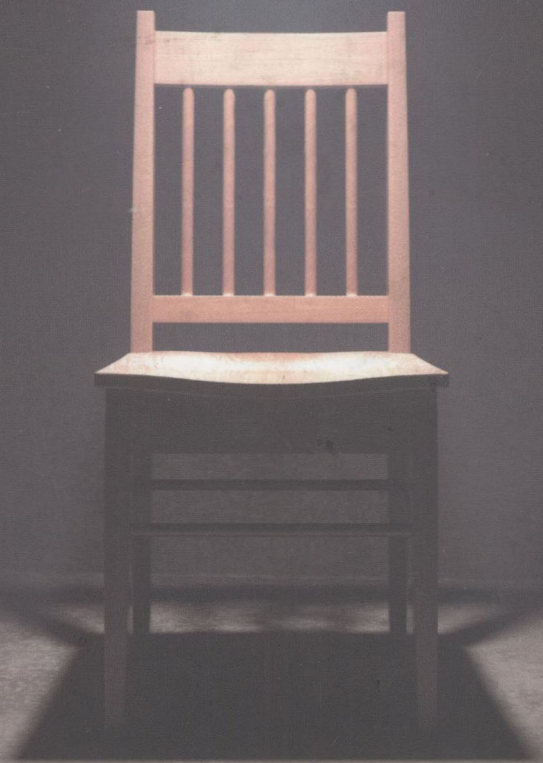
JINEE LOKANEETA

Transnational Torture



Law, Violence, and State Power in the United States and India

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Contents

Introduction: Do the Ghosts of *Leviathan* Linger On?

Law, Violence, and Torture in Liberal Democracies

The 2009 Oscar hit was a British/Indian film titled *Slumdog Millionaire* about a boy from a Mumbai slum who manages to win twenty million rupees in a game show, thereby enacting a true "rag to riches" story.[1] Less talked about is the framing of this incredibly popular film, which provides an insightful comment on the discourse on torture in contemporary India. In the very first scene of the film, one observes a constable beating up the boy while the senior police official calmly watches, both assuming that the boy has been winning the game show by cheating. Interestingly enough, news reports mention that initially the senior official was seen as torturing the boy, but the Indian government asked the film producers to change the role of the torturer in the film. As *New York Times* reporter Somini Sengupta explains,

> On one occasion, Mr. Colson [the producer of the film] recalled, the Indian authorities took umbrage at a scene in the script in which a suspect is tortured by a police commissioner during interrogation. The Indian authorities told Mr. Colson to take out the police commissioner. No police officer above the rank of inspector should be shown administering torture, they said. The makers of "Slumdog Millionaire" obeyed.[2]

Here, it is striking that instead of asking for scenes of torture to be removed entirely as being improbable, indeed impermissible in a liberal democracy, the Indian government appears to have been more specific in its request that no senior police officer be represented in an act of torture. In this moment, the film simultaneously captures the routineness of torture in the Indian criminal justice system even while complying with the govern-

ment's request not to subvert the state's recent interventions, which rely on a "clean" image of its senior officials.[3]

Another key moment in 2009 was the public disagreement of the former U.S. vice president Dick Cheney with President Obama just as the latter was announcing the plans to close down the prison at Guantánamo Bay and espousing an unequivocal rejection of torture. When asked whether the interrogation techniques used against "high-value detainees," including waterboarding, were authorized by him, Cheney said,

> I was aware of the program, certainly, and involved in helping get the process cleared, as the agency in effect came in and wanted to know what they could and couldn't do. . . . And they talked to me, as well as others, to explain what they wanted to do. And I supported it. . . . It's been a remarkably successful effort, and I think the results speak for themselves.[4]

Cheney publicly admitted his support for waterboarding, widely considered a form of torture, despite statements against torture by the administration he represented. Thus, in 2009, in both these liberal democracies, India and the United States, despite the long history of laws against torture, justifications of this violence crept directly or indirectly into popular and legal/political discourses.

This study focuses on the legal and political discourses on torture in India and the United States to theorize the relationship among law, violence, and state power in liberal democracies. In liberal legal and political theory, one of the foundational principles is that law in modern societies is primarily based on certain norms/rules and principles. In legal theory, H. L. A. Hart and Ronald Dworkin assert that law based on coercion, as upheld by John Austin and Thomas Hobbes, has been largely replaced in modern societies by law based on rules and principles.[5] Hence, there is an assumption by political and legal theorists that violence occupies a secondary place in the legal process. This assumption in legal and political theory has been successfully challenged by critical theorists such as Robert Cover, Austin Sarat, and Timothy Kaufman-Osborn, who, using the example of the death penalty, point to law's continued dependence on violence in modern societies.[6]

With regard to torture in particular, Michel Foucault has argued that torturous spectacles used in ancient regimes to represent the sovereign's (state) power have been largely replaced by disciplinary and surveillance mechanisms in modern societies.[7] This has meant that the state relies less on force and more on discipline. In contrast, theorists such as Darius Rejali argue that

instead of disciplinary institutions replacing torture, as Foucault suggests, torture actually becomes a part and parcel of those disciplinary institutions.[8] He thus rightly argues that torture is not simply a feature of premodern society but also a key aspect of modern society.[9] Further, Talal Asad points out that the existence of modern torture has a practical logic since it is "integral to the maintenance of the nation state's sovereignty" in policing and upholding national security.[10]

Following this tradition of analyzing the role of violence in liberal democracies, specifically torture, I examine the jurisprudence of interrogations in the United States and India to examine how their legal discourses address the question of torture. In this study I argue that even before recent debates on the use of torture in the "war on terror," the legal discourses were much more ambivalent about the infliction of excess pain and suffering than most political and legal theorists have acknowledged.[11] Rather than viewing the recent policies on interrogation as anomalous or exceptional, I argue that efforts to accommodate excess violence are long-standing features of interrogations in both the democracies.

Torture in Democracies: A Liberal Paradox

Images of U.S. soldiers engaging in torture at the Abu Ghraib prison in Iraq in 2004 brought the debate on torture back to the forefront of legal and political discourse both in the United States and worldwide. Official U.S. memos authorizing "harsh interrogation techniques," such as waterboarding, and the military tribunals under the Military Commissions Act of 2006 debating the admissibility of coercion-based evidence, confirmed that these images were not mere aberrations. These images and memos resulted in a proclamation by both the critics and the defenders of these policies that the post-9/11 United States had witnessed a return of the unthinkable: torture. This articulation is premised on the assumption that in liberal democracies, instances of torture are considered either features of the past or, at worst, aberrations that occur rarely. As the 1999 *U.S. Report on Torture* to the Committee against Torture states, "Torture does not occur in the United States except in aberrational situations and never as a matter of policy."[12] Similarly, in India, the late Indian prime minister Rajiv Gandhi stated in January 1988, "We don't torture anybody. I can be very categorical about that. Wherever we have had complaints of torture we've had it checked and we've not found it to be true."[13] The assertions continue despite the documentation of acts of torture in both these democracies.

In this section, I explore why torture appears as a paradox for liberal democracies both theoretically and historically. One of the self-defining features of liberal democracies is the absence of torture or indeed any "unnecessary" state violence. This appears both in the political rhetoric (noted earlier) and in liberal theory. Thus, Michael Ignatieff, in his discussion of the United States as a liberal democracy, refers to it as "a constitutional order that sets limits to any government's use of force."[14] Of course, liberal democracies are characterized not just by their relationship to violence. As Steven Lukes notes,

> Democracy, definable in different ways, is on almost every account a system with mechanisms that hold its officials responsive and responsible to the people's wills or preferences. A liberal democracy will have a further feature: it will hold its officials responsible for respecting the principles of liberal equality: for not violating their citizens' rights and *respecting their dignity*.[15]

Thus, there are a number of other features that characterize liberal democracies, such as the rule of law, representational government, state accountability through a system of checks and balances, separation of powers, and protection of individual rights and liberties, including a respect for human dignity. All these features have one thing in common: they are conceptually and ostensibly based on consent.

After all, as one of the foremost theorists of classical liberalism, John Locke, put it, "For 'tis not every compact that puts an end to the state of nature between men, but only this one of *agreeing together mutually* to enter into one community, and make one body politic."[16] Locke goes on to explain, "all men are naturally in that state [of nature], and remain so, till by their *own consents* they make themselves members of some politic society."[17] Thus, John Locke emphasized the importance of consent in the formation of the government.

Of course, the liberal state, while being based on consent, continues to be closely related to violence, as noted in Max Weber's famous statement that "legal coercion by violence is the monopoly of the state."[18] As Weber explains,

> Sociologically, the question of whether or not guaranteed law exists in such a situation depends on the availability of an *organized coercive apparatus* for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion.[19]

Weber does recognize the significance of norms in the regulation of society, but he asserts that respect for these norms exists only because they can be backed by legal coercion. Thus, the functioning of the state is closely related to the concrete possibility of legal coercion. Liberal theorists, while accepting the role of violence, however, specify that the state does not govern primarily through violence and that any violence it employs is actually constrained. As Ignatieff puts it,

> [L]iberal states seek both to create a free space for democratic deliberation and to set *strict limits to the coercive and compulsory powers of government.* This is the double sense in which democracies stand against violence: positively, they seek to create free institutions where public policy is decided freely, rather than by fear and coercion; negatively, they seek to reduce, to a minimum, the coercion and violence necessary to the maintenance of order among free peoples.[20]

For Ignatieff, the liberal state both ensures the freedom for people to deliberate and also subjects them only to the minimal violence required to maintain law and order in society. Indeed, the liberal state not only views coercion as a necessary "evil"; it also requires that much introspection take place before the administration of pain and suffering. As Ignatieff notes, "Only in liberal societies have people believed that the pain and suffering involved in depriving people of their liberty must make us think twice about imposing this constraint even on those who justly deserve it."[21] Thus, coercion, violence, pain, and suffering are subject to scrutiny and kept to a minimum, according to Ignatieff's framework of a liberal state and democracy.

Therefore, despite Weber's blatant assertion about the state's monopoly on violence, it is undisputed that the liberal state exhibits an attempt to constrain the violence. Whether the limits to violence are put in place for the purpose of masking its real nature, gaining legitimacy, or displaying a developed respect for human dignity, it is this feature of liberal democracy that makes torture and excess violence a particularly paradoxical proposition.[22]

Indeed, if one traces the standard narrative of the history of Western torture, one discerns a similar assumption that the decline of torture is associated with the emergence of the Enlightenment era and a "civilized" modern society.[23] As Jeremy Waldron articulates it, "torture is certainly seen by most jurists—or has been seen by most jurists until very recently—as inherently alien to our legal heritage."[24] Historically, in Europe, apart from the Greeks and the Romans, the use of torture due to the influence of Roman canoni-

cal law began in the twelfth century and was institutionalized as a practice.[25] Subsequently, a demand for reform in the eighteenth century by Enlightenment philosophers such as Cesare Beccaria and Voltaire, who focused on the human body and human dignity, led to the removal of many "barbaric" forms of punishment (penal torture) and interrogation (judicial torture).[26] In many narratives on the history of Western torture, the eighteenth and nineteenth centuries were considered to be the period when torture was abolished in almost all countries of Europe, and this phase was seen as marking the emergence of modernity.

There are of course variations on this standard narrative of Western torture. In a fascinating book, *Invention of Human Rights*, Lynn Hunt traces the process by which human rights became self-evident in the eighteenth century, particularly in the American Declaration of Independence in 1776 and the French Revolution in 1789. Hunt explains that during this time, "New kinds of reading (and viewing and listening) created new individual experiences (empathy), which in turn made possible new social and political concepts (human rights)."[27] More specifically, in the context of torture, Hunt notes that the decline of torture was integrally connected to the ways in which notions of empathy and autonomy emerged in Europe at this time. However, these changes did not occur just because "judges gave up on it or because Enlightenment writers eventually opposed it." Rather, she suggests, "Torture ended because the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves."[28]

Karl Shoemaker also locates the transformation of punishment from painful to painless methods in terms of a change in the understanding of pain from medieval to modern times. In modern times, he notes, there emerged an aversion to pain and a desire to control it.[29] Lisa Silverman maps this change within the medical profession, which evolved from treating the root cause of a problem through surgery to treating the pain associated with the problem and getting rid of it.[30] Thus, scholars point to a consensus among the abolitionists of torture in Europe in the eighteenth century that pain had to decline and torture had to be seen as primarily a negative tool to be used in extremely rare cases.[31]

These scholars complicate the standard narrative on the decline of torture to the extent that they link that decline to transformations in larger social processes, such that the contribution of the abolitionists must be seen merely

as moral justification of the reforms rather than as their primary cause. However, these studies continue to fit neatly into the Enlightenment narrative of the decline of torture from medieval to modern times. In the process, they fail to explain why the revival of torture in the twentieth century could take place in many of the same European countries despite the progress against pain. In addition to the colonial powers, England and France (which used torture even prior to the twentieth century), Nazi Germany, Stalinist Russia, Italy, and Spain also used forms of torture in their regimes.[32] The so-called revival of torture also questioned the dominant explanation that it was the moral and humane considerations in modern societies that led to the decline of torture in the first place.

In contrast to the "fairy tale" (as Langbein terms it) of abolition of torture as a story of progress in modern societies, Edward Peters and John Langbein point to other reasons why the use of torture declined.[33] Langbein notes that it was mainly two juridical forces that led to the rejection of torture in Europe: first, the development of "new criminal sanctions"; and second, a "revolution in the law of proof" in the seventeenth century.[34] Thus, in addition to death and disfigurement as punishments, there was now a range of alternatives, including the disciplinary institutions such as prisons and correctional facilities. The laws of evidence also began to be based on more circumstantial and physical evidence because of the rise of new technologies. Therefore, torture was no longer seen as an unavoidable part of the legal criminal procedure. The disappearance of the "legal and technical underpinnings of torture" allowed torture to be the target of "logical, moral, and social criticisms."[35] Indeed, Lisa Silverman suggests that even Beccaria recognized the limitations of torture as a mechanism for gaining the truth.[36] In other words, a change in the requirements of the legal system also allowed torture to become less important in Europe in the eighteenth century. Ironically enough, although Enlightenment philosophers campaigned against torture both as contradictory to the rights and will of the citizen (humanistic reasons) and as inefficient (pragmatics), their contributions continue to be highlighted primarily in terms of a moral condemnation of torture.

Darius Rejali and Edward Peters point out that consequently, torture continues to be considered primarily in "moral and sentimental terms," thereby limiting the debate on torture and especially moving the discussion away from the pragmatics of the phenomenon.[37] Addressing the pragmatics of torture in modern democracies is of course not intended to remove the moral aspects of the issue but, rather, is meant to allow for better recognition of the significance of both morality and pragmatics, historically and in modern times.[38]

The "fairy tale" of abolition of torture is significant also because it allows for the association of torture with different stages of society. Torture is associated not only with either the ancient or medieval regimes, as noted earlier, but also with the "other," generally non-Western societies, which continue to be considered more "primitive" and "barbaric." Conversely, the focus on torture as a feature of the "other" suggests that it is inherently absent in more modern, "civilized," democratic (often Western) societies. Waldron notes that even as early as 1911, the Encyclopedia Britannica noted that "the whole subject [of torture] is now one of only historical interest as far as Europe is concerned," thereby absolving the entire continent of the "sin" of torture.[39]

This notion of the impermissibility of torture as an indicator of modern, civilized societies makes an appearance each time practices of torture appear. In fact, immediately after September 11, 2001, when FBI officials appeared on talk shows and gave statements in the newspapers about the possibility of using torture, one FBI agent who had been involved in the 9/11 investigation was quoted as saying, "'We are known for humanitarian treatment, so basically we are stuck.'"[40] Legal scholar Edward Greer rightly characterizes this inherent belief in the absence of torture in the following way: "In the hegemonic legal ideology of the United States, torturing people is taboo."[41] Thus, the United States cannot appear to be condoning an "uncivilized" and "medieval" practice such as torture. Echoing a similar sentiment, in *D. K. Basu v. State of West Bengal*, the Indian Supreme Court stated the following:

> The word torture today has become synonymous with the *darker side of human civilization*. . . . It is a calculated assault on human dignity and *whenever human dignity is wounded, civilisation takes a step backward—[the] flag of humanity must on each such occasion fly half-mast*.[42]

Thus, theoretically, rhetorically, and historically, the standard narratives on the history of torture have created a discourse of impermissibility of torture in modern liberal democracies and indeed deemphasized the role of violence in the very functioning of the state and law. In such a framework, any reappearance of torture in image or in policy is considered an exception, and it is this assumption that I unravel in the course of this study.