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# National Security versus Fundamental Rights: Legalising Torture to Maintain Internal Peace

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*Autonomy of an individual, particularly bodily autonomy, has been an integral part of the setup of Fundamental Rights enshrined under Part III of the Constitution of India. These rights have served as a protective mechanism for individuals against undue oppression by the State and its agencies, and ensure that citizens are not subjected to violent means of maintaining order in the State, particularly torture and unjust incarceration. However, the State machinery, taking the support of various constitutional provisions and justifications based on prevailing ground realities, has resorted to multiple methods of torture, both orthodox and unorthodox methods, which include, but are not limited to, imposition of AFSPA and interrogation through psychotropic drugs, respectively. The purpose of this article is to understand India's position and its commitments to the International Convention on Torture, and whether the justification of maintaining internal peace and order used by the subsequent governments stands the test of its commitments at the international stage. Further, this article shall also endeavour to decode the judicial discourse on the use of methods of torture on both citizens as well as foreigners, and to determine whether such acts of torture, particularly methods like Narco-Analysis, Polygraph test, used during interrogation, amount to violation of the fundamental rights of the persons subjected to it, and if it is violative of the same, what safeguards are available against such torture. The article shall also aim at understanding the dichotomy between securing the fundamental rights of the individual and maintaining internal peace and national security, and shall conclude by trying to lay down a way forward.*

**Keywords:** *constitution, fundamental rights, torture, national security, constitutional morality.*

## INTRODUCTION

*"There have been, and are now, certain foreign nations... which convict individuals with testimony obtained by police organisations possessed of unrestrained power to seize persons... hold them in secret custody and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of this Republic, America will not have that kind of government."*[1]

Maintenance of national security, as envisioned under the larger scheme of pursuing and fulfilment of a nation's national interest, has been the cornerstone of the policy framework of all the countries of the world, whether civilised or totalitarian. State policies, thus, contain an element of supremacy of national security over other considerations, particularly the protection of the civil liberties of the people living in the country. While this supremacy remains virtually unchallenged during a war, its applicability during peace time is subject to the law of the land, as the expansion of governmental authority to supersede the Fundamental Rights ceases upon the cessation of armed conflicts and should eventually give way to a rights-based legal regime, where the State is bound to respect the Fundamental Rights of its subjects.

However, the perpetual need of maintaining the law-and-order situation in a state as well as securing the borders in the face of persisting threats has given a justification to the executive to side-step the claims of rights and liberties, to the extent of abusing them as and when it deems it necessary, with the judiciary often accepting these claims and tacitly allowing the violation of fundamental rights and liberties of the individuals subjected to the hard-handling of the authorities.

Almost all the countries of the world, be it the United States of America, which is the torch-bearer of Human Rights and constitutional liberties across the globe, to countries like India, where fundamental rights are not just legal precepts, but are accorded the status of basic guarantees which are deemed to be inviolable, except in certain circumstances, give

[1] *Ashcraft v Tennessee* [1944] 322 U.S. 143

preference to national security considerations over the constitutional guarantees wherever possible. For example, President Bush's 2002 U.S. *National Security Strategy* spoke of a commitment to protecting basic human rights. [2]However, in the same document, the POTUS unequivocally stated that defending our Nation against its enemies is the first and fundamental commitment of the Federal Government.

This approach has enabled the State to use means such as undue incarceration, torture, among other things, to detain without a warrant or a trial, any person who causes or is suspected to cause a threat to its national security. Such State actions have created a conflict between maintaining national security and protecting fundamental rights in almost all the legal systems of civilised nations.

General preference to security concerns has not only derogated the indispensable fundamental rights to mere legal provisions, but has also raised various questions on the sanctity of the constitutional structure of such countries. The purpose of this article is to study the commitment of the Government of India towards preventing the infliction of torture upon its subjects and investigate its actual practices towards the said commitment.

## TORTURE: MEANING, DEFINITION, AND INTERNATIONAL POSITION

The Oxford Dictionary defines torture as the infliction of severe pain as a punishment or means of coercion. In general parlance, it refers to inflicting a treatment of such a nature that is brutal and detrimental to the physical, emotional, or psychological well-being of the victim of such a treatment. The general purpose of subjecting a person to such cruel, intimidating, and dehumanising activities is to extract some information from the person that he was unwilling to give during the routine interrogation, or to punish the person for a wrong done by him.

Torture was initially considered as the physical violence inflicted upon a person, either as a punishment or as a means of interrogation, the evidence of which can be found in the works of Ulpian, a prominent Roman jurist who defined torture as the torment and suffering of the body to elicit the truth[3]. This view came to be supported by various legal and medical

[2] 'Overview of America's International Strategy' (*The White House,* 01 June 2002) <https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss1.html> accessed 29 March 2025
[3] *Ibid*

scholars of that time, particularly Gary E. Jones, who in his article on torture.[4], presented a case for the justification of torture wherein he was of the view that a humane torture which does not cause an everlasting harm is justified, and also formed the basis of the report of the Compton Commission which was formed to investigate into the alleged brutality inflicted by the Britishers upon the members of the IRA.

The Report, published in 1971, concluded that while violence inflicted upon the internees was deplorable, the methods of interrogation employed by the British were not violent[5] and therefore, the treatment was not considered to be torture. This explanation was heavily criticised by psychiatrist Anthony Starr, who, for the first time, raised the matter of sensory deprivation as being used as a means of torture. He opined that ... physical brutality was not the only kind of brutality that mattered... deprivation techniques could be used to produce was temporary episode of insanity ... no one could know the term aftereffects of such procedures would be upon men to whom applied.[6] This criticism initiated the shifting from the conventional meaning of torture as including only physical harm, towards including psychological harm as an essential component of torture.

After various attempts at defining torture not yielding sufficient results, it was the United Nations that framed a wide definition of torture through the Convention Against Torture. It defined torture as "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.*"[7]

This definition included both violent as well as non-violent means of torture which can have physical, as well as psychological effects on the victim, and therefore, forms the basis of

[4] G. E. Jones, 'On the Permissibility of Torture' (1980) 6(1) Journal of Medical Ethics <https://doi.org/10.1136/jme.6.1.11> accessed 29 March 2025
[5] Her Majesty's Stationery Office, *Report of the Enquiry into Allegations Against the Security Physical Brutality in Northern Ireland Arising Out of Events in August 1971* (1971)
[6] Anthony Storr, *Churchill's Black Dog, Kafka's Mice, and Other Phenomena of the Human Mind* (Ballantine Books 1990)
[7] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, s 2

determining whether an act committed by any State comes within the ambit of torture, where such act is committed during a war, internal conflict or even during peacetime. The convention, through its provisions, seeks to define the contours of the concept of torture and identify and subsequently punish the states that contravene the provisions of the convention.

Apart from the 1984 Torture Convention, various other instruments prohibit torture, but they do not use the word torture explicitly. These international instruments prohibit the states from inflicting any cruel, brutal, and inhumane treatment on the detainees, persons accused or suspected of committing any crime against the State, and ensure that the fundamental dignity of such persons is respected.

The UN Charter of 1945, under Article 55, imposes an obligation on the states "to promote universal respect for, and observance of, human rights and fundamental freedoms."[8] Further, Article 5 of the Universal Declaration of Human Rights (UDHR) 1948 declares that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment".[9] Furthermore, the International Covenant on Civil and Political Rights (ICCPR) 1966, under Articles 4 and 7, also prohibits the signatories from engaging in any activity like torture "during public emergencies that threaten the life of the nation."[10]

The Geneva Conventions of 1949 which deal with the rules applicable during armed conflict and is applicable on both combatants and civilians and ensures their protection from cruel and degrading treatment by the enemy states mentions that the detainees must be "treated with humanity and…shall not be deprived of the rights of fair and regular trial"[11] (Fourth Geneva Convention, Article 5). The UN General Assembly also adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 9 December 1975, which formed the basis of the present Convention against Torture.

[8] United Nations Charter 1945, art 55
[9] Universal Declaration of Human Rights 1948, art 5
[10] International Covenant on Civil and Political Rights 1966, arts 4 & 7
[11] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1950

## INDIAN POSITION ON TORTURE

Indian position on the issue of torture, particularly torture by the state authorities, can be understood through its theoretical and practical concepts. Theoretically, while India is a signatory to the 1984 Torture Convention, the state has not yet ratified the Convention[12], meaning that the treaty is, as of now, not applicable to the Government of India. The practical implication of such non-ratification is that the international authorities under the Convention cannot hold the state accountable for any action that violates the provisions of the Convention. However, it cannot be said that the State has unbridled power to subject its people to state-conducted torture, or any other violent activity like torture. The Indian judicial mechanism has put in place various protective measures for the prevention of torture by interpreting the existing constitutional and legal provisions to include protection against torture as an essential part of all Indian laws.

**General Protection:** The Indian Constitutional and legal system does not permit violence by the state authorities and provides the people, an inviolable protection against such state transgressions. The scheme of Fundamental Rights enshrined under Part III of the Constitution of India protects the people (citizens, as well as non-citizens in some cases) from any state action which is violative of their Fundamental Rights.

Article 21[13], which forms the cornerstone of the notion of Fundamental Rights, ensures that every person has a right to life and personal liberty, which cannot be violated except according to the procedure established by law. This provision not only forms the principal protective measure for the people of the state against any violence conducted by the state, but its contravention also allows the aggrieved party to approach the Constitutional Courts, i.e., the Supreme Court under Article 32[14] and the High Courts under Article 226[15] to seek a remedy against the violation of the right under Article 21.

Over the past few decades, the Hon'ble Supreme Court has expanded the scope of the protection available under Article 21. Through its various judgments, the Court has

[12] Ravi Nair, 'India's continued refusal to ratify U.N. Convention Against Torture lacks substance' *The Leaflet* (21 November 2022) <https://theleaflet.in/international-law-world-affairs/indias-continued-refusal-to-ratify-u-n-convention-against-torture-lacks-substance> accessed 29 March 2025
[13] Constitution of India 1950, art 21
[14] Constitution of India 1950, art 32
[15] The Constitution of India 1950, art 226

interpreted the phrase 'right to life' as mentioned under the provision to include the right to live with dignity under the purview of the right to life.[16] Further, the apex court has also interpreted the phrase procedure established by law and has stated that any procedure which allows the state to bypass the protection under the provision must be a procedure which is just, fair and reasonable.[17]. Any procedure that does not fulfil the said criteria shall be struck down as unconstitutional by the apex court, and therefore, cannot violate the rights of the beneficiaries of the right.

**Protection Against Custodial Torture:** Custodial violence, which includes physical torture and 'third-degree' treatment of the inmates of a prison is one of the grotesque forms of torture wherein the police authorities, in their capacity as the agents of State, subject the incarcerated to gruesome violence either to extract a confession from them, or to extract revenge for a perceived wrong done by them. This form of torture can also be considered as a 'death penalty' before the actual judgement of a death penalty is pronounced, as in some cases, such torture leads to the death of the victim of such violence.

The biggest tragedy of this exercise is not just the demise of the human rights of the accused, but the mockery it makes of the entire penal process as the police authorities, which are under an obligation to protect the life and limb of the accused under their custody, start acting as vigilantes, and punish the accused 'on behalf of the society.'

The Bhagalpur Blinded Prisoners case[18], Nilabati Bahera case[19] There are some of the many instances where the police subjected the inmates to such extreme levels of physical torture that it resulted in their deaths, or physical disability in some cases. In cases which affect the conscience of the society at large, such as rape cases, the authorities deliberately choose to forego their constitutional obligations and succumb to the societal pressures to give an instant justice to the accused, even in those cases where their culpability has not yet been proven.

To counter such increasing instances, the Supreme Court took notice of the issue in the case of D.K. Basu v State of West Bengal. It issued various guidelines to be complied with by the

[16] *Francis Coralie Mullin v The Administrator, U.T. of Delhi & Ors* (1981) 2 SCR 516
[17] *Maneka Gandhi v Union of India* (1978) 2 SCR 621
[18] *Khatri and Ors v State of Bihar and Ors* (1981) 1 SCC 627
[19] *Nilabati Bahera v State of Orissa* (1993) 2 SCC 746

police authorities when taking and keeping a person in their custody. The primary purpose of these guidelines was to protect the persons in custody from any form of violence by the police, and to impose accountability if such an instance does take place. It was observed that Torture has not been defined in the Constitution or other penal laws. Torture of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilisation. Further, it stated Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means.

The interrogation and investigation into a crime should be, in the true sense, purposeful to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind closed doors what the demands of our legal order forbid. No society can permit it.

The Court went on to state that Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1)[20] are required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhumane, or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation, or otherwise.

In conclusion, the apex court issued guidelines for the prevention of custodial torture and upheld the right of compensation of the aggrieved party in such cases. The guidelines have the force of law and therefore, act as the law of the land in the absence of a specific statutory provision.

**Protection Against Narco-Analysis and Other Scientific Means of Evidence Collection:** With the increasing awareness and consequent backlash for the conventional methods of torture employed by state authorities, the methods of torture have undergone a substantial change in the last decade and a half. The authorities have started using various scientific

[20] Constitution of India 1950, art 21 & 22(1)

techniques, particularly Narco-analysis, polygraph tests, and brain mapping tests, among others, to facilitate the process of investigation and evidence collection. While each test has a different modus operandi, the underlying theme behind all these tests is to make the subject lose his ability to frame stories in his mind so that he cannot lie, and that whatever answer he gives to a question shall be the truth.

The driving force behind the popularity and increasing usage of these techniques is that they enable investigative agencies to extract the truth from the accused person without resorting to any violent methods. However, some scholars have termed these tests to be a form of torture or a psychological third-degree treatment.[21]

The reason behind terming them as such lies in the fact that these tests fulfil all the criteria laid down by the UN Torture Convention: they produce physical/mental suffering, it is intentionally inflicted, its purpose is to extract information, and it is enacted by an official authority.[22] Taking cognizance of such tests being violative of the rights of the accused as per the Indian Constitution, the Hon'ble Supreme Court, in the case of Selvi v State of Karnataka.[23], made the following observations: "It is undeniable that during a narcoanalysis interview, the test subject does lose `awareness of place and passing of time'. It is also quite evident that all three impugned techniques can be described as methods of interrogation which impair the test subject's `capacity of decision or judgment'. Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes `cruel, inhumane or degrading treatment' in the context of Article 21.

It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud, or inducement used to elicit the same. The popular perceptions of terms such as torture and cruel, inhumane, or degrading treatment are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.

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[21] Marcy Strauss, 'Torture' (2003) 48(1) New York Law School Law Review <https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1203&context=nyls_law_review> accessed 29 March 2025

[22] Abhishek Pathak and Mona Srivastava, 'Narco Analysis - A Critical Appraisal' (2011) 5(2) Indian Journal of Forensic Medicine and Toxicology <https://www.researchgate.net/publication/289437413_Narco_analysis_-_A_critical_appraisal> accessed 29 March 2025

[23] *Selvi & Ors v State of Karnataka* (2010) 7 SCC 263

Based on this observation and other evidence, the apex court held that such tests are violative of the protections available under Article 21 if done without the consent of the accused. The issue of consent was inserted by the Court after understanding that such methods, while not indispensable, may certainly be useful in certain cases where investigation needs to be expedited or where the accused is a hardened criminal. The Court in this case set out various guidelines which must be complied with by the investigative authorities while undertaking such tests.

It is important to note that the judges in this case observed the importance of the UN Convention Against Torture. It observed: "……it is necessary to clarify that we are not bound by the contents of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) [Hereinafter `Torture Convention'].

This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253[24], and we do not have a national legislation which has provisions analogous to those of the Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms. Through this observation, the Court made it clear that while the domestic courts are not expressly bound by the Convention, they can take recourse to the letter and spirit of the document to evaluate the actions of the state authorities.

**LEGALIZING TORTURE: FUNDAMENTAL RIGHTS v NATIONAL SECURITY**

Having gone through the discourse engaged into by the Hon'ble Supreme Court on the issue of torture, one can imagine that the rising consciousness about the means and effects of torture, both physical and psychological, would have proven to be a strong motivating factor for the Indian Legislative and Executive branch to frame such laws and policies which would serve as the guiding principles to regulate, and even abolish the cruel and abhorrent practice of torture.

But to the dismay of the supporters of human rights, the State has made provisions wherein the practice can continue unabated. The biggest travesty is that this form of 'institutionalised

[24] Constitution of India 1950, art 253

torture' has the backing of the judicial set-up, as it is undertaken in the name of ensuring national security.

National security is a very sensitive issue that flares up the nationalistic sentiments of the people of a nation to the extent where the community consciousness favours the curtailment, or even the violation of the fundamental human rights of the persons suspected to have causing a threat to a nation's security.[25] The government takes advantage of the favourable public sentiment and frames laws that cannot be challenged for their procedural impropriety. Consequently, they are upheld by the constitutional courts if a challenge is raised. Upon the issue of violation of the fundamental right to life and personal liberty, the general trend is that while the courts remain concerned about the demise of the rights, national security takes precedence in some special cases. One reason for such pronouncements lies in the fact that judges are generalists and not national security experts.

This not only makes their job difficult, but also imposes an extra burden on them as not only are they not in a position to accurately analyse the threat perception, but even a minor error in their judgement may prove to be catastrophic for the nation's security. Therefore, a sense of deference on the part of the judiciary towards national security considerations becomes not only wise but also imminent.[26]

The primacy of maintaining national security over ensuring respect for civil liberties as a guiding principle for legislative and executive actions is not restricted to third-world states like India, China etc., Countries like the USA, UK which are often seen championing the cause of human rights and civil liberties, whenever faced with a crisis, conveniently crucify the civil liberties of their citizens at the altar of national security, in the name of fighting against the crisis. Further, states like Israel, which are always under the threat of an attack, as in the latest October 7 attack by Hamas, run their counter-insurgency operations with the single-point agenda of destroying their enemy, whatever the cost may be. Its actions are not only justified but also openly supported by the Western powers. The mindset and actions of

[25] Riddhi Dasgupta, 'Constitutionality of Torture in a Ticking-Bomb Scenario: History, Compelling Governmental Interests, and Supreme Court Precedents' (2010) 30(2) Pace Law Review <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1040&context=plr> accessed 29 March 2025
[26] Geoffrey R. Stone, 'National Security v. Civil Liberties' (2007) California Law Review <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2962&context=journal_articles> accessed 29 March 2025

such countries towards the dichotomous relation between national security and civil liberties are explained below:

**United States of America:** During World War II, the United States placed more than 120,000 Japanese-Americans in internment camps. There was no evidence to suggest that these people are loyal to the United States. Army officers, according to one general, think the Japanese are Japanese. The United States finally realised that it had made a huge mistake. In 1988, Congress passed a law recognising that actions were committed without adequate security clearance and that they were motivated by ethnic hatred, the threat of war, and a lack of political leadership. Those who were arrested were sent back. This is a great tribute to the United States.[27]

On the other hand, it should be remembered that there was a precedent in Korematsu v United States[28], where Korematsu was of Japanese descent. After the bombing of Pearl Harbour, he volunteered for the army but was rejected for health reasons. He got a job in the maintenance industry. Arrested in June 1942 for violating detention orders. He challenged the constitutionality of the orders. The question is whether the military's needs have been resolved.

The court was divided. Delivering the opinion of the majority of the Court, Justice Black stated: "*To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.*" Demonstrating significant deference to the executive, he concluded: The military authorities considered that the need for action was great, and time was short.

We cannot, by availing ourselves of the calm perspective of hindsight, now say that at that time these actions were not justified. Not many in the United States, in the moderate spectrum of views, would now defend this outcome, even viewed from the perspective of 1942. In any event, in 1984, a federal district court overturned Korematsu's conviction on the ground that the government had knowingly withheld information from the courts when they were considering the critical question of military necessity. In giving judgment, Judge Patel observed that the case 'stands as a caution that in times of distress the shield of military

[27] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) The International and Comparative Law Quarterly <https://www.jstor.org/stable/3663134> accessed 29 March 2025
[28] *Korematsu v United States* [1944] 323 U.S. 214

necessity and natural security must not be used to protect governmental institutions from scrutiny and accountability'.

The second decision of the United States Supreme Court is Ex parte Quirin (1942)[29], the so-called 'Saboteurs case'. It is a case of a very different kind and in many ways more understandable than Korematsu. U.S. government officials have called it a symbol of detention at Guantanamo Bay. In June 1942, while the United States was at war with Germany, eight Nazi agents, including an American citizen, entered the United States by submarine. They planned to commit acts of violence. Two of them presented the plan. On July 2, 1942, President Roosevelt ordered that these men be tried by a military commission for crimes against the laws of war and the principles of war.

The statement added that they no longer have access to the courts. On July 8, 1942, the trial began and proceeded in secret. Three weeks later, the Supreme Court convened a special summer session to hear petitions for habeas corpus filed by the killers. The defendants argued that they have a constitutional right to a fair trial and a right to a trial in a civil court. On July 31, 1942, the Supreme Court ruled that the military commission was illegal and held it illegal.

On August 8, 1942, all of the mockers were found guilty, and six of the eight were executed. Their sentences were reduced. About three months after the execution of the assassins, the Supreme Court issued a ruling that allowed Congress to authorise military commissions to try violations of the laws of war. However, the court held that standing for judicial review does not apply to habeas corpus. However, secret tests without proper judicial guarantees are allowed by law.

Then came the terror of September 11, 2001. Using civilian aeroplanes as missiles, Al-Qaeda terrorists attacked and attempted to attack important state and national symbols. Of America. The army could not respond. Three days later, President Bush declared a national emergency. Congress quickly passed the PATRIOT Act, which gave the executive branch broad powers to violate civil liberties.[30]

[29] *Ex parte Quirin* [1942] 317 US 1
[30] Robert N. Davis, 'Striking the Balance: National Security vs. Civil Liberties' (2003) 29(1) Brooklyn Journal of International Law <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1341&context=bjil> accessed 29 March 2025

Congress authorises the president to use all appropriate force against those responsible for the terrorist attacks on September 11 to prevent further attacks. On November 13, 2001, the President ordered the trial of those accused of violating the laws of war by military commissions. This order has been changed several times. Since January 2002, approximately 660 detainees have been transferred first to Camp X-Ray and then to Camp Delta in Guantanamo Bay.

This statistic includes children between the ages of 13 and 16, as well as the elderly. Recent reports suggest that Muslim prisoners were forced to shave their beards, contrary to their religious traditions. According to a presidential decree, all prisoners have been stripped of their rights as prisoners.

**Israel:** No country in the world has enshrined human rights in its constitution. Not only does Israel have no constitution, but there are no laws to establish human rights. These rights are not derived from the constitution, but are considered extra-constitutional. This is why the courts have ruled that people have the right, the origin of which is unknown to this day, to do things that are not prohibited by law. But in the absence of a constitution, only the legislature or any other party may limit this right whenever and wherever necessary. A strong legislative assembly, which does not claim to be democratic, is entitled to curtail human rights. His main goals, like most foreign leaders, are to ensure security, public order, and political stability. As a result, he considered human rights a threat and a danger.

This idea of freedom of speech, for example, was expressed in the Press Act of 1933, which determined that no newspaper could be published without permission from the police. That decision continues that the High Commission has the power to suspend the publication of a newspaper for such period as it thinks fit without prior notice if it publishes information which it believes the High Commission will cause problems in the lives of the people. Or if the newspaper has published falsehoods or falsehoods which, in the opinion of the High Commission, are likely to cause confusion or confusion. A council for the supervision of films and plays, the members of which were appointed by the High Commissioner, was established in other ordinances, and no film or play could be shown if it did not obtain its approval, while no criterion or limitation was placed on the council's discretion.'

Another ordinance, which established the severe crime of incitement to rebellion, included in the crime, among other things, publication of material which could lead to hatred, scorn, or disloyalty toward the authorities, or could arouse dissatisfaction or disquiet among the inhabitants of Palestine. One can list numerous other regulations, in addition to the foregoing antidemocratic measures, which delimit freedom of speech and other liberties to a distressing degree.

The most telling blow to human rights was delivered by the Mandatory Government in the form of the Defence (Emergency) Regulations, 1945. These Regulations were promulgated to expedite the war that the British regime was waging against the national movement of the Jewish community. They gave every army officer who was designated for this purpose the power to arrest and punish, at his discretion, almost indiscriminately: to detain without trial and indefinitely, to deport, to prevent publication of newspapers and books, to confiscate and demolish buildings, to impose curfews and seal off territories, etc., etc. These laws are so strict that they don't try to balance security needs with human rights. They give officers almost unlimited power and no way to check the wrongdoing.

It is the view of various Israeli scholars that it is particularly difficult in Israel to reach a suitable balance between the interests of national security and those of human rights. The special conditions that prevail here foster an extreme approach, which tends to assign absolute priority to national security above all other interests, and to disregard the need to strike a balance between them. This approach finds adherents both among the general public as well as in ruling circles. It may be found in the Knesset and even in the courts. As a result, whenever there is a clear conflict between national security and one of the basic human rights, and the two cannot be reconciled, national security wins out.[31]

While it may be advocated that the situation which Israel has found itself to be in since its formation has always been a precarious one: an existential crisis in the face of an unrelenting opposition which has necessitated a pro-active military response from the establishment, be it the wars against the Arab nations or the current conflict against the Hamas and Hezbollah terrorists, and that in such a high-stakes conflict.

[31] Itzhak Zamir, 'Human Rights and National Security' (1989) 23(2-3) Israel Law Review <https://doi.org/10.1017/S0021223700016782> accessed 29 March 2025

While it is hoped for, it cannot be expected that the parties shall fully comply with the humanitarian laws ensuring respect to the civil liberties of the terrorists and the general public; such an argument does not hold weight in the current time and age, which is the age of human rights.[32]

India also does not remain untouched by what can be a familiar notion of prioritising national security over civil liberties or fundamental rights, as named under the Constitution. There are various laws and constitutional provisions that give unfettered powers to law enforcement agencies to inflict both physical and psychological torture on persons who cause, or are likely to cause, or are even suspected of causing a threat to India's national security. Some of them are:

**1. Emergency Provisions: Articles 358 and 359:** Article 358[33] empowers the State to pass any law or take any executive action curtailing the fundamental freedoms enshrined under Article 19 of the Constitution, which include inter alia freedom of speech and expression, when the Proclamation of Emergency under Article 352 is in effect. Further, under Article 359,[34] the State is empowered to restrict the right to seek judicial remedy for the violation of fundamental rights (except Article 20 and 21). It means that during an Emergency, the State can suspend virtually all the fundamental rights of the people guaranteed to them by the Constitution, and the judiciary would become handicapped in such a situation.

**Armed Forces (Special Powers) Act 1958:** The Armed Forces (Special Powers) Act, hereinafter referred to as AFSPA, confers a power upon the armed forces of the nation to designate certain violence-prone areas as disturbed areas wherein the forces have a responsibility of maintaining peace and order and are endowed with some special powers to achieve their objective. These special powers are enumerated under Section 4 of the Act, and include the power of using violence for the maintenance of public order, where such violence may also lead to causing death of a person.[35] Further, the Forces under this provision are empowered to arrest without warrant any person who commits or is even suspected to have committed a cognizable offence and to use as much force as necessary to give effect to the

[32] Thomas I. Emerson, 'National Security and Civil Liberties' (1982) 9 The Yale Journal of World Public Order <https://core.ac.uk/download/pdf/72839276.pdf> accessed 29 March 2025
[33] Constitution of India 1950, art 358
[34] *Ibid*
[35] The Armed Forces (Special Powers) Act 1958, s 4

arrest. In the exercise of powers provided under this Act, the Armed Forces incarcerate a massive number of people and subject them to atrocities beyond comprehension. While some of them are terrorists or their supporters, a substantial number of common people of the region suffer the brunt of the powers.

The Supreme Court, in the case of Naga People's Movement of Human Rights v Union of India,[36] held that the Act is constitutional and is within the legislative competence of the Parliament. On the issue of misuse of powers under the Act, the court simply stated "While exercising the powers conferred under Section 4(a) of the Central Act, the officer in the armed forces shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order."

Apart from AFSPA, there are various other laws such as the Unlawful Activities (Prevention) Act, 1967, which deals with the issue of internal security and counter-terrorism, the Prevention of Money Laundering Act, 2002, which aims at curbing the practice of money laundering, under which the law-enforcement agencies have unbridled powers to arrest the accused persons without warrant and take them into custody for days even before filing of chargesheet. The undertrials are subjected to multiple interrogations and deplorable prison conditions, and are generally not granted bail. While it does not involve physical violence, it causes psychological trauma, as such accused persons are kept in dingy prison cells with hardened criminals, which eventually takes a toll on their mental health.

## JURISPRUDENTIAL ASPECTS OF JUSTIFICATION OF TORTURE

There has been an unending debate on these laws, which have, in a way, legalised torture, particularly in cases of terrorism and national security, and the silent affirmation of the Indian judiciary for such actions. While the arguments against these laws centre around the violation of human rights, there are various arguments given in favour of such laws, which focus on the primacy of national interest over individual interest. The dichotomy between these two ideas creates a gap between the theory and practice of the concept of non-derogable fundamental rights. The jurisprudential aspects of the debate can be seen in the debate between Positivists and Naturalists, where the former deems legislation as the primary

[36] *Naga People's Movement of Human Rights v Union of India* (1998) 2 SCC 109

source of law, while the latter aims to find law in nature. The famous Hart-Dworkin debate may also be invoked in the present inquiry.

According to Prof. Hart, law would primarily be the rules framed by the legislature to be followed by the judiciary, but would also include an element of discretion of the judge in a case where the law is ambiguous or non-existent. This element of discretion was targeted by Dr. Dworkin, stating that such discretion would subject rights to utilitarian considerations and therefore cannot be permitted. According to him, *"rights are trumps over utilitarian considerations."*

So, in a practical scenario, if a judge is allowed to exercise his discretion in allowing the Narco or polygraph test of an accused, he will decide the issue based on a cost-benefit analysis or popular perception and may agree to sacrifice the human rights of the accused for the larger good. Here, the judge would use his power of discretion to discriminate among the accused persons, which would be against the spirit of human rights.

To further understand the jurisprudence behind this debate, one can look into the concepts of Categorical Imperatives given by Immanuel Kant and the theory of Utilitarianism as given by Jeremy Bentham. Both these concepts are quite popular and explain the ambivalence regarding the issue of torture.[37]

The Utilitarians would generally argue in favour of torture and state that if torturing a person can save hundreds or thousands of lives, such torture is justified. However, there may be a situation where utilitarians argue against the practice of torture. Such thinkers disregard the ticking bomb illustration, wherein it is said that torturing a person is justified if he has some vital information about a live bomb, the explosion of which could claim many lives. They argue that while such a situation is impractical, even if it happens, the cons of the exercise would far outweigh its pros, as such an exercise might lead the detainee to give false and inaccurate information, leading the officials on a wild goose chase. Further, such activities would not only impact the country's fight against terrorism, but would also be used as a tool by terrorist organisations to facilitate their public relations and ensure higher recruitment by peddling misinformation.

[37] Rebecca Evans, 'The Ethics of Torture' (2007) 7(1) Human Rights & Human Welfare <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1222&context=hrhw> accessed 29 March 2025

On the other hand, the Deontological arguments against torture state that the dignity of an individual is paramount and therefore cannot be subjected to the calculations of utility. Here as well, there may be certain deontological arguments in favour of torture. Such thinkers would argue that engaging in torture, or other words, getting their hands dirty, is the duty of the officials since they must ensure the protection of their State, and whatever is done in compliance with this duty shall be justified. Additionally, there are various other arguments in favour of torture, like the deterrence factor associated with torture and its validity as a historical means of punishment.

As far as the Indian jurisprudence on the issue is concerned, one can look into the obiter dicta in the D.K. Basu case, wherein the judges emphasized that "The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statures has been upheld by the Courts. The right to interrogate the detainees, culprits, or arrestees in the interest of the nation must take precedence over an individual's right to personal liberty.

The Latin maxim salus populi est supreme lex (the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the state is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed, subjected to sustained and scientific interrogation determined by the provisions of law.

He cannot, however, be tortured or subjected to third-degree methods or eliminated to elicit information, extract a confession, or drive knowledge about his accomplices, weapons, etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things, there would be a qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal. The challenge of terrorism must be met with innovative ideas and approaches. State terrorism is not the answer to combat terrorism. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to terrorism. That would be bad for the State, the community, and above all for the Rule of Law.

The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated the human rights of innocent citizens may render him liable for punishment, but it cannot justify the violation of these human rights except in the manner permitted by law.

The need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge. It shows that the Indian judicial system is striving to maintain a balance between the competing interests by emphasising the importance of the scientific methods of investigation, where the use of such methods is limited to the most important cases.

However, despite all the arguments in the world in favour of torture, the states must realise that this age is the age of human rights and that any deviation, if unreasonable, will not be supported by the people. Therefore, a balanced approach must be established between human rights and national security, as even though some human rights may be identified as inviolable, they shall have to be subjected to some practical limitations depending upon the prevailing situations.[38]

A right may be indispensable, but its application must be limited just because a larger interest is involved in a particular case. The discretion to limit the application of a human right must be placed in an unbiased institution that can perceive and pursue both ends legitimately.

**SUGGESTIONS**

It is a common saying that "wars are not fought based on Magna Carta." It must also be understood that wars are not fought at the cost of conscience. As stated earlier, this is the age of human rights, and no violation will go unnoticed and unpunished. But at the same time, no right can be exercised at the expense of national security.

Therefore, a middle way has to be formulated by lawmakers as soon as possible so that both national security and the dignity of human rights can go in tandem, even in the long run. This middle way can be achieved when the states realize that ensuring compliance of civil

[38] Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) Journal of Comparative Policy Analysis Research and Practice <http://dx.doi.org/10.1080/13876980500513335> accessed 29 March 2025

liberties and curbing the abhorrent practice of torture serves a larger interest of creating a law-abiding society, as it has been seen time and again that engaging in activities impacting the rights of the citizens gives rise to defiance, deviance and delinquency. This not only creates a law-and-order problem, but also impacts the morale of the youth, which is the future of the nation. The argument that international human rights promotion is essential to any nation's national security is amply advanced by the strategic correlation between a state's domestic human rights record and its inclination for international aggression.

India, or any other nation, may improve national security by reducing the possibility of international hostility by pushing the advancement of human rights around the world. Nations must reject the conventional wisdom that human rights and national security are mutually exclusive or in conflict and instead permit human rights to influence foreign policy in a world where transnational and international violent acts are commonplace. The ensuing policies will not only revitalise the campaign for human rights but will also make the countries more secure.

Constitutional rights are not ultimately sacrificed in the name of national security. A democracy cannot coexist with a strict, closed security system that aims to eliminate all threats. It's also ultimately unachievable. It is not appropriate to see the endeavour to reconcile the conflicts between constitutional rights and national security as a zero-sum game. It is untrue to say that higher constitutional liberty equals lower levels of national security or that greater levels of national security correspond with lower levels of constitutional liberty. Instead, the two systems need to work together in harmony, with each supporting and enhancing the other.

The courts play a critical role in this process. They begin with the conventional view that constitutional rights must be upheld for national security measures to be implemented. However, considerations of national security invariably influence the application of constitutional constraints, therefore, the questions are presented before them in a dynamic condition.

The government's propensity to exaggerate the risks, the pressures imposed by appeals to national security, and the possibility of using national security as a pretext for unlawful actions require the courts to be vigilant to avoid being stampeded. To play a useful role, they

must be robust in their demands for principles that hold the government to high standards and treat assertions made by the legislative and executive departments with scepticism.

**CONCLUSION**

It is a widely held belief that security comes before other national concerns. Security is a prerequisite for survival, and without survival, goals like the economy, health, education, and even justice have no purpose. Justice, more than other concerns, is an abstract concept. On the other hand, security is a real worry. Words and ideals do not speak louder, clearer, or more convincingly than blood and bombs. The interest of society in surviving supersedes the interest of the individual in liberty, even morally speaking.

The fact that those of us who reside in countries with less oppressive regimes are fortunate is a question of circumstance. We gain from this situation without clearly paying for it, even though we did not contribute. Is it our duty to contribute by abstaining from corrupt behaviour, though? Accounts of those who risked their lives to rebel and leave comfortable lives are also found in the history of torture.

No one else can require this kind of civil fortitude, but it greatly advances our understanding of what it means to be human and that we can thrive even in the most trying circumstances. A grave moral shortcoming is the inability to acknowledge the dignity of the human person. A risk persists that we become not simply societies with torture, but societies presence of torture transforms human dignity itself, and all individual and social life.

Arguments about torture, which are not believed, lead us to this conclusion. Sometimes, moral panic can cause us to deviate from our judgments and take local debt on dry land. But if we choose, it's kind of sad, because things like the hard case are driven home.