 2005) http://www.nytimes.com/2005/05/01/international/01renditions.html?_r=1&pagewanted=print&position= accessed on 20 September 2009.

from around the world, including the State Department. The rendition programme, under which the CIA transfers terror suspects to foreign countries to be held and interrogated, has linked the United States to other countries with dismal human rights records, like Syria and Egypt.²²

Almost all liberal democracies have sullied their reputation by resorting to torture at various points of time. The United States as the beacon of democracy is the greatest offender in recent times. President Bush's call for "promotion of democracy and freedom" in the Middle East is hypocritical considering the infamous Abu Ghraib episode and the foisting of an unpopular government on the people of Iraq in contravention to international treaties. The miserable human rights record of the British government is not worthy of emulation. Atrocities committed by the British as an erstwhile colonial power have been documented. Like its closest ally, the U.S., London has condoned serious human rights violations in Israel, while condemning lesser violations elsewhere. After September 11, 2001, London's approach to the issue is consistently hypocritical considering its active cooperation with Washington during the 'rendition' of suspects, a practice regarded as equally abhorrent as direct torture.²³

The Indian Hypocrisy

An analysis of Article 14 and Article 21 of the Indian Constitution supports the proposition that Indian law forbids torture. But ground realities state otherwise. The U.S. State Department castigated India in a report in February 2000, which stated: "...torture is common throughout the country [India], and authorities often use torture during interrogations. In other instances, they torture detainees to extort money and sometimes as summary punishment".²⁴ If that is a case for concern, the use of torture and other serious violations in strife-torn Kashmir and equally problematic North-East, is alarming. It is also pertinent to note that free markets and regular elections alone do not make a civil society. The apparent disdain for international laws and norms, the haughty statements of the policy makers, and the disregard for human rights amply displayed by India's ruling elite undermine its soft power.

Indian legislators hardly ever raise the issue of torture and other misuse in the nation's parliament for fear of offending the conservative electorate. Think-tanks in India deplore, often gleefully, American excesses in Guantanamo Bay and Abu Ghraib, and the inadequacies of the American news media in the run-up to the war in Iraq. But the Indian news media has yet to carry a single detailed

²² *Ibid.*

²³ Emanuel Gross, *The Struggle of democracy Against Terrorism*, (Charlottesville: University of Virginia Press, 2006), pp. 80-85.

²⁴ Mark A. Weisburd, "Customary international law and torture: the case of India", *Chicago Journal of International Law*, April, 2001, available at <http://www.allbusiness.com/legal/international-law/1067194-1.html> accessed on 17 September 2009.

report on the torture, illegal detention, and extrajudicial killings of hundreds of civilians in Kashmir over the last decade.²⁵

5. THE TORTURE DEBATE

Contrary to popular belief, the unregulated treatment of prisoners, in various secret locations and U.S. bases have been opposed in America too in addition to attracting adverse publicity overseas. This episode has also persuaded the U.S. lawmakers and think-tanks to address the situation. It has been noted that ad hoc strictures and regulations have led to gross mistreatment of prisoners. It has, thus, motivated many concerned individuals to call for the setting-up of a body or mechanism to regulate torture in order to prevent 'abuse.' Consequently, this has triggered a debate in the United States which might have ramifications over the human rights regime, and moderate the American foreign policy. The debate in America is extensively cited here because of the overwhelming influence Washington possesses over the globe, both economically and politically. Moreover, the U.S. at the head of the international coalition in Iraq and Afghanistan has a disproportionate say on the framing of policy. Therefore, decisions made in Washington shall inevitably influence its junior partners. In spite of its size and international standing, Israel, as the closest ally of Washington has a disproportionate voice in the U.S. foreign policy. Moreover, as a consistent and seasoned votary of torture, Israel's experience has impacted and informed the U.S. policy and debate pertaining to torture. This is attested by numerous references by American academics and legislators attributable to Israel.

Debate in Washington

The problem of contextualising torture (or coercion) in a liberal democracy is best exemplified through the American experience in its 'war on terror.' The debate on torture in the U.S. has led the politicians, military leaders, academicians, and all, to be divided on diverse lines which Jerome Slater terms as essentially three positions.²⁶

The first, being the traditional moral position wherein torture is categorically (that is, absolutely) prohibited, with no room for exceptions or compromises.

The second position is that the legal and moral norm of categorical prohibition must be maintained in principle, law, and rhetoric – although there

²⁵ Pankaj Mishra, "Gaining Power, Losing values", (op-ed), *The New York Times*, 22 November 2006 at <http://www.nytimes.com/2006/11/22/geinion/22mishra.html> accessed on 16 September 2009.

²⁶ Jerome Slater, "Tragic Choices in the War on Terrorism: Should we try to Regulate and Control Torture?" *Political Science Quarterly*, Vol. 121, No. 2, 2006.

could be exceptional circumstances in which violation of the norm is tacitly accepted, but violators go unpunished.

The third position is that terrorism is likely to be a long-term threat and is so grave that “exceptional circumstances” have become the norm. Therefore, the immediate task “is to create some type of legal and institutional framework for the regulation and control of torture, to ensure that it is resorted to in the war on terrorism only when the consequences of not doing so are so terrible as to outweigh the terrible nature of torture itself.”²⁷

American academics and intellectuals like Jerome Slater, Michael Walzer, and Michael Ignatieff hold diverse, but influential posturing on torture. Michael Ignatieff takes a categorical stand on torture and argues for absolute prohibition against not only torture but also physical coercion. He regards torture as the “greater evil” in his world of lesser and greater evils. Slater notes Ignatieff’s overall consequentialist argument that in the war on terrorism, it will be necessary to choose lesser evils to avoid even greater ones, and that included among these necessary and justified lesser evils are various forms of violence, assassinations, and perhaps even preemptive war.²⁸

Putting forward a different view, Slater argues for legitimizing and regulating torture in the United States, in the fight against terrorism. Drawing lessons from history, he believes that leaving the decision of torture of captured terrorists to unregulated and unaccountable political and military leaders who have already abundantly demonstrated that they are not to be trusted with this terrible power is a recipe for disaster. Slater also argues that uncontrolled torture that has become the norm in the U.S. violates every morally necessary restraint, but also aggravates rather than diminishes terrorism. For these reasons, he believes “there is a strong argument for developing laws, institutions, and procedures to authorize, monitor, and control torture, as well as, when necessary, to severely punish unauthorized and illegitimate torture.”²⁹

Slater admits that the distinction between torture and “highly coercive interrogation” is a conundrum, and, that the distinctions in the UN Convention against Torture do not seem morally compelling. According to him, the best solution is to distinguish between “torture”, which should be accepted as the infliction of severe physical or mental pain, and “coercion”, defined as significantly less-severe methods than torture (like stress binding, sleep deprivation, exposure to heat and cold, etc.) In Slater’s article, one might detect a sense of acquiescence in the thin dividing line that separates torture from

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

coercive interrogation, and in the feeling that blurring of lines would be inevitable.

In putting forward his case for legitimizing and regulating torture, Jerome Slater subscribes to the Just-War Theory as interpreted by Michael Walzer, and in a circuitous manner extends it to justify torture. Like many others, Walzer is a categorical moralist, and as he holds that even in just wars, a party is absolutely prohibited from employing unjust means, which principally means that innocent civilians or noncombatants may never be deliberately attacked. There is, however, as Slater points out, one critically important exception to Walzer's application of categorical morality to warfare: "supreme emergency," which "exists when our deepest values and our collective survival are in imminent danger."³⁰ Walzer made this exception after studying the causes of British bombing of German cities during World War II, where moral compunctions in targeting civilian areas was thrown aside in the supreme objective of thwarting Hitler from attacking Britain. To drive his point home, Slater quotes Walzer:

When our deepest values are radically at risk, the constraints lose their grip, and a certain kind of utilitarianism re-imposes itself. I call this the utilitarianism of extremity (...).No government can put the life of the community itself and of all its members at risk, so long as there are actions available to it, even immoral actions, that would avoid or reduce the risk.³¹

Slater extends the same logic and postulates it to elevate use of torture as a just-cause in supreme emergency.

Echoing fellow Americans Alan Dershowitz and Andrew C. McCarthy, Slater calls for the formation of effective principles, procedures, and institutions to control torture, in order to ensure that it is resorted only when an overwhelming emergency leaves no other rational or, indeed, morally defensible choice. He envisages an institutional process for controlling torture, which would begin with some kind of system of advance authorization. Besides that, Slater supports the creation of a single federal "national security court," which would allow the judges to develop expertise in matters of national security. Finally, he believes that controlling coercion and torture in the war on terrorism should be the responsibility not only of the judiciary, but also of the Congress, to ensure that the executive branch is complying with the law.³²

Even though Slater rules out the role of torture warrants in his machinery of legalized torture or coercion, some degree of judicial involvement is difficult to avoid. And in that sphere, as Richard Posner argues: "if legal rules are promulgated permitting torture in defined circumstances, officials are bound to

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

want to explore the outer bounds of the rules, and the practice, once it were thus regularized, would be likely to become regular.”³³ Posner also raises a valid point when he states:

Once one starts down the balancing path, the protection of civil liberties quickly erodes. One starts with the extreme case, the terrorist with plague germs or a nuclear bomb in his traveling case, or the kidnapper who alone can save his victim. Well, if torture is legally justifiable if the lives of thousands are threatened, what about when the lives of hundreds are threatened, or tens? And the kidnap victim is only one”³⁴

Those who advocate a legitimization and regularization of torture or coercive methods in the US or elsewhere, obviously failed to acknowledge Israel’s bitter experience with its own version of institutional torture.

Gross Abuse of Prisoners by Israel: Lessons for the U.S. and Other States

The Israeli chapter is pertinent in the context of debate owing to the fact that a number of lawmakers and scholars, especially Americans, have invoked Israel’s experience in this matter, notwithstanding the questionable transparency and authenticity of such sources. The growing resemblance between America’s and Israel’s approach to interrogation of terrorist suspects is remarkable – hooding, loud noises, sleep deprivation, exposure to intense heat and cold. What makes Israel’s case so relevant to contemporary America is that for more than a decade, Israel was the only country in the world that officially adopted the use of physical force in interrogation of suspected terrorist and as such its experience is also particularly relevant to the public debate in the United States regarding legitimacy of coercion against terrorist suspects. The Israeli case categorically proves the fallacy of the belief that it is possible to legitimize torture to thwart terrorist attacks and at the same time restrict its use to exceptional cases.³⁵

The official sanction of torture in Israel stemmed from the recommendations made by the Landau Commission that were approved by the Israeli government, making Israeli the only country officially to sanction the intentional infliction of pain and suffering during interrogation. As mentioned earlier, the “ticking bomb” scenario became the bedrock for the endorsement of physical force. With increasing banality, the concept of “ticking bomb” was stretched to include cases where the danger to human life was not immediate; so much so that it became the paradigm for almost every interrogation. And as predicted by many critics, once the moral and statutory prohibition was removed, the slippery slope into torture

³³ Steven Lukes, “Liberal Democratic Torture”, *British Journal of Political Science*, Vol.36, No.1, 2005, p. 15.

³⁴ *Ibid.*

³⁵ Kenneth Roth (ed), *Torture: Does It Make Us Safer? Is It Ever OK?*, New York: The New Press, 2005, p. 29.

went beyond the methods allowed by the Landau commission. In practice, torture was not limited to “persons who planted bombs”, but extended far beyond that to include friends and relatives. The practice that was rationalized as the necessary response to address the exceptional case of the “ticking bomb” became common for almost every single interrogation.³⁶

Moreover, the supervision mechanisms failed and the interrogators who violated the permissions granted by the Landau Commission were rarely prosecuted. The regulatory bodies failed to restrain interrogators from operating outside the boundaries of the law. The overall effect was that the Landau Commission ended up legitimizing torture and making it easier to extend it into a routine practice.³⁷ Thus the example of Israel should be instructive to the proponents seeking to legalize coercive interrogation in the U.S. and other democratic states.

The legalization of torture or related practices would have a detrimental effect on international conventions on torture and may jeopardize the human rights movement itself. If the U.S. or any other democracy adopts such a norm, the effects on the world community would be devastating. Democracies would simply lose the moral force and status that they possess. Let one not lose sight of the fact that every authoritarian state is on the defensive in the domain of civil liberties. Issues of freedom and democracy dominate the world agenda and in the discourse between nations. And what happens if American citizens or soldiers are taken captive by hostile forces or terrorists: Can one expect them not to torture prisoners as a *quid pro quo*? Can the International Red Cross be expected to intercede on behalf of a government that authorizes torture with utter disregard to international conventions?

Torture Debate: Case of Few Countries

The issue of ‘extraordinary renditions’ first inaugurated a period of debates across Europe riveting public interest on the subject that intensified when the nefarious activities of the Americans at Abu Ghraib was exposed. While the debates brought about unanimous and overwhelming condemnation of torture in any form, it also undermined the efforts of some European governments to drum up support for George Bush in the war in Afghanistan and Iraq. It is assumed that media-debates moulded public opinion and strengthened the anti-war and anti-torture movements in Europe. Its impact was the strongest in France.

During the Algerian war (1954-62), the French military used torture on a massive scale to suppress the Algerian freedom fighters. Although the French campaign against torture as a central component of the anti-war movement died

³⁶ *Ibid*

³⁷ *Ibid*

out after 1962, it was revised again in June 2002 in an extraordinary media debate. The consensus that emerged in France among the mainstream political parties as well as among many ex-soldiers, who had served in Algeria, was that torture had constituted an unspeakable catastrophe. It had irreparably damaged both the victims and the perpetrators. It is estimated that some 350,000 French ex-combatants still suffer from psychiatric disorders and trauma.³⁸

Human Rights and Democracy in the South Asian Context

A report of the Human rights Watch noted the worsening of human rights in South Asia referencing the violation of human rights by the governments of Pakistan, India, Bangladesh, Sri Lanka, and Nepal in efforts to put down rebellions. The report highlighted the absence of transparent investigations or prosecutions of Indian security personnel blamed for serious human rights abuses in conflict zones. Regarding Bangladesh, the Report remarked on the worsening of an already strained human rights record following the bombing campaign by extremists in 2005. The report also mentioned the numerous abuses, including extrajudicial killings and excessive use of force and custodial torture by Bangladesh's security forces.³⁹

This confirms that fundamental differences exist between liberal democracies of the West and the democracies of South Asia in the scope and use of torture. Whereas the western democracies have almost eradicated police (domestic) torture, it is still prevalent in South Asia, which again shows no signs of diminishing. Moreover, unlike liberal democratic states, South Asian governments are more likely to torture their own citizens and within their own national territories. If and when liberal democracies do torture, and that too foreign subjects only, they avoid doing so within their own territories. Instead they have devised the pioneering technique of 'renditions,' or transfer of terror suspects to foreign soil, where the 'dirty' task of torturing those suspects is entrusted to authoritarian and despotic governments. A disquieting feature that again distinguishes South Asia is that in addition to its ostensible purpose of extracting information, torture is also seen as a tool to punish rebels. Moreover, internal conflicts being endemic in South Asia, scope of torture increases manifold. This has been witnessed in Kashmir, Balochistan, Northern and Eastern Sri Lanka, Chittagong hill tracts of Bangladesh among others. Thus, one may infer that inherent defects of the state system in South Asia makes it vulnerable to torture, and also stifle human rights norms.

Many scholars aver that it will be quite impossible for democratic South Asian states to become completely 'liberal' in the near future because the core

³⁸ Neil Macmaster, 2004, *op.cit.*, pp. 8-9.

³⁹ BBC, "South Asia human rights worsen", *Report, South Asia*, 18 January, 2006, at http://news.bbc.co.uk/2/hi/south_asia/4623528.stm accessed on 18 September 2009.

idea of the states is based on an organic, 'ethnic' ideal of the nation. This ethno-nationalism or communalism does not fall back on the state as an integrating factor.⁴⁰ An ethno-nationalist state like India, therefore, is plagued by insurgencies because some minority groups believe that they are oppressed by the state which is controlled by a majority ethno-religious group. Thus outbreak of conflicts is more likely within an ethno-nationalist state with a corresponding rise in the occurrence of torture. This is unlike the civic-democratic nationalism of liberal democracies where emphasis lies on the function and form of the state.⁴¹ This view is highlighted not only to explain the essential differences that exist between western democracies and those of South Asia, as also to examine the factors that breed torture in the less-developed region. This might also explain to some extent the reasons that compel the South Asian governments to obstruct human rights agencies from functioning unhindered in the region. As for example, India has not yet ratified some of the anti-torture norms.

6. CONCLUSION

The consensus that has emerged following the American reaction to the September 11 incidents is overwhelmingly against torture. The triumph of the western world in the 1990s and the existence of 'democratic peace' have reduced the occasion to torture considerably. After the initial setback to the human rights regime after 2001, it is optimistically believed that the anti-torture norm is gradually regaining lost ground. Public opinion particularly in Europe, to some extent fostered by debates, has pressurized their governments to withdraw their troops from unauthorized wars, especially in Iraq. There is no doubt that mistreatment of detainees at Guantanamo and Abu Ghraib have played a significant role in the anti-torture movement. That torture has no place in a liberal democracy is demonstrated by the efforts of the governments to 'outsource' the practice in order to keep their lands and slates clean. The idea that human rights are sacrosanct and not negotiable, and that it was under siege during the Bush era is acknowledged even in the United States. It is ironic that Americans who had earlier backed the aggression of President Bush have already started terming his era as the "evil past."

Finally, the torture debate in the West has a message for the "not-so-liberal" democracies of South Asia. Firstly, as the American experience, though inconclusive shows, it is better to abolish torture or coercive interrogation of suspects for all time to come than to 'regulate' it. Secondly, as the region is still plagued by ethnic conflicts at alarming levels, it will be prudent to abolish the practice of torture than allow it to be grossly misused by unscrupulous politicians to suppress ethnic minorities on the pretext of countering terrorism. Democracy

⁴⁰ Carsten Wieland, "Nation State by Accident", (New Delhi: Manohar, 2006), p. 71.

⁴¹ *Ibid.*

in South Asia is still under severe stress given the demoralising levels of illiteracy, ethnic strife, and corruption. Even if the South Asian region lags behind on all parameters pertaining to the characteristics of a 'liberal democracy,' yet it would be better off avoiding the excesses committed by Western democracies on the pretext of protecting or promoting democracies.