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Custodial Violence in India with Reference to the Prevention of Torture Bill and International Legal Framework

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Abstract

Torture in custody is a confession of failure to do justice. It is one of the worst crimes against humanity and a naked violation of human rights governed by the rule of law. It is the *brink of disaster,* specifically for the economically backward class and socially deprived section of the society. We claim ourselves as 'Vishwa guru' even though many instances of police savagery occur not because of individual aberration, but because of systematic compulsions. India is a member of the Convention against Torture but failed to give effects to its provisions. The cases of torture are rising at an unpredictable and unprecedented rate; it is raising so many *burning questions about the quandary motive* of the government to not take any appropriate steps towards protecting the rights of victims from inhuman torture. The researcher divided this paper into several parts as they attempt to study the International Convention on Torture with a detailed analysis and interpretation of the Prevention of Torture Bill 2010 and 2017 with a historical overview of torture in India in its first part, similarly, the second part focused on the infamous techniques used by the police authorities to torture the accused. A comparison study with other countries' laws also focuses on landmark decisions by the respective Hon'ble courts. In the third part, the researcher dealt with the existing domestic legislation on inhuman and degrading treatment and ended with some short recommendations and a conclusion.

Keywords: Prevention of Torture Bill, Custodial Violence, Convention against Torture, Human Rights, Police brutality, etc.

Introduction

"*Torture is a wound in the soul so painful that sometimes you can almost touch it but is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy, including yourself.*"

-"Adriana P. Bartow"

Torture in custody is a *sword of Damocles* in the civilized society, is governed by the rule of law, and poses a grave threat to an orderly society. It is a breach of human rights and a violation of the basic fundamental rights of the citizens, and today, no civilized law presumes such inhuman violence. In India, custody is two types Police Custody and Judicial Custody. The Supreme Court of the United States, in the case of Miranda v. Arizona, implies the word custody means apprehending someone for protective care and depriving them of their liberty. Children are in the custody of parents; patients are in the custody of hospitals and doctors, and so on. updated few more pages

The term 'custodial violence' "includes all types of physical and mental torture inflicted upon a person in police custody. It is a crime against humanity and a

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naked violation of human rights." After various Law commission Reports, the National Human Right Commission's note to the government, and the guidelines of D.K Basu, the cases of custodial violence still rise. During the year 2019, it was reported that "there was a rise in the number of custodial death cases as 5 people die each day in custody, and it has become a *burning question* today." By accepting *the grain of salt* incidents, the 'Prevention of Torture Bill was introduced two times in the parliament of India to give effects to the provisions of the UN Convention called Convention Against Torture (Hereafter UNCAT), but all went in vain; after several discussions and due to lack concern of the government it sits *on the fence,* and the bill lapsed.[3]

While in the opening speech *to pull the strings* to the UN Human Rights Council, India's Attorney-General cited Mahatma Gandhi, and Gautam Buddha on state-sponsored or state-sponsored torture in 2017, stating, "*India believes in peace, non-violence, and upholding human dignity. As such, the concept of torture is completely alien to our culture, and it has no place in the governance of the nation*[4]*"* If ever, it would be an example of hypocrisy in the textbook.[5]

Custodial violence and abuse of power by police officers or other government authorities continue, and it emerged as a significant issue of human rights concern at the *brink of disaster. It* is one of the root obstacles to democracy, the rule of law, and the development of human well-being in contemporary societies.

Historical Overview of Torture in India

There is a long history of torture as a major investigation technique in the Indian sub-continent. The Madras Torture Commissions Report of 1865 shows that torture, force, and coercion date to the 2nd Century AD.[6]

Torture during ancient India

Amongst the authors of Dharamshastra, Manu is considered to be the eldest. "He speaks of the four forms of punishment- Vak Danda (*admonition*), Dhik Danda (*censure*), Dhanadanda (*pecuniary punishment including fine*), and Bandhadanda (*all sorts of physical punishment including the death penalty)"*.[7]The Bandhadanda includes beating, severance of the limbs, marks embedded on the body, capital punishment, and pouring hot oil on the body. [8] The trial by danda (*rod*), ordeal, and caste system were the three factors by which the punishment was decided in ancient India.[9]

In the Veda, the Upanishads mentioned the trial by ordeal as a feature of Indian law. They were used mainly in cases where the witnesses were unavailable or considered not reliable. In some ordeals, the accused was required to prove his innocence with the mode of payment. "Sometimes the accused was required to hold hot iron in his hand to prove his innocence. Also, the accused was thrown in the water; if he were innocent, he would not drown." Ktesias and Greek historians of the 5th century BC speak of a more severe form of an ordeal. "He mentions a fountain from which he says that water coagulates like cheese. If a person drinks, he becomes delirious and confesses everything he

3 Jasir Aftab & Nausheen Khan, *Custodial Torture And Deaths: The Dark Side Of Indian Police,* Livelaw (Jan. 07, 2022, 19:45 PM), Custodial Torture And Deaths: The Dark Side Of Indian Police (livelaw.in).

4 Mr. Mukul Rohatgi, Former Attorney General of India at United Nation Human Right Council, Reviewed by Universal Periodic Review (May 04, 2017, 14.30 – 18.00) OHCHR | India's human rights record to be reviewed by Universal Periodic Review.

5 Baljeet Kaur, *India's Silent Acceptance of Torture Has Made It a 'Public Secret'* 53(36) Economics & Political Weekly EPW 01, 14 (2018).

6 Anuj Bhuwania, *Very Wicked Children: 'Indian Torture' and the Madras Torture Commission Report of 1855,* 06 International Journal on Human Rights IJHR 09, 10 (2009).

7 Graves Champney Haughton & Standish Grove Grady, *Institutes of Hindu Law, or, The Ordinances of Menu*,_according to the Gloss of Cullúca: Comprising the Indian System of Duties, Religious and Civil London: Wm. H. Allen, 164 (1869).

8 Qadeer Alam, *Historical Overview of Torture and Inhuman Punishments in Indian Sub-continent* 31(2) Journal of the Punjab University Historical Society JPUHS 127, 128 (2018).

9 Arthur Llewellyn Basham, The Wonder That Was India: A Survey Of The History And Culture Of The Indian Sub-Continent Before The Coming Of The Muslims 122 (New York Taplinger Publishing Company 1968).

has done.[10]" Similarly, in danda prakriya, it was said that "*Law is nothing but danda itself.*[11]" "*The laws of Manu, the Arthashastra of Kautilya Chanakya, and the Mahabharata all state that danda must be wielded with maximum discretion by the King to uphold justice.*[12]"

During the rule of the Mughal

Muslims started ruling in the 13th century and flourished until the beginning of the 18th century. [13]There are various instances[14] in which it has been mentioned that they followed the Islamic Principles of justice and equity. Still, they induced heavy penalties on the people, especially in the case of robbery and murder. "The traditional execution method was used to get the criminals trampled under the elephants' feet.[15]" The execution used to be conducted in public in broad daylight to create deterrence among the people. The conditions of the prisoners were also miserable. During medieval India (1206-1806 AD), a mixture of the Indian system of the monarchy with crime and punishment was inflicted.[16] The king remained as the higher authority to give justice to the people. No code of crime was widely followed during the time; only the *Shariat law* was in force. The practice of torture during this period was seen.[17]

Torture and Legislation during the British Period

The criminal justice system did not exist during India's initial years of British rule. Men, women, and children were tortured into confessing the crimes, even though they did not commit them. The revenue collector also tortured people during the revenue collection if they could not pay it sufficiently. In 1854, an allegation was put against the East India Company in the session of The House of Commons.[18] "The revelations in the Parliament and the press coverage that followed in 1854 made the Madras government constitute a three-member commission to *'conduct a fullest and most complete investigation'*." It sat for continuous seven months, and I heard several cases regarding it.[19]

The Torture Commission (1855) report highlighted that police torture was quite prevalent in Madras presidency, following their recommendations laid the foundation for the setup Police commission, in 1860. [20]Further, it recommended forming a single homogeneous force of civil constabulary under the proposed Police Act of 1861. "*The report of the Police Commission in 1905, appointed by Lord Curzon, reveals that innocent persons were bullied and threatened or compelled to give their information.*[21]"

10 John Watson M' Crindle, Ancient India: As Described By Ktesias The Knidian 18 (Trubner, London 1881).

11 Manu, Chapter VIII, SI. 14

12 Manu, Chapter XII :58, 78-79

13 Vol. 2, Saiyid Athar Abbas Rizvi & Arthur Llewellyn Basham, The Wonder That Was India: A Survey Of The History And Culture Of The Indian Sub-Continent From The Coming Of The Muslims To The British Conquest, 161 (Sidgwick & Jackson, London 1987).

14 Anil Chandra Banerjee, A New History Of Medieval India 393 (S. Chand, New Delhi 1986).

15 Home Office, Report of Royal Commission on Capital Punishment 703 Her Majesty's Stationary Office, London (1949-53).

16 *Id.*

17 Manu, Ch. VII, SI.1-13; also see Upendra Nath Ghoshal, A History Of Indian Political Ideas: The Ancient Period And The Period Of Transition To The Middle Ages 43 (Oxford University Press, Oxford 1959).

18 Speech of Danby Semour, at Hansard, 3rd ser.,135 (July 11, 1854), (1854) 61.

19 A Letter issued from the Chief Secretary, H. C. Montgomery, Public Department, Fort St. George, 925 (Sept. 9, 1854).

20 The Police Commission Report, (Sept. 01, 1860) https://police.py.gov.in/Police%20Commission%20reports/Police%20commission%20report%201860.pdf

21 East India Police, Report of The Indian Police Commission and Resolution of the Government of India 16 Printed for His Majesty's Stationary Office, London (1905).

The Britisher implemented the Indian Penal Code, 1860, a codified uniform law. It prohibited punishment like trampling by the elephants, mutilation, and other ancient practice of inhuman punishment. Though it had punishment, including rigorous imprisonment and the death penalty, it was far better than the earlier modes of granting punishment.[22]

Role That Parliament Played By Introducing 'The Prevention of Torture Bill' In 2010 And 2017

The death of Benix and Finix in Tamil Nadu *added fuel to the fire*. It raised a *burning question* about the Indian police system causing illegal detention, custodial torture, and beatings *like black and blue* custody. However, neither state nor the central government has taken a single step towards improving the hell-like situation by the police authorities nor showed any intention of introducing torture law or compliance with the UNCAT. A similar incident happened when George Floyd's death by a police officer in the U.S. led to massive protests. The government agreed to introduce a police reform bill as a result of protests, and along with this, it decided to create a national database to document all police brutality.[23] The question remained, "when does this bill turn into a law" in the United States.

The parliament of India also introduced an Anti-Torture bill in Lok Sabha on the 26th of April 2010 to curb torture or inhuman, degrading treatment and to give effect the provision of the UNCAT.[24] The bill was passed on May 26, 2010, and referred to a select committee of Rajya Sabha for examining the Bill, comprising 13 members. The committee recommended some changes to expand the definition of "Torture", but the bill lapsed in 2014 due to the dissolution of the 15th Lok Sabha and *kept the ball rolling*.[25]

The former Union Minister of Law of India filed a petition in 2016 before the Supreme Court to comply with UNCAT. Meanwhile, the Law Commission of India submitted its 273rd report to the apex court. It recommended[26] the government make domestic legislation to ratify the conventions. The commission's recommendation again introduced the Bill in 2017 to *get fish out of the water*.[27] *Pull the wool over everybody's eyes,* this time, it was introduced in the lower house of parliament as a private member bill, but due to a lack of concern of the government and dissolution of the 16th Lok Sabha, the bill again lapsed and remained to *add another nail in one's coffin*. The objective of the law was to expand the definition of the word 'Torture.'[28]

The legislation fulfills India's commitment towards UNCAT to *get out of the hot water* and reaffirms that "this law prohibits torture and other cruel treatment, [29]the legislation strengthens the persons who are deprived of their liberty against the inhuman treatment by any public servant or any person or under judicial or police custody[30] So far, *to live in an ivory tower* the Government of India has not acted on the order of the Apex Court or accepted recommendations given by the Law Commission of India. It pays mere *lip service* to the obligations set out by UNCAT. Even after 73 years of independence and 23 years of signing the convention, we remain one of the five countries in the world that have yet to rectify this Convention, including countries like Sudan, Brunei, and Haiti. It shows a *man of straw.*

22 *Id.*

23 Derrick Bryson Taylor, *George Floyd protest: A Timeline*, The New York Times (Jan. 08, 2022, 16:54 PM), A Timeline of the George Floyd Protests - The New York Times (nytimes.com).

24 The Prevention of Torture Bill, 2010 (Bill No. 58 of 2010)

25 Ministry of Home Affairs, Prevention of Torture Bill, 2014 (Dec. 20, 2017, 3:58PM), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1513316.

26 273rd, Law Commission of India, (Report No.273 of 2017), Report273.pdf (lawcommissionofindia.nic.in).

27 The Prevention of Torture Bill, 2017, No. XXIX, Bill of Parliament, 2017 (India).

28 The Prevention of Torture Bill, 2017, No. XXIX, Bill of Parliament, 2017 (India).

29 The Prevention of Torture Bill, 2010, No. 58, Bill of Parliament, 2010 (India)

30 The Prevention of Torture Bill 2017, No. XXIX, Bill of Parliament, 2017 (India)., "See" Statement of object and reasons of the bill.

Interpretation of The Anti-Torture Bill With UN Convention Against Torture Law

The annual report on torture 2019

1. National Campaign Against Torture (NCAT) is a platform pledge to wipe out torture and inhuman or degrading treatment worldwide. 'On the International Day in Support of Victims of Torture, an "Annual Report was released and stated that in the year 2019, a total of 1,731 people died in custody, i.e., the death of roughly five people per day. [31]This included 1,606 people who died in judicial custody, and 125 deaths occurred in police custody. At the same time, there were 1,966 deaths in custody during 2018, including 147 deaths in police custody and 1,819 deaths in judicial custody.[32]

Infamous incidents of 2019 and techniques used by the police while interrogating

2.1. In the upcoming years, it was witnessed that the police officer used different and very harsh or inhuman techniques to obtain information and to confess something by intimidating or coercion; a few incidents were reported in 2019 are *Penelope,* such as the use of hammering iron nails in the body (*Gufran Alam and Taslim Ansari of Bihar*, were picked by the police and family found dead in custody by the police brutality)[33], applying roller on the legs and burning (*Rizwan Asad Pandit of Jammu & Kashmir* were pickup for questioning in a terror-related case by the dreaded Special Operations Group where he died).[34]

2.2. 'Falanga' wherein the soles of the feet are beaten (*Rajkumar of Kerala was* arrested in a financial fraud case, he was detained by the police 4 day before his arrest were recorded and finally died due to the police brutality in custody),[35] hitting in private parts (*Brijpal Maurya and Lina Narjinari of Haryana*), pricking needle into the body (3-year-old *minor of Tamil Nadu*), kicking in the belly of a pregnant woman (*Minuwara Begum of Assam*, The pregnant woman started bleeding and she lost her child because of torture).[36] and beating after stripping (*Mohammed Tanveer of Haryana, Minuwara Begum, and Sanuwara and Rumela of Assam*)."

2.3. Other types of custodial violence were also reported, which are *shaking in the shoes,* such as "included electric shock on the prisoner, injecting petrol into private parts of the alleged person, beating while handcuffing, branding with a hot iron rod, inserting a hard blunt object into the anus by the police officer while interrogating, beating after hanging upside down with bound hands and legs, pressing fingernails with pliers and beating with iron rods after the victim was suspended between two tables with legs and hands tied to the prisoner who was under the custody."[37]

3. Public servants are responsible for grievous and simple damages under the IPC.[38] But *de novo* torture bill 2017 is not intended to prevent the occurrence of simple hurt but only grievous hurt. For example, stubbing a cigarette on a person's body several times, beating a person with different instruments, etc., are punishable under IPC. Still, the proposed bill does not explicitly identify such acts of torture as UNCAT[39].

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31 Maktoob, *In 2019, India Registered Average Five Custodial Deaths Daily*, Matoob National Campaign Against Torture (June. 29, 2020, 01:11 AM), In 2019, India registered average five custodial deaths daily, Matoob | National Campaign Against Torture (uncat.org).

32 *Id.*

33 The wire, Bihar Custodial Death Case: Nails 'Hammered' Into Two Men; Probe Ordered (thewire.in) (Jan 12, 2022, 11:04 PM).

34 Sameer Yasir, *Custodial death of Kashmir teacher Rizwan Pandit likely due to his affiliations with Jamaat-e-Islami, claims family*, Firstpost (March 14, 2020, 11:04 PM) https://www.firstpost.com/india/custodial-death-of-kashmir-teacher-rizwan-pandit-likely-due-to-his-affiliations-with-jamaat-e-islami-claims-family-6292901.html.

35 The News Minute, https://www.thenewsminute.com/article/custodial-death-rajkumar-kerala-idukki-sp-kb-venugopal-transferred-104924 (March 18, 2020, 23:30 PM).

36 *Id.*

37 *Id.*

38 Pen. Code. § 330 and § 331 (1860).

39 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 1

4. Section 5 of the bill provides the limitation for taking cognizance within 6 months.[40] That is not in compliance with the UNCAT.[41] Before a court can entertain a lawsuit, the approval of the appropriate government is required. This means that if, after six months, a survivor of torture wants to file a case, the court would not be able to take cognizance of it. Public employees cannot be dismissed in "the Code of Criminal Procedure (hereafter, CrPC)" without the sanction of the respective government.[42] Furthermore, it does not prescribe a time limit for filing cases for crimes whose sentence exceeds three years' imprisonment.[43]

5. The proposed bill has no provision for dealing with compensation to the victims, and no independent body has been made to investigate complaints about custodial torture by the authorities. At the same time, Article 14 of the UNCAT[44] Provides "the member countries to ensure that victims of torture have a right to compensation." In many previous landmark judgments, the Apex court of India held that illegal detention or torture inflicting upon the alleged person is a negation of "Article 21 of the constitution." If anything happens contrary, compensation must be granted to the victim.[45]

International Legal Framework

The incorporation of legal enactment against torture finally resulted in the UNCAT, which the UN General Assembly endorsed on December 10th, 1984.[46] The purpose of this Convention is 'to avoid acts of torture and other actions forbidden under this convention.'[47] "The word 'Torture' has been enshrined under Article 1 of the Convention.[48] The interpretation of the Convention also states that torture cannot be justified under any circumstances, including during war or public emergency, as enshrined under Article 2 of the convention."[49]

Article 4 of the convention *"requires each state to ensure that all acts of torture, attempts to commit torture or participation in torture are offences punishable under the criminal law of their states*." "It also provides for the prosecution or extradition of persons alleged to have committed acts of torture."[50]

The implementation of the Convention is monitored by a "Committee against Torture", comprising of 10 experts who are elected by the 'States parties. They are presumed to report to "the Committee regularly on the steps they have taken to give effect to the provisions of the Convention." The UN General Assembly adopted Optional Protocol to CAT in December 2002. It created a subcommittee to examine the places of detention to be performed in collaboration with national institutions.[51] Similarly, Article 22 of the UNCAT[52] Provides "state has made a declaration accepting the treaty bodies' competence to receive complaints, and local remedies have been exhausted."[53] Even though India has

40 The Prevention of Torture Bill 2017, §. 5, No. XXIX, Bill of Parliament, 2017 (India)

41 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 1, art. 14, art. 19 and art. 22

42 Code Crim. Proc. § 1987 (1973)

43 Code Crim. Proc.§ 468 (1973)

44 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 14

45 Sube Singh v. State of Haryana and others AIR (2006) SC 1117.

46 *Id.*

47 *Id.*

48 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 1 "see" *"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 third person information or a confession*" It may be "*inflicted by or at the instigation of or acquiescence of a public official or other person acting in an official capacity*"

49 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 2

50 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 4

51 Oette L. (2018) *The UN Human Rights Treaty Bodies, International Human Rights Institutions, Tribunals, and Courts International Human Rights Springer*, Singapore (November 11, 2020, 11:03 AM) https://doi.org/10.1007/978-981-10-4516-5_5-1.

52 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 22

53 Divya Vikram, '*India's Response against the Act of Torture'*, National University of juridical sciences Nujs (2010) India's Response Against The Act Of Torture | Law Resource India (wordpress.com).

not rectified the convention but still cannot be denied reservation from Articles 20 and 22 of the UNCAT,[54]

However, regardless we do not have any domestic legislation on torture, the Apex Court of India is a champion of this convention and often used it to condemn torture, illegal detention, and custodial violence, which contributed to creating a national jurisprudence for combating the instances of torture or inhuman treatment in India.

Customary International Law

As mentioned above, the convention consists of 170 state parties. At the same time, 83 members are signatories to it, and India is among the five countries worldwide that have not ratified this law yet. But being a Signatory member also imposes an obligation to refrain in good faith from actions that would undermine the object and intent of UNCAT during the time between signature and ratification.[55] The State officially consents to be bound by its commitments and reports to the Committee on the measures it has taken within one year.[56] International law in the 21st century regulated not only interactions between States but between States and individuals. States could no longer assert that their jurisdiction over their territories was preventing intervention for such actions. At the domestic point, state activity was now open to outside scrutiny[57] "as enshrined in the Charter of United Nations and the Statute of the International Court of Justice, of which India is a founding member."[58] In all conditions, "torture is unethical and impermissible under any circumstances like war, national emergency, or threat of terrorism. The restriction is so strong and widely accepted, and it has become a fundamental principle of customary international law**."** It ensures that even states that have not ratified any international conventions that expressly ban torture are prohibited from using it against anybody, anywhere. Now it is becoming part of the customary international law.[59]

On December 10, 1948, UN General Assembly proclaimed UDHR, and article 5 asserted that "*No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.*"[60] This Article is widely considered to express international customary law. "Torture In the context of the United Nations, several international treaties that are legally binding on those States that have ratified them are expressly prohibited."[61]

Whereas "**International Covenant on Civil and Political Rights"** (ICCPR) is another international Law that India not only signifies but also ratified this law on the 10th of April 1979,[62] and "Article 7 of the same convention prohibits torture or cruel, inhuman, or degrading treatment or punishment."[63]

Some Regional Treaties and Instruments on Torture

1. **"The European Convention on Human Rights 1953"** was drafted in 1950 to protect human and fundamental rights for the countries belonging to the Europe-

54 The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, art. 20 and art. 22

55 Vienna Convention on the Law of Treaties 1969, art. 10 and, art. 18 "see also" India Const. art. 51

56 Convention Against Torture Initiative, https://cti2024.org/content/images/CTI%20Ratification%20tool%20-%20executive%20action%20and%20annexes%20compilation%20FINAL.pdf (Sept. 19, 2020, 22:44 PM).

57 International Court of Justice, art. 38(b), "See" Where a complaint is submitted by a State, the International Court of Justice has competence to declare whether a violation of customary international law has in fact occurred (Article 38(1)(b), Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June 1945, T.S. 993, entered into force Oct. 24, 1945, and incorporated therein by Article 92).

58 Refworld, https://www.refworld.org/docid/3ae6b3930.html (Dec 20, 2021).

59 Goiburú and Others v. Paraguay, § 128 op. cit. 2006, Tibi v Ecuador § 143 op. cit. 2004, Gómez-Paquiyauri Brothers v Peru §112 op. cit. 2004, Urrutia v Guatemala § 92 op. cit. 2003.

60 Universal Declaration of Human Rights, 1948 (General Assembly resolution 217 A) art. 5

61 UN General Assembly, 999 International Covenant on Civil and Political Rights 171 (16 December 1966), https://www.refworld.org/docid/3ae6b3aa0.html [accessed 7 January 2022]

62 *Id.*

63 *Id.*

an Council.[64] It has 47 members of the state, including Russia and the UK; Article 3 states, *"No one shall be subjected to torture or inhuman or degrading treatment or punishment*.[65]"

2. **"The American Convention on Human Rights 1978"** provided "domestic legislation to the American states to provide its citizen with a system of personal liberty and social justice based on respect for the essential rights of man on the same principles as enshrined under UDHR and other international instrumental law.[66]" Article 5 of this convention provides the detailed provision for the *'Right to Humane Treatment.'*[67]

3. **"The African Charter on Human and Peoples 'Rights 1986"** was drafted and enacted for its member states to promote international cooperation, the 'Charter of the United Nations, and the UDHR[68]. Article 5 of the same charter provides *"the dignity of every human being and prohibit all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment, and treatment shall be prohibited*.[69]"

4. **"The Inter-American Convention to Prevent and Punish Torture 1987"** defines the word 'Torture' more expensively than the UNCAT to protect Human rights "*The use of techniques to obliterate the victim's identity or reduce his physical or mental ability, even though it does not cause physical pain or mental anguish*."[70] It has been drafted within the framework of American Convention on Human Rights. Similarly, "**The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1989"** was enacted by its council members 'to mark a fresh and preventive approach to dealing with human rights abuses after the European Convention on Human Rights 1953[71].'

Domestic Legislation Dealing With Inhuman Treatment

"Very well said on the occasion of the constitutional day by our father of law as "So long as you do not achieve social liberty, whatever the law provides freedom is of no avail to you" and "Law and order are the medicine of the body politic and when the body politic gets sick, medicine must be administered."

- "B R Ambedkar"

Constitutional provisions

The policing system is known for its 'limb of law' in society, is bound to 'Rule of Law', and wishes that the government's executive arm be depoliticized. "*Similarly, it is not wise to lift the police officers to themselves, as they require government supervision and are subject to the general scrutiny of the judiciary*[72]" The policeman has an onerous responsibility to maintain law and order in society, to provide social security, liberty, freedom, and crime-free environment to the peoples. But on the contrary, they often use disproportionate force to confess the acquisition, which they have never done. [73]The act cannot be justified at any cost, especially by whom to known as protectors and flag bearers of the law; it negates the rule of law.

I) 'Article 20(1) of the constitution states as "*No person shall be convicted of any offence except for violation*

64 Refworls, *Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, (Nov 4, 1950), https://www.refworld.org/docid/3ae6b3b04.html (Jan 7, 2022).

65 The European Convention on Human Rights, 1953 art. 3

66 Refworld, Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, (Nov. 22, 1969) https://www.refworld.org/docid/3ae6b36510.html [accessed 7 January 2022]

67 The American Convention on Human Rights, 1978 art. 3

68 Refworld, Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), https://www.refworld.org/docid/3ae6b3630.html Jan. 7, 2022).

69 The African Charter on Human and Peoples 'Rights 1986 art. 5

70 Refworld, Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture 67 (Dec, 9, 1985) https://www.refworld.org/docid/3ae6b3620.html (Jan. 7 2022)

71 Cassese, Antonio 83(1) *A New Approach to Human Rights: The European Convention for the Prevention of Torture,* The American Journal of International Law 128-153 (1989).

72 State of West Bengal v. Swapan Kumar Guha & Others AIR 1982 SCC 561.

73 *Id.*

of a law". In contrast, Article 20(3) "*No person accused of any offence shall be compelled to be a witness against himself.*[74]"

The Hon'ble Supreme Court in the case of *Selvi v. the State of Karnataka,*[75] contended that "the three most prominent interrogation techniques, viz., *narco-analysis, the lie-detector test, and brain-mapping* violated an accused person's right against self-incrimination under Article 20(3), and her right to life and personal liberty under Article 21 of the Constitution and disagreed with The post-Independence Supreme Court that had broadly endorsed by colonial logic, which had favoured the maintenance of law and order over the rights of the accused and which had seen no problem conscripting the individual's body (and its private spaces) for law enforcement and crime detection purposes.[76]" Finally, the court declared the forced application of all three interrogation techniques unconstitutional.[77]

II) 'Article 21 of the constitution provides that "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"[78] In *Meneka Gandhi v. Union of India,*[79] Justice Bhagwati observed that "the procedure established by law under Article 21 of the constitution must be a right, just and fair, not an arbitrary or oppressive procedure."

III) In *ADM Jabalpur v. Shivakant Shukla*, [80]Justice Khanna, in his dissenting opinion, ponied that "*sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from a state of tooth and claw to a civilised existence. Likewise, the principle that no one shall be deprived of his life and liberty arbitrarily without the authority of law was not the gift of the Constitution.*[81]"

The Supreme Court first drew attention to the prisoner's rights in *T.V. Vatheeshwaran v. Tamil Nadu State*; the court held "that the fundamental rights granted under Articles 14, 19 and 21 are at all times applicable to prisoners as are granted to the freemen." Similarly, in *Munn v. Illinois,* [82]*Kharak Singh v. the State of UP*,[83] and *Francis Corallie Mullin v. the Administrator, Union Territory of Delhi*,[84] the Hon'ble court emphasised that *"life means something more than mere animal existence and the inhibition against the deprivation of life extends to all those faculties and limits by which life is enjoyed."*

IV) In *'DK Basu v. State of West Bengal,'*[85] a very celebrated judgment by the Apex court for the protection of the rights of prisoners while in custody and issued a detailed guideline for police personnel who must follow while arresting any person. "It acknowledged the right against custodial torture and death in police custody and further instituted guidelines to be followed in all cases of arrest and detention to ensure transparency and accountability, and it indicates *not to have caused any worsening of attitude in the inhuman approach to dealing with prisoners in custody*."

V) Article 22[86] of the constitution deals with "Protection against arrest and detention in certain cases." Similarly, "any criminal trial that may result in a person being deprived of personal liberty and his right to life must be impartial and without prejudice to or against the

74 INDIA CONST. art. 20(3)

75 AIR (2010) SC 1974.

76 Arun Ferreira, Colours Of The Cage (Aleph Book Company 2014), "See" Arun Ferreira was re-arrested in August 2018, and was under house arrest at the time that this book was sent to the publisher.

77 Gautam Bhatia, The Transformative Constitution: A Radical Biography In Nine Acts 219 (HarperCollins Publishers India 2019).

78 INDIA CONST. art. 21

79 (1978) 2 SCR 621.

80 (1976) 2 SCC 521.

81 ADM Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521 (4:1 decision) (Khanna, J., dissenting) para 487 and 501

82 Munn v. Illinois 94 US 113 (1877).

83 AIR (1963) SC 1295.

84 AIR (1981) SC 746.

85 (1997) 1 SCC 416.

86 INDIA CONST. art. 22

accused.[87]" "A punishment that is too inhuman or torturous has often been considered unconstitutional.[88]" "While making an arrest, the police authorities must have to follow the 11-point guidelines laid down by the Hon'ble Supreme Court in the *D.K. Basu case*.[89]"

Procedural and statutory provisions

The criminal justice system has two distinct models. The first is the 'Crime Control Model', which stresses action efficacy, and the second is the 'Due Process Model', which focuses on the legitimacy of the action. Although France, West Germany, and Latin American countries adopt the model of crime control and countries such as the U.S.A., Australia U.K., and India follow the model of due process. Therefore, in both models, custodial violence poses fundamental concerns about the legitimacy of the rule of law and the operation of the criminal justice system.

Statutory Provisions

1. Indian Evidence Act 1872

I) 'Section 24 of the Act' stated: "that a confession made by an accused is considered irrelevant if it has been caused by inducement, threat or promise concerning the accused.[90]"

II) 'Section 25 of the Act provides that *"No confession made to a police officer (read with Section 162 of CrPc)."*[91] Supreme Court in *Aghnu Nagesia v. the State of Bihar*[92] stated that "*if the FIR is registered by the accused person to any police officer or made any confessional statement to a police officer is debarred as a proof of the confession under section 25 of the Indian Evidence Act.*" 'This section clearly stated that a confessional statement made to the police officer is not admissible and not treated as a piece of evidence for a conviction until or unless it is made before the magistrate.[93]

III) 'Section 26 of the Act provides that "*Confession by accused while in the custody of Police not to be proved against him unless it is to be made in the immediate presence of the magistrate.*"[94] Whereas 'section 27 of the Act sets out "*how much information received from an accused may be proved.*[95]" The application of the section must separate the accused's statement into its parts and distinguish the admissible portion thereof. The only discoverable part will be admissible as proof.[96]

2. Indian Penal Code 1860

I) 'Section 330 of the IPC' states that whoever "*Voluntarily causing hurt to extort confession or to compel restoration of property, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine.*[97]" while 'Section 331 of the code' provide that whoever "*Voluntarily causing grievous hurt to extort confession, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.*[98]*"* in reality, it is different, police officers often uses his excessive or disproportionate force while investigation to confession which accused person never knows and deals with the suspect inhuman way, such technique of police authorities made him liable under 'section 330 and 331 of the IPC.'

II) 'Section 342 of the IPC deal with *"Punishment for wrongful confinement*[99]*"* Similarly, Section 348 of the

87 Nahar Singh Yadav v. Union of India, AIR 2011 SC 1549.

88 Inderjit v. State of Uttar Pradesh, AIR 1979 SC 1867.

89 (1997) 1 SCC 416.

90 Indian Evidence Act, 1872, § 24, No. I, Act of Imperial Legislative Council, 1872 (India).

91 Indian Evidence Act, 1872, § 25, No. I, Act of Imperial Legislative Council, 1872 (India).

92 AIR (1972) SC 922.

93 Code of Crim. Proc. § 164 (1973)

94 Indian Evidence Act, 1872, § 26, No. I, Act of Imperial Legislative Council, 1872 (India).

95 Code of Crim. Proc. § 27 (1973)

96 Indian Evidence Act, 1872, § 27, No. I, Act of Imperial Legislative Council, 1872 (India).

97 Indian Pen. Code. § 330 (1860).

98 Indian Pen. Code. § 331 (1860).

99 Indian Pen. Code. § 342 (1860).

IPC provides that the "*Wrongful confinement extort confession, or compel restoration of property.*[100]" The provisions in this code have been designed for officers also to not to use tortuous or inhuman acts during the investigation to restore the information or to confine someone illegally even after completion of the conviction; if it happens, then police officers are not above the law, and they also held liable and punishable under the IPC.[101]

III) Section 375deals with "*Rape*"[102] while Section 376deals with the "*Punishment of Rape*,[103]" clause (1) (b) of 376 of the IPC contented that "*being a public servant, takes advantage of his official position and commits rape of a woman in his custody or place subordinate it, as such public servant shall be punished with rigorous imprisonment and shall also be liable to fine*."[104] 'Similarly, Section 376C of the IPC' provides "a penalty for sexual intercourse by a person in authority and *shall be punished with rigorous imprisonment*.[105]" Again, 'Sections 7 and 29 of the Indian Police Act' deal with "the provisions for dismissal and other penalties for police officers who are negligent in the discharge of their duties or unfit to perform the same.[106]"

Procedural Provisions

Code of Criminal Procedure, 1973

I) 'Sections 46(3) and section 49 of the Code "protect the person from being arrested and the detenu under police custody, which are not found guilty of a crime punished by law for life imprisonment or death." "*The person cannot be subjected to more repression than is required to prevent his escape*.[107]"

II) "Sections 50 and Section 56 of the code are in conformity and consonance with Article 22 of the Constitution. The alleged person must be told of the reasons for the detention and the right to bail." Moreover, "*he is to be produced before the Magistrate within the predetermined period*.[108]"

III) 'Section 54 of the Code' extends "*safeguard against any infliction of custodial torture and violence by providing for examination of an arrested person by a medical officer*." 'Section 57of the code' requires "*the police to bring the suspect or accused within 24 hours of arrest before the nearest magistrate*." "It corresponds to Article 22(2) of the Constitution.[109]"

IV) 'Sections 162, 163(1), and 315' of the code disallow "*(i) forced confession and (ii) testimony as inadmissible in the court of law and protect the accused against such confession.*" Whereas, 'Sections 167' laid down "*a duty to put the suspect before the court to protect his rights and interests*.[110]"

V) Section 176 of the same code "*provides for compulsory magisterial inquiry on the death of the accused in police custody*,[111]" whereas 'Section 357A talks about framing *"the victim compensation scheme by the respective State Government."* Similarly, 'Section 358 of the code deals with "*the compensation to persons groundlessly arrested*.[112]"

100 Indian Pen. Code. § 348 (1860).

101 Rudal Shah v. State of Bihar, AIR (1986) SC 14.

102 Pen. Code. § 375 (1860).

103 Pen. Code. § 376 (1860).

104 Pen. Code. § 376 (1)(b) (1860). "See" *(2) Whoever,— (a) being a police officer commits rape— (i) within the limits of the police station to which he is appointed; or (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or (iii) on a woman in his custody or in the custody of a police officer subordinate to him; or (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him;*

105 Pen. Code. § 376C (1860).

106 Indian Police Act, 1860 § 7 and § 29, No. 5, Act of Imperial Legislative Council, 1860 (India).

107 Code Crim. Proc. § 46 and § 49 (1973).

108 Code Crim. Proc. § 50 and § 56 (1973).

109 Code Crim. Proc. § 54 and § 57 (1973).

110 Code Crim. Proc. § 162 § 163 (1) and § 315 (1973).

111 Code Crim. Proc. § 176 (1973).

112 Code Crim. Proc. § 357 and § 358 (1973).

Landmark Judicial Pronouncement

The court, in the case of *'Rudal Shah v. The state of Bihar,'*[113] held "*the government liable for the wrong done by the government officials and the victim's right to compensation. The victim was wrongly detained in jail for 14 years after acquittal by the Sessions court. The Supreme court awarded Rs 35,000 as compensation and observed that the state must accept responsibility for the behaviour of its employees*." "That Article 21 guaranteeing the Fundamental right to life and liberty would lose its significance if the power of the Supreme court were limited to passing orders for release from illegal detention and that if the court refused to order compensation, it would be doing mere lip service to his Fundamental right of liberty."

In *M. Kalithai v. State of Tamil Nadu*[114] court directed "*the state government to pay a compensation of 2 lakh to the victim family of the person who died in police custody at the police station*." The government held liable inspector of the police station guilty as they detained the victim without recording the arrest in the station register. The government refused to pay by taking a plea that the death was a suicide. The bench found that since the arrest was not recorded is enough to prove that the authority is guilty of violating Constitution while citing D.K. Basu guidelines about compensation for human rights abuse. Similarly, the case of *Nilabeti Behera v. the State of Orissa*[115] observed: "*that prisoners and detainees are not given their Fundamental basic rights under Article 21 when they are in custody*." Further, it was observed that police and prison authorities are responsible for ensuring that citizens in its custody are not deprived of their constitutionally declared fundamental right –'the right to life.'

"The court also *awarded a sum of Rs 1.5 lakh to the mother since her son died in police custody, quoting,"* "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

In *S. Nambi Narayana v. Siby Matthews and Ors,*[116] a scientist was taken into police custody without justifying cause.' The court observed, "*that the police would take anyone into custody without reason if the people were not appropriately interrogated*." Further, it was directed to be prosecuted. A similar view was seen in *Murad Abdul Mulani v. Salma Babu Sheikh and Ors*. Similarly, in *Mehboob batch v. State*[117] on suspicion of theft, the police officers wrongfully confined a person and heinously gang-raped his wife. "*The court was shocked after seeing the police officer's actions and observed that the police officers must learn how to behave as public servants to ordinary citizens in a democratic country, and officers must not act as oppressors of the society*."

In *Joginder Kumar v. State of UP and Others*.[118] Court held that *"arrest shouldn't be merely on suspicion about the person's complicity in crime and policeman must be satisfied with necessity and justification of arrest based on some investigations and Reasons of arrest must be recorded by police officers in their diary and the arrest should normally be avoided except in cases of heinous crimes.* "Similarly, the court in *'Sheela Barse v. the State of Maharashtra*[119]*'* emphasised "*the need for Magistrates to inform all arrested persons of their rights. The most significant one is that the arrestee should be subjected to medical examination every 48 hours during his detention by a doctor from the approved panel of doctors. Copies of all prescribed documents should be sent to the concerned Magistrates, and it is permitted for the alleged person to meet his lawyer*." While in *Charles Sobaraj v. Supdt Central Jail Tihar,* the Hon'ble Court held "*that imprisonment does not take away any of the Fundamental rights as guaranteed by the Constitution of India. Fair procedure and justice are the souls of article 21."* The essence of 19(5) is the reasonableness of the restrictions and saving people for justice to uphold the concept of equality as in Article 14. The state or authority has no right to take

113 AIR (1983) SC 141.

114 (2009) 3 MLJ 702.

115 AIR (1993) 2 SCC 746.

116 AIR (2015) 14 SCC 664.

117 AIR (2011) 7 SCC 45

118 AIR (1993) SCC 746.

119 AIR (1983) SC 378.

away article 21, which is guaranteed to every person under the Constitution, even the person in jail.[120]

Some Sort of Recommendations on the Anti-Torture Act

The definition of the term "TORTURE" should be extended and must be wide rather than the present one. It should also include acts that cause severe mental suffering, including threats to family or loved ones, and must comply with the provisions of UNCAT.

1. High time to ratify UNCAT Convention and amend the existing statutes

Even after spending more than 24 years, we failed to ratify the convention. If we successfully approve it, it will be an open invitation to the state and individuals to complain about their grievances. Also, the draft of the law commission on the Anti-Torture Bill should be considered. Similarly, though India's existing laws and statutes are strong enough to ensure fair justice to citizens, victims of torture remain to it, hence need to amend the specific provision of code 1973[121] and to it clause-B in section 114 of the Indian Evidence Act, 1872[122] it will ensure the burden of proof will shift upon the concerned authorities if injury sustains to any person the under custody, compensation must be awarded to the victim, and they shall be liable to answer it further.

2. Serious punishment for the acts of torture

To create deterrence amongst the people, the provisions of the punishment of torture should be amended. "*It should include 10 years of rigorous imprisonment and shall also be liable for a fine."* In cases where the torture leads to death, the punishment will include life imprisonment and a fine both. The collected fine should be given to the victim or their family. However, it should be the duty of the courts to award suitable and justifiable compensation to the victims. Furthermore, "*the compensation should be sufficient to bear the expenses of the medical treatment and rehabilitation of victims."* Compensation should also be given for accusations without reasonable cause and on groundlessly arrest.

3. Custodial Injury

No doubt, if the person in police custody sustains an injury, it would be presumed as the police authorities are behind their injury. *So, "the burden of proof shall be on the police authorities to explain the incident as it happens with rape victims*[123]*"* as a burden is placed on the accused. Similarly, there must be an independent and unbiased investigation in cases of heroic allegations of torture. Also, an immediate medical examination should be done, and an experienced medical team should deal with these cases.

4. Installation of cameras

Recently in May 2022 the Delhi High Court pointed out the apex court directive for the installation of CCTV cameras in all police stations and the case of *Paramvir Singh Saini v. Baljit Singh & Others,*[124] held that "the State and Union Territory Governments should ensure that CCTV cameras are installed in each and every Police Station functioning in the respective State and/or Union Territory. Further, in order to ensure that no part of a Police Station is left uncovered, it is imperative to ensure that CCTV cameras are installed at all entry and exit points; the main gate of the police station; all lock-ups; all corridors; lobby/the reception area; all verandas/outhouses, Inspector's room; Sub- Inspector's room; areas outside the lock-up room; station hall; in front of the police station compound; outside (not inside) washrooms/toilets; Duty Officers room; the back part of the police station, etc. the CCTV systems had to be equipped with night vision and must necessarily consist of audio as well as video footage."

"These directions are given by the court in furtherance of the fundamental rights of each citizen of India guaranteed under Article 21 of the Constitution of India", but no substantial action has been taken by the state government. Hence all the state governments and Union territories should pay heed to it in furtherance to implementation of the court directive and ensure the

120 State of Andhra Pradesh v. Challa Ramkrishna Reddy, AIR 2000 SC 2084.

121 Code Crim. Proc. § 357B (1973)

122 Indian Evidence Act, 1872, No. I, Act of Imperial Legislative Council, 1872 (India).

123 Indian Evidence Act, 1872, §. 114A, No. I, Act of Imperial Legislative Council, 1872 (India).

124 AIR (2021) 1 SCC 184

protection from custodial violence and remind the police officers that they are protectors, not oppressors and it is the constitutional duty and mandate to protect the rights of every individual.

5. Must comply with the D.K Basu Guidelines

As recently former Chief Justice of India, N.V Ramana said: "threat to human rights is highest in the police station. Custodial torture and other police atrocities are problems that still prevail in our society. Despite constitutional declarations and guarantees, the lack of effective legal representation at the police stations is a huge detriment to arrested/detained persons." Hence, to ensure the safety, security, and ensure protection of basic human rights as enshrined in the constitution, it is the responsibility of all the state governments including union territories to regular check and holds accountable for failure to comply with the 11 points guidelines as laid down by the court in "D. K Basu v. State of West Bengal" to curb the rise of custodial violence and provide compensation for human rights abuse.

Conclusion

Taking into note the above discussions, it is evident that the concept of 'torture or other inhuman treatment was not a novel introduction by British rule.' "Still, it had its long history of getting cruel treatment by the official authority in Indian society." Jorg Fisch is an imminent Swiss historian who wrote in his book about the National movement of Indian independence and rightly coined "*why the loss of a limb is more cruel or inhuman than the loss of liberty or even the loss of life*."[125]

Custodial violence is not restricted to any sect. Still, it was evident from the abovementioned examples that most torture victims are from economically and socially deprived sections of our society. The Law Commission's draft of the bill, 2017, is *in the nick of the time,* and it's a unique opportunity for the government to create comprehensive legislation and rectify the convention to avoid illegal tortious acts in custody. Government should realize the importance of the basic rights of citizens because it is fundamental to all human rights, and there would be no point in getting the other rights if we fail to ensure the right to life even after more than 74 years of independence.

"If we want to remain a society governed by the rule of law, it is imperative for us to bridge the gap of accessibility to justice between the highly privileged and the most vulnerable. To keep police excesses in check, the dissemination of information about the constitutional right to legal aid and the availability of free legal aid services is necessary. The installation of display boards and outdoor hoardings in every police station/prison is a step in this direction." The Convention constituted a crystal legal codification and procedures regarding torture and its purpose is to prevent and eradicate and stop the use of torture or state-sponsored violence, now it is the responsibility of the government to ensure the accountability of the wrongdoer done by or within the premises of police station or happened because of any political ill-will between other states, so every individual may get survival justice.

In the past, we have rectified many of the international conventions, which results in domestic legislation and is beneficial for every section of society such, "*CEDAW' gives us a 'Domestic violence Act 2005', The convention on the rights of persons with disabilities (CRPD) gives us 'Rights of a person with disability Act 2016', The pattern on the rights of the child (UNCRC) gives us 'Juvenile Justice Act 2015' etc."* these are the model law created by the international body which has a vast ground effect. Hence, the Convention constitutes a coherent legal codification and procedures regarding torture and purposes to combat and eradicate the use of torture or state-sponsored violence.

125 Jörg Fisch, *Cheap lives and dear limbs: the British transformation of the Bengal criminal law*, 1769–1817 (Heidelberg, Bd.79, Kenneth Ballhatchet, 1983), Cheap lives and dear limbs : the British transformation of the Bengal criminal law 1769-1817 - University of Toronto (utoronto.ca)