

THE PREVENTION OF TORTURE BILL, 2010: A CRITICAL ANALYSIS

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Introduction

Human rights can generally be defined as those rights which are inherent in our nature without which we cannot live as human beings.¹ The concept of “human rights” is the mother’s milk of the international community. Human rights are the rights of a human being, and without these basic, inalienable and sacrosanct human values there is no meaning to human life.² According to Nagendra Singh implementation of human rights is achieved best through the agency of municipal or national law.³ Basic need for human rights protection is not at the international level, but in each state where oppression must be curbed.⁴

Torture is the most heinous practice that ought to be prohibited in any country.⁵ It has been the concern of international community because the problem is universal, and the challenge is almost global. Custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality.⁶

The prohibition of torture and other forms of ill-treatment has a special status in international protection of human rights. At present the United Nations (U.N.) human rights treaty regime is grounded in the 9 core human rights treaties, which apparently prohibits all forms of torture. Perhaps the most notable international agreement prohibiting torture is the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 (CAT) which requires signatory parties to take legislative, administrative,

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¹ N.S. Kamboj, *Human Rights and Judicial Activism*, 41(1) J.I.L.I. 110 (1999).

² D.S. Prakasa Rao, *Human Rights-Ideology and Practice: Indian Perspective*, 1(62) *Journal of Indian Legal Thought* 62 (2003).

³ NAGENDRA SINGH, *ENFORCEMENT OF HUMAN RIGHTS* 81 (1st ed., Eastern Law House Pvt. Ltd., Calcutta 1986).

⁴ S.L. BHALLA, *HUMAN RIGHTS* 171 (1st ed., Docta Shelf Publications, Delhi 1991).

⁵ J.B. Bhushan, *Custodial Violence-A Gruesome Practice*, XXVIII(1) *IBR* 99 (2001).

⁶ Surender S. Jaswal, *Custodial Crimes-An Affront to Human Dignity*, XXX (2 & 3) *IBR* 255 (2003).

judicial and other measures to prohibit torture within their territorial jurisdiction and to criminalize all acts of torture.

On October 14, 1997, the Government of India signed CAT making the following statement:

“The Convention corresponds to the ethos of Indian democracy, rule of law, individual freedom, personal liberty and security enshrined in Indian polity.”

Signing to CAT by India is an important milestone in the process of India’s continued commitment to fundamental and human rights of all persons and directive principles of national policy.⁷

In India, torture remains an entrenched and often routine law enforcement strategy, despite India’s status as the world’s largest democracy. The Lok Sabha passed the Prevention of Torture Bill, 2010 (hereinafter the Bill), on May 6, 2010 and it is now pending before the Rajya Sabha. The ostensible rationale for its formulation is the fulfillment of the requirement of an enabling legislation, necessary if India is to ratify CAT. Accordingly, the Bill defines torture; prescribes necessary punishment; and provides certain procedural safeguards relating to the process of investigation.

This paper examines these aspects in the Bill and attracts considerable criticism. It also falls short of meeting India’s international law obligations, while at the same time it contains several clauses which are theoretically unsound and may create several undesirable ramifications in practice. The Bill in its current form does not bring India’s domestic law in conformity with CAT. The Bill fails to establish a strong and credible legal framework for the prevention of torture. On the basis of this analysis, appropriate amendments to the clauses are desired which will secure necessary compliance with international law obligations under CAT as well as to ensure that interpretive difficulties under domestic law are smoothed to make the provisions in the Bill justifiable in theory and efficacious in practice.

⁷ Maryam Bacha, *Third Degree Torture: State Terrorism to Combat Other Forms of Terrorism*, III Cr.L.J. 2 (2005).

Prohibition of Torture and Other Forms of Ill-Treatment in International Treaties

The following are international instruments that absolutely prohibit torture and ill-treatment:

1. Universal Declaration of Human Rights, 1948

The unequivocal prohibition on torture is included in the founding document of the international human rights system: the Universal Declaration of Human Rights, 1948 (UDHR). It provides that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁸

2. Standard Minimum Rules for the Treatment of Prisoners, 1955

In the year 1955, Standard Minimum Rules for the Treatment of Prisoners, was adopted. It provided the basis for human treatment of suspects/accused.⁹ It provides that, corporal punishment, punishment by placing in dark cell, and all cruel, inhuman or degrading punishment shall completely prohibited.¹⁰

3. International Covenant on Civil and Political Rights, 1966

International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that: “[N]o person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.¹¹ It also provides that: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.¹²

ICCPR provides that anyone claiming that their rights have been violated shall have an effective legal remedy. Further, no derogation is allowed regarding the right; not to be subjected to torture and other forms of ill-treatment.

4. Code of Conduct for Law Enforcement Officials, 1979

To realize freedom from torture to every individual the U.N. General Assembly has adopted a Code of Conduct for Law Enforcement Officials on December 17, 1979.

⁸ UDHR art. 5.

⁹ Subrahmanyam, *Rights Against Torture; A Review*, 4 Cr.L.J. 178 (2000).

¹⁰ Standard Minimum Rules for the Treatment of Prisoners, r. 31 (1955).

¹¹ ICCPR art. 7.

¹² *Id.* art. 10.

It provides that law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.¹³ They may use force only when strictly necessary and to the extent required for the performance of their duty.¹⁴ It also prohibits use of torture and no enforcement official may invoke superior orders or exceptional circumstances such as war, political instability or public emergency as a justification for torture.¹⁵

5. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984

The U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 (CAT) is the most comprehensive international treaty dealing with torture.

It contains a series of important provisions in relation to the absolute prohibition of torture. CAT requires each state party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction, not to expel or extradite a person to another state where he would be in danger of being subjected to torture, and to outlaw torture in their criminal legislation. CAT further clarifies that no order from superior officer on exceptional circumstances may be invoked as a justification for torture.

CAT: An Overview

Over the past several decades, a number of international agreements and declarations has condemned and/or sought to prohibit the practice of torture by public officials, leading some to conclude that torture is now prohibited under customary international law. Perhaps the most notable international agreement prohibiting torture is CAT.

1. Definition of Torture

It is important to stress at the outset that the legal definition of “torture” differs quite significantly from the way the term is commonly used in the media or in general conversation, which often emphasizes the intensity of pain and suffering inflicted. Whereas a number of prior international agreements and declarations condemned and/or prohibited torture, CAT appears

¹³ Code of Conduct for Law Enforcement Officials, art. 2 (1979).

¹⁴ *Id.* art. 3.

¹⁵ *Id.* art. 5.

to be the first international agreement to actually attempt to define the term.

It provides the internationally agreed legal definition of “torture” as:

“Torture means 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”.¹⁶

Importantly, this definition specifies that both physical and mental suffering can constitute torture, and that for such suffering to constitute torture, it must be purposefully inflicted. Further, acts of torture covered under CAT must be committed by someone acting under the color of law.

2. CAT Requirements Concerning the Criminalization of Torture

A central objective of CAT is to criminalize all instances of torture. It requires states to ensure that all acts of torture are criminal offenses, subject to appropriate penalties given their “grave nature”.¹⁷ State parties are also required to apply similar criminal penalties to attempts to commit and complicity or participation in torture. CAT’s prohibition of torture is absolute:

“No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture”.¹⁸

¹⁶ CAT art. 1.

¹⁷ *Id.* art. 4.

¹⁸ *Id.* art. 2(2).

3. CAT Requirements Concerning the Availability of Civil Redress for Victims of Torture

CAT provides that signatory states must ensure that their legal systems provide victims of torture (or their dependents, in cases where the victim has died as a result of torture) with the ability to obtain civil redress in the form of “fair and adequate compensation including the means for as full rehabilitation as possible”.¹⁹

4. CAT Requirements Prohibiting Cruel, Inhuman, or Degrading Treatment or Punishment

Article 16 of CAT requires signatory states to take preventative measures to prevent “cruel, inhuman, or degrading treatment or punishment” within any territory under their jurisdiction when such acts are committed under the color of law.

5. CAT Enforcement and Monitoring Measures

CAT also established a Committee Against Torture (CAT Committee), composed of 10 experts of recognized competence in the field of human rights who are elected to biannual terms by state parties.²⁰ Each party is required to submit, within a year of CAT entering into force for it, a report to the committee detailing the measures it has taken to give effect to the provisions of CAT, as well as supplementary reports every 4 years on any new measures taken, in addition to any other reports the committee may request.²¹

The CAT Committee monitors state compliance with CAT obligations;²² investigates allegations of systematic CAT violations by state parties, and makes recommendations for improving compliance;²³ and submits annual reports to CAT parties and the U.N. General Assembly.²⁴

Article 30 of CAT provides that disputes between 2 or more signatory parties concerning the interpretation and application of CAT can be submitted to arbitration upon request. If, within 6 months of the date of request for arbitration, the parties are unable to agree upon the organization of the arbitration, any of the parties may refer the dispute to the International Court of

¹⁹ *Id.* art. 14.

²⁰ *Id.* arts. 17, 18.

²¹ *Id.* art. 19(1).

²² *Id.* art.19.

²³ *Id.* arts. 20-23.

²⁴ *Id.* art. 24.

Justice. Article 30 contains an “opt-out” provision, however, that enables states to make a reservation at the time of CAT ratification declaring that they do not consider themselves to be bound by Article 30.

The Prevention of Torture Bill, 2010: An Overview

It is an understatement to say that the Prevention of Torture Bill, 2010 is a disappointment. The Bill falls exceedingly short of national and international human rights standards. Not only are the present provisions wholly insufficient to address, much less punish, the full scale of torture that is practiced in the country; there are critical omissions. If the government’s sole objective is to pass a piece of legislation to ratify CAT, irrespective of the public interest and national importance of an act such as this, the government has already failed. The Bill in its current form does not bring India’s domestic law in conformity with CAT. The Bill fails to establish a strong, credible legal framework for the prevention of torture.

1. Restrictive definition of torture

Clause 3 of the Bill defines “torture”:

“Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes,-

(i) grievous hurt to any person; or

(ii) danger to life, limb or health (whether mental or physical) of any person

is said to inflict torture....”

The above definition of “torture” is narrow and restrictive. It does not capture the spirit and essence of CAT.

Despite the prevalence of custodial deaths as a result of torture, it makes no reference to death as a result of torture. This means acts of torture that result in death are likely to be prosecuted as a murder and, thus, sentences may not incorporate the gravity of the crime of torture as the cause of death. Similarly, there is no reference to “other cruel, inhuman or degrading treatment or punishment” anywhere in the Bill.

2. Lenient punishment for torture

It punishes torture in Clause 4 as follows:

“Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person-

(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct; and

(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punishable with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.”²⁵

Clause 4 of the Bill provides for a maximum of 10 years imprisonment for those who are convicted of torture. The Bill once again does not take into account Indian realities of custodial deaths as a result of torture. For India to comply with CAT, punishments for offenders of torture should reflect the gravity of the crimes committed, as stated in CAT Article 4(2). If torture leads to death, will the law enforcement personnel be still awarded 10 years imprisonment?

The Bill equates crimes by law enforcement personnel, including torture, with normal crimes. This is a serious omission considering that law enforcement personnel exercise the sovereign power of the state. Through being entrusted with carrying out duties by the state, they are afforded special powers and, thus, have a higher level of responsibility. Hence, the crimes committed by law enforcement personnel should receive harsher punishment than is provided under the Indian Penal Code, 1860 (I.P.C.).

3. Limitation for cognizance of offences falls far below national law

Clause 5 of the Bill provides that:

“Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Cr.P.C.), no court shall take cognizance of an offence under this Act unless the complaint is made within 6

²⁵ The Prevention of Torture Bill, cl. 4 (2010).

months from the date on which the offence is alleged to have been committed.”²⁶

The limitation of 6 months for taking cognizance is less than that for other comparable crimes under Cr.P.C. In its definition, the Bill includes “grievous hurt” as part of infliction of torture. However, for normal crimes of grievous hurt there are no limitations under Section 468 of the Cr.P.C. as provided below:

“Section 468.-Bar to taking cognizance after lapse of the period of limitation

1. Except as otherwise provided elsewhere in this Code, no court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
2. The period of limitation shall be-
 - a. Six months, if the offence is punishable with fine only;
 - b. One year, if the offence is punishable with imprisonment for a term not exceeding one year;
 - c. Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.
3. For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.”

Victims of torture need longer to be able to gather courage and resources to make the complaint. Under Section 468 of Cr.P.C. the limitation of 6 months for taking cognizance is applicable only to offences punishable by a fine. Torture would definitely not fall within this category. As a general rule criminal laws tend not to fix a limitation period for serious offences.

Since the punishment given under the Bill is maximum of 10 years, the limitation of 6 month for taking cognizance is contrary to Cr.P.C. and therefore, inappropriate.

²⁶ *Id.* cl. 5.

4. Sanction for prosecution

Clause 6 of the Bill provides that:

“No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction,-

- (a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
- (b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
- (c) in the case of any other person, of the authority competent to remove him from his office.”²⁷

The regime of prior sanction exists in many laws including Section 197 of the Cr.P.C. and has been consistently used in India to provide impunity by denying permission. This provision does not comply with the requirement of Article 2 of CAT that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

Alarming, in the current Bill, the wording of Clause 6 is excessively and unjustifiably broad, and moves far beyond the protection already afforded in Section 197 Cr.P.C. Clause 6 calls for prior sanction for any alleged offence committed by a public servant “during the course of his employment”. It seems the law ministry has taken it upon itself to provide blanket protection for public servants from prosecution for torture.

5. Issues excluded in the Bill

The Bill also does not include any text pertaining to the following provisions of CAT:

I. Penal offences

In a serious omission, the Bill does not incorporate the offences in I.P.C. which constitute acts of torture, even those which specifically set out custodial crimes by public servants. The Law

²⁷ *Id.* cl. 6.

Commission of India in 1994 described the types of custodial crimes being perpetrated in “alarming dimensions”—torture, assault, injury, extortion, sexual exploitation and death in custody.²⁸

The Bill also makes no reference to gender-based violence perpetrated by public servants particularly sexual violence affecting women in custody. Given the wide ambit for states to codify a broad definition of torture as advised by the U.N. Committee Against Torture, borrowing from domestic definitions, the relevant I.P.C. offences need to be incorporated into the definition of torture in Clauses 3 and 4 of the Bill. The addition of these offences will serve to broaden the definition of torture in the Bill both in terms of intent and effects. It is crucial to legislate torture as a continuum of offences, and not curtail its gravity because limited cause and effect are written into the anti-torture law.

II. Deaths in custody

In spite of the high numbers of custodial deaths in India, many of them obviously resulting from torture, the Bill is totally silent on deaths in custody. It can be strongly recommended that Clauses 3 and 4 are amended to include a provision that establishes death in custody, or death occurring as a result of injuries sustained while in custody, as a part of the definition of torture. Any death in custody, or as a result of injuries sustained while in custody, should be made punishable with the offence of murder, or culpable homicide, depending on the specific circumstances of each case.

III. Exclusion of evidence obtained by torture

The Bill remains silent on the issue of evidence obtained through torture. No statements or evidence obtained by torture can be used in legal proceedings. To address the problem, any discovery of evidence entered in court, if found through the use of torture, should ideally be excluded in proceedings. Admittedly it is probably more appropriate to include this requirement through amendment of the Indian Evidence Act, 1872.

IV. Right of victims to redress and compensation

Article 14 of CAT provides that: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation,

²⁸ LAW COMMISSION OF INDIA, CUSTODIAL CRIMES (Aug. 1994).

including the means for as full rehabilitation as possible”. The Bill fails to include any such provision. Such a right should apply whether or not any individual is identified as responsible, charged or convicted of torture. Such a provision also falls in line with the recommendation of the Law Commission which suggested the addition of a new Section 357-A in the Cr.P.C. to provide a statutory right to compensation in custodial offences.

V. Criminal liability of superior officers for acts of torture

It is another gaping omission that command responsibility has not been addressed at all in the Bill. The Committee Against Torture has interpreted the absolute prohibition of torture to include command responsibility. Article 2(3) of CAT holds that “an order of a superior or public authority can never be invoked as a justification of torture”. In parallel, the Committee has also held that senior officials are criminally liable for acts of torture committed by juniors.

The prevalence of torture at the behest of superior officers is rampant but little known. In spite of their role, superior officers escape all accountability because they are not actually involved in the acts, and the hierarchies in security forces are so entrenched that it is unthinkable for a junior officer to implicate his senior for wrongful orders. The inclusion of a provision codifying senior officers’ criminal liability for torture will act as a tremendous deterrent, and also better ensure that the law is upheld.

Conclusion

It is unacceptable that the Ministry has prepared such a shoddy and inept draft of such an important bill. It is a matter of shame for the Government of India that rampant and institutionalized torture continues to occur in India’s police stations, and all other places of detention. Alarming, the Government of India has not demonstrated its opposition to the continuing practice of torture—it has not acted to strengthen access to justice for victims, by strengthening their legal rights or enabling prosecution; nor has it taken substantial steps to punish the perpetrators. The weak “Statement of Objects and Reasons” provided in this Bill reveals the absence of the government’s commitment to hold public servants accountable for torture.

The current Bill is an eyewash and is nowhere in conformity with CAT. It needs serious consideration and amendments if it is to live up to its object and if it is going to curb the rampant practice of torture in the country. The Bill in its present form seems to be designed more

to address the diplomatic embarrassment over the inordinate delay in ratifying CAT, rather than to increase the accountability of law enforcement personnel for resorting to torture.

Thus, in spite of constitutional and legal safeguard, established procedural law, judicial verdicts, international conventions and treaties against the torture and death in police lock-up, the menace is on increase and nothing seems to have substantially changed on ground level. The torture leading to lock-up death is a fundamental violation of human rights and extremely misuse of power by the state law enforcing agency. Therefore, the immediate steps are required to eradicate this growing menace otherwise the constitutional provisions assuring justice, liberty and dignity of the individual would remain on paper unless the police are brought under greater central of civil magistracy.

If this country has to set the human rights record correct it is time to come up heavily on those who indulge in custodial killings sometime in the name of establishing laws and order and sometimes in the name of national interest. The concept of “rule of law” enshrined in the Constitution of India is of no use if we cannot protect those citizens/human beings that are in the custody of state. A state cannot claim itself to be a welfare state if its citizens are killed when they are in state custody.

