Torture and Modern Liberal Democracy in the US and India

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Michel Foucault had told us that spectacles of torture, which were integral to public modes of punishment and characteristic of the domineering/coercive state, have given way to modern regimes of punishment, which rely on efficient bureaucratic-rational control to generate productive and disciplined bodies. Published in 1985, Elaine Scarry’s book, The Body in Pain, relocated the body within the hermeneutics of pain, which while sensed by the body, becomes constitutive of, and affirms power relations in society. More recently, after the commencement of the war on terror in the aftermath of the 11 September 2001 (9/11) attacks in the United States (US), studies on the development of a visual culture around pain have located the torture body within a politics of looking. In her article on the “Politics of Pain and the Use of Torture”, for example, Liz Philipose shows how the circulation of the Abu Ghraib photos contributed to the “cultural production” of the Muslim terrorist and the “solidification of the new racial grammar rooted in the regime of visibility” (2007: 1048).

The indefinite detention and the use of torture to force-feed in the Guantanamo Bay, for example, similarly produced the “abject racial object”, through what is sometimes seen as a suspension of law, but is more often than not, the product of a legitimate application of law. These images of legally-approved and legitimated torture are transmitted to the American mainland, argues Philipose, “to mainstream mechanisms of visibility” (ibid: 1049). Significantly, while the pictures of detention and torture are intended to invoke outrage, which they do, they are also tied historically to the specific history of public lynching in the US. The practice of looking at the pictures of tortured bodies from Abu Ghraib and Guantanamo Bay, while resonating with the earlier images of torture, produce the effect, as before, of white supremacy and social control, amidst the anxieties of vulnerability produced after the 9/11 events.

At other sites, in particular in the borderlands created within nation state territories, the state makes itself manifest as a structural effect, legitimating its occupation of territory, by controlling the movements of people. The checkpoints scattered across Israeli-occupied territory of Palestine, for example, are spaces which are produced through differentially-positioned bodies and corresponding discourses of violence. The suicide terrorist, who can slink past the checkpoint, becomes a justification for stringent security and the application of excess/surplus violence on vulnerable bodies of women, children and old persons. This surplus violence can be absorbed, however, in the violence necessitated by the explosive body of the suicide bomber (Kotef and Amir 2007). In her more recent work Elaine Scarry points at the “structural injury” (2010: 7) inflicted by the USA Patriot Act, which creates an “extra-legal universe” (ibid: xvii) through “the relentless and ruthless acts of lawbreaking” (ibid: xiv) by legitimating “actions designed to extend executive power” (ibid: xiv). Scarry presents a striking analogy, when she says that the “extended sequence of additions and deletions” effected by the Patriot Act, makes the task of reading the Act like “being forced to spend the night on the steps outside the public library, trying to infer the sentences in the books inside by listening to hundreds of mice chewing away on the pages” (p 8). The inscrutability of its provisions, and the manner in which gnaws at the fabric of statutory law by simultaneously bleeding into it, convey in some sense the difficulties of separating the extralegal from the legal universe.

Reiterative Violence

Jinee Lokaneeta’s book may be placed within this body of work which examines the relationship between law and violence. While the foundational violence of law is assumed, Lokaneeta sets out to trace law’s reiterative violence, by examining the discursive practices of torture, which are negotiated within and through law. Contesting the claim that public spectacles of torture, and indeed torture itself, is a relic belonging to a past, Lokaneeta presents a strong case for arguing that far from being anachronistic residuum, violence is an inextricable part of the practices of rule in modern liberal democracies. The denial of its coevalness and contemporariness amounts to a politics of forgetting, which, the author points out, has largely been the fallout of normative legal theory. For the author, it is not simply recovering the link between law and justice, which is an extremely important project (as normative legal theorists like H L A Hart and Ronald Dworkin would have us believe), but also the recovery of a framework which helps us see the relationship between law and violence. While the alternative basis of law in the rules of recognition may hold as a normative ideal, they should not be permitted to obfuscate the processes through which the legal order makes itself manifest. Thus, one of the objectives of this work is to show how the modern Leviathan, far from being decapitated, lingers on. More importantly, it shows how the modern legal systems continue to rely on force (“controlled violence”), while persistently denying it, leading to a “tension in law” (p 14). It is this tension that law has with violence in liberal
The Politics of Denial
The book opens (and in some senses also closes) with a discussion of the torture scene in the Oscar-winning film Slumdog Millionaire. While the film was being made, the Indian government objected to a high-ranking police officer being shown as the tormentor, compelling a change in the shot. In the final version the actual torture is carried out by a constable, while the officer stands by. The illustration conveys, with much pugnacity, the paradox and the doublespeak which inheres in legal discourses on torture. While as an innocent bystander the officer represents the official denial of torture, the constable constitutes a useful aberration, carrying the burden of illegitimacy of what is otherwise a ubiquitous technique of interrogation. Indeed, it is this notion of a public secret which “is generally known, but cannot be articulated” (Michael Taussig cited by the author on p 45), which the author brings out through a meticulous examination of the jurisprudence of interrogation. Significantly, the historical evolution of the legal regime of interrogation in the us, to which the author devotes her initial chapter, brings out the ambivalences in the routine jurisprudence of interrogation, and law’s attempts at determining what constitutes torture, the limits of permissible violence and unnecessary pain, and what constitutes coercive interrogation and excess violence. While within the trajectory of routine law (from Bram (1897) to Miranda (1966) in the us), there would appear to be a smooth evolution of protection against self-incrimination and the elimination of violence which such progression would imply, there is little effort, if any, points out Lokaneeta, to examine the nature of violence itself (p 39).

It is this tendency in law to obfuscate violence while claiming to address it, which urges the author to give up on what she calls the absolutist moralist arguments. These arguments, she feels, give no scope for an analysis of why states use violence, and in particular what justifications are offered by liberal democracies for recourse to violence. Steering clear of arguments which seek to see violence as an “excess” which exists beyond the rule of law, as an exception dictated by a necessity, with the implication that law itself is pristine, Lokaneeta focuses on how the tensions in the routine context help in constituting the exception in democracies. The much prevalent exception framework is seen by her as inadequate for intervening in the torture debates, since it suggests that torture is excess violence which exists only temporarily in an extraordinary phase, thereby assuming that the routine discourse has ensured its impermissibility. On the contrary, the violence claimed by

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the state to be unnecessary is “a constantly negotiated category not only in exceptional contexts but also in routine times” (p 27). It is the exploration of specific negotiations with torture in the domain of law which persuades the author to argue that the “degree of coercion” permissible during interrogations, which has never been adequately specified, always constituted a point of tension in routine/ordinary jurisprudence.

**The Question of Limits**

“There was a before 9/11 and an after 9/11. After 9/11 the gloves came off…” (Cofer Black, the CIA’s former counter-terrorism chief cited by the author, p 68). Black’s emphasis on 9/11 as having precipitated change is a telling statement on how the conundrum over necessity and exception was reframed in what came to be seen as the changed contexts of public safety and security. The author would like to distance herself from frameworks which function with what she sees as the exception-norm binary, with the exception leading on to changes which become the norm, making for a permanence of the temporary.

It appears to me, however, that the relationship of the exception with the routine should be seen as substantive and not consequential. Thus in both India and the US, the liberal state’s anxiety and quandary over deciding the limits of torture, or even deciding what constitutes torture, is alleviated (and as the author would say becomes more troublesome, therefore) when linked to situations of necessity. Indeed, while deciding the constitutionality of laws and the degree of violence available during interrogation, the judges in both countries have construed necessity as a factor in determining constitutionality.

In India, for example, the constitutionality of Terrorist and Disruptive Activities (Prevention) Act – (TADA) (and Prevention of Terrorism Act – (POTA) after that) was affirmed on grounds of “supreme necessity not covered by law”, and procedural safeguards were inserted to make provisions pertaining to confession conform to constitutional protection to life. Which is why perhaps it is not surprising that in the Faisal Shahzad’s case (the attempted Times Square bombing case of 2010), the Federal Bureau of Investigation (FBI) in the US turned to “the necessity discourse and the public safety exception to question him and only then Mirandized him” (p 66). It may perhaps then be argued that the tensions in routine law on torture, while they made for an impressive body of procedural protections through judicial decisions (in particular in custodial violence cases in India), the necessity argument allowed for a form of “hyperlegality” that involved, as the author says, “a more aggressive use of gaps within the preexisting laws on torture…meant specifically to narrow the protections possible under the law” (p 70). Ironically it is this narrowing of protections, which assumes a modular form, for not just an ordered liberty in the security state, but for efficient functioning of routine law.

**Why (Not) Compare?**

Jinee Lokaneeta’s book raises important concerns, and explores them through historically situated illustrations to make some significant interventions in the contradictions in state practices, which while laying claims to being liberal democracies simultaneously rely on legalised/legitimate violence. What is interesting is the modes of legitimisation that liberal democracies resort to, so that while torture, as a public spectacle, and retributive public participatory punishment disappears, it resurfaces in privatised state violence, in procedurally bound legal forms, periodically justified by the executive and affirmed by the judiciary, judged on grounds of procedural legality. Studies of democracies have often confined themselves to electoral democracy, democratic transitions, and institutional capacities of the state. The book is remarkably rigorous in its examination of the jurisprudence of interrogation, and must be credited for bringing torture squarely into scholarly/academic debates on democracy and the state.

The book focuses on India and the US as two illustrations of liberal democracies, in the spirit of using empirical illustrations to theorise the state, joining ranks of political theorists who do not restrict themselves to traditional normative political theory. While Lokaneeta chooses to focus on the US since some of the most significant public debates on torture in democracies have come in the post-9/11 context in the US, both the historical frame within which the 9/11 context is placed, and the fluidity with which the discussion straddles popular culture (the circulation of meanings of torture in TV shows discussed in Chapter 3) and legal discourse, involves some dexterous comparative moves.

I am less convinced about the reasons Lokaneeta gives for her selection of India “as a second illustration”, which are, to focus on a non-western liberal democracy, and challenge the imaginary of liberal democracies as “primarily Western”. Is the reason for choosing a non-western democracy to roll back a continuing colonial deferral, or is it to show that irrespective of their origins, the dilemmas and denials concerning violence traverse common grounds? Moreover, even as she would claim not to have used comparison as a method to examine the structural patterns of violence, the comparative frame is unmistakable in the conclusion of the book.

What the book achieves is pointing out with emphatic force that the relationship between law and violence is not antithetical but law produces violent effects. It is in this space of tension between law and excess violence that the relationship between the state and its differentiated/graded relationship with different sections of citizens may be seen. This perhaps brings us back to the fundamental concern which Lokaneeta raises in her book, which concerns the paradox in liberal democracies urging...
us not to conceptualise the registers of democracy/rights/justice and governance/power/rule as two contradictory registers which run parallel to each other, but as registers which in practice interlock and often produce effects which are undemocratic. A search for the democratic state is precisely a quest towards the unravelling of its rule register and looking for possibilities of making it correlate and correspond with the democratic register.

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REFERENCES


